Looking over the 86th Lege:
An Overview of Selected Bills that Passed and Those that Didn't
(But You Ought to Know About Anyway)

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Collin County Bar Association
LEGISLATIVE UPDATE
Plano, Texas
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EDUCATION

- University of Texas School of Law, J.D. (1991)
- Baylor University, B.A., Communications, *cum laude* (1988)

PROFESSIONAL EXPERIENCE

- Shareholder, Adams, Lynch & Loftin, P.C., Grapevine, Texas (2006 – Present)
  Civil trial, transactional, administrative, and appellate practice: Areas of emphasis include commercial and residential real estate, commercial litigation, construction, corporate, employment, education, health care, and religious organizations.
- Shareholder, Suchocki, Bullard & Cummings, P.C., Fort Worth, Texas (1993 – 2005)
  Civil trial and appellate practice: Areas of emphasis included products liability, personal injury, construction accidents, premises liability, toxic torts, medical malpractice, insurance coverage, bad faith, contract disputes, and deceptive trade practices.
- Associate, Law Offices of Earl Luna, P.C., Dallas, Texas (1992 – 1993)
  Civil trial and administrative practice: Represented school districts in administrative, employment, and disciplinary proceedings; construction litigation; and ad valorem property tax collection.

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

- Board Certified — Civil Appellate Law — Texas Board of Legal Specialization (1998 – Present)
- AV/Preeminent Rating by Martindale-Hubbell
- Member, Appellate Section, State Bar of Texas
  Vice-Chair (2018 – 2019)
  Treasurer (2017 – 2018)
  Secretary (2016 – 2017)
  Council Member (2007 – 2010)
  Co-chair, Legislative Liaison Committee (2009 – Present)
  Co-chair, Bench-Bar Liaison Committee (2005 – 2009)
  Bench-Bar Project Subcommittee (2004)
  Annual Meeting Program Planning Committee (2003)
- Member, Litigation Section, State Bar of Texas
  Legislative Committee (2017)
- Member, Appellate Section, Tarrant County Bar Association
  Pro Bono Committee (2012 – Present)
  Planning and Programming Committee (2004 – Present)
  Chair (2003 – 2004)
  Secretary (2002 – 2003)
- State Bar of Texas, Court Administration Task Force (2007 – 2008)
- Member, State Bar of Texas Litigation Section Working Group for Senate Bill 1204 (2007)

- Member, Tarrant County Bar Association
  Election Committee (2018 – Present)
- Life Fellow, Texas Bar Foundation and Tarrant County Bar Foundation
- Adjunct Professor, Legal Writing and Analysis, Texas Wesleyan University (2005)

HONORS AND AWARDS

- Tarrant County Top Appellate Lawyers, Fort Worth, Texas Magazine (2013 – Present)
- Recipient, 2017 Certificate of Merit, presented by the current and past presidents of the State Bar of Texas for outstanding service to the legal profession during the 2016-2017 bar year.

ADMITTED TO PRACTICE

- State Bar of Texas (1991)
- All levels of trial and appellate courts of the State of Texas
- United States District Courts for the Northern, Western, Eastern and Southern Districts of Texas
- Fifth Circuit Court of Appeals, New Orleans, Louisiana
- United States Supreme Court

RECENT LAW RELATED PUBLICATIONS AND PRESENTATIONS

- Author/Speaker, Harris County Civil District Courts – Judicial Education Conference, August 2018
- Moderator, Tarrant County Bar Association and the Fort Worth Chapter of the Association of Legal Administrators Law Day Luncheon Panel Discussion: *Separation of Powers – Framework for Freedom*, May 2018
- Co-Columnist, The Appellate Advocate, State Bar of Texas Appellate Section Report: *Texas Courts of Appeals Update – Substantive* (2002 – 2017)
- Co-Columnist, Insight, Texas Association of School Administrators Professional Journal: *Legal Insights* (2008 – 2017)
- Author/Speaker, Harris County Civil District Courts – Judicial Education Conference, August 2017
- Author/Speaker, Collin County Bar Association General Meeting: Legislative Update, July 2017
- Author/Speaker, Tarrant County Bar Association Brown Bag Seminar Series: Legislative Update for Litigators, June 2017
- Author/Speaker, Dallas Bar Association Appellate Law Section, Legislative Overview, April 2017
- Author, State Bar of Texas Litigation Section Newsletter, News for the Bar, "A Closer Look at the Lege: A Legislative Update," Spring 2017
- Author/Speaker, Plano Bar Association, Legislative Update, October 2015
- Author/Speaker, Harris County Civil District Courts – Judicial Education Conference, August 2015
- Author/Speaker, The University of Texas School of Law 25th Annual Conference on State and Federal Appeals, "Legislative Update," June 2015
- Author/Speaker, Dallas Bar Association Appellate Law Section, Legislative Preview, February 2015
- Author/Speaker, Tarrant County Bar Association Brown Bag Seminar Series: Questions about Appeals? Answers for Novices and Experts, "Issue Framing", March 2014
- Author/Speaker, Tarrant County Bar Association Brown Bag Seminar Series: Legislative Update, November 2013
- Author, State Bar of Texas Litigation Section Newsletter, News for the Bar, "Peering Over the Lege: An Overview of Bills Passed by the 83rd Legislature," Fall 2013

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I. INTRODUCTION

The 86th Legislature ended its regular session on May 27, 2019. According to the Texas Legislative Reference Library, a total of 7,795 bills and resolutions were introduced during the session.[1] 1,525 bills and resolutions (1,429 bills; 96 resolutions) were passed and sent to Governor Abbott.[2] Of that total, 58 were vetoed.[3] The remainder were either signed by the Governor or allowed to become law.[4]

This paper summarizes legislative proposals that could have a noticeable impact on the practice of civil trial and appellate law in Texas. For more detailed information about each bill and additional background information about the same, please visit Texas Legislature Online at http://www.capitol.state.tx.us and/or subscribe to Jerry Bullard's e-newsletter by following the directions at the end of this article.

II. LEGISLATION THAT PASSED

A. Architects and Engineers

SB 1928 – Certificate of Merit in Certain Actions Against Licensed or Registered Professionals[5]

SB 1928 amends section 150.001 of the Civil Practice and Remedies Code (CPRC) to: (1) substitute "claimant" for "plaintiff;" (2) define "claimant" as "a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification;" and (3) define "complaint" as "any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional." SB 1928 also amends section 150.002 to provide that the required complaint be supported by an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who "practices" (as opposed to just being "knowledgeable") in the area of practice of the defendant.

Effective date: June 10, 2019. The changes in the law addressed in SB 1928 were effective on June 10th and apply only to an action or arbitration proceeding commenced on or after June 10th.

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[1] Legislative Reference Library of Texas, 86th Legislature Bill Statistics (June 17, 2019).
[2] Id.
[3] Id.
[4] As a general rule, the governor has ten (10) days upon receipt of a bill to sign it, veto it, or allow the bill to become law without a signature. However, if a bill is sent to the governor within ten (10) days of final adjournment, he has until twenty (20) days after adjournment to act on the bill. If the governor neither signs nor vetoes the bill within the allotted time, the bill becomes law. TEXAS CONST. ART. IV, § 14.
[5] Act of May 25, 2019, 86th Leg., R.S., S.B. 1928 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §§150.001 and 150.002).

B. Attorney Advertising

SB 1189 – Prohibition of Deceptive Advertising of Legal Services[6]

SB 1159 amends the State Bar Act by adding a section to address "a television advertisement that promotes a person's provision of legal services or solicits clients to receive legal services." SB 1189 prohibits advertisements for legal services that: (1) present the advertisement as a "medical alert," "health alert," "drug alert," "public service announcement," or use a substantially similar phrase that "suggests to a reasonable viewer the advertisement is offering professional, medical, or government agency advice about medications or medical devices rather than legal services;" (2) display the logo of a federal or state government agency in a manner that suggests to a reasonable viewer that the advertisement is presented by a federal or state government agency or by an entity approved by or affiliated with a federal or state government agency; or (3) use the term "recall" when referring to a product that has not been recalled either by a government agency or through an agreement between a manufacturer and government agency.

SB 1189 requires legal services advertisements to contain the following disclosures, both verbally and visually: (1) at the beginning of the advertisement, "This is a paid advertisement for legal services."; (2) the identity of the sponsor of the advertisement; and (3) either: (a) the identity of the attorney or law firm primarily responsible for providing solicited legal services to a person who engages the attorney or law firm in response to the advertisement; or (b) the manner in which a responding person's case is referred to an attorney or law firm if the sponsor of the advertisement is not legally authorized to provide legal services. Further, SB 1189 will require that legal services advertisements soliciting clients who may allege an injury from a prescription drug approved by the U.S. Food and Drug Administration (FDA) include the following verbal and visual statement: "Do not stop taking a prescribed medication without first consulting with a physician."

SB 1189 also creates formatting requirements for warnings and disclosures. A visual statement to appear in an advertisement must be presented clearly, conspicuously, and for a sufficient length of time for a viewer to see and read the statement. A court could not find that a visual statement in an advertisement is noncompliant with the statute if the statement is presented in the same size and style of font and for the same duration as a visual reference to the telephone number or Internet website of the entity a responding person contacts for the legal services offered or discussed in the advertisement. A verbal statement required to appear in an advertisement must be audible, intelligible, and presented with equal prominence as the other parts of the advertisement. A court could not find that a verbal statement in an advertisement is noncompliant with the statute if the statement is made at approximately the same volume and uses approximately the same number of words per minute as the voice-over of longest duration in the advertisement.

SB 1189 further provides: "[I]f the advertising review committee of the State Bar of Texas reviews, in accordance with the committee's procedures, an advertisement for compliance

[6] Act of May 25, 2019, 86th Leg., R.S., S.B. 1189 (to be codified at TEX. GOV'T CODE ANN. §§81.151–81.156).

with this subchapter before the first dissemination of the advertisement and the committee informs the sponsor of the advertisement that the advertisement is in compliance with this subchapter and the applicable advertising standards in the Texas Disciplinary Rules of Professional Conduct, the consumer protection division of the attorney general's office or a district or county attorney may not pursue an action…unless: (1) the consumer protection division or the district or county attorney demanded that the sponsor of the advertisement cease further dissemination of the advertisement; (2) the sponsor of the advertisement is given a reasonable amount of time to ensure the advertisement is withdrawn from dissemination to the public; and (3) the sponsor of the advertisement fails to ensure the advertisement is withdrawn from dissemination to the public within the time provided."

Under SB 1189, a violation of the statute will be a deceptive act or practice that is actionable under chapter 17 of the Business & Commerce Code, and may be enforced by either the consumer protection division of the Office of the Attorney General (AG) or a district or county attorney. SB 1189 does not create a private cause of action.

Effective date: September 1, 2019. The changes in the law addressed in SB 1189 apply only to an advertisement that is presented on or after September 1st.

C. Attorney's Fees

1. *SB 27 – Recovery of Damages, Attorney's Fees, and Costs Related to a Frivolous Regulatory Action*[7]

SB 27 amends section 105 of the CPRC by adding a provision that limits recovery under the statute to "a total amount not to exceed $1 million for" fees, expenses, and reasonable attorney's fees incurred in defending against the agency's action if the court finds that the action is frivolous (excluding "unreasonable, or without foundation") and the action is dismissed or judgment is awarded to the party.

SB 27 also amends Chapter 2001 of the Government Code (Administrative Procedure Act) and the CPRC by adding sections 2001.903 and 105.005 respectively, which will permit the administrative law judge or court reviewing a contested case to award a person, in addition to all other costs permitted by law, an amount not to exceed $1,000,000 for reasonable attorney's fees and costs incurred in defending against a frivolous regulatory action during the case and judicial review of that case, if: (1) the person prevails in the case; and (2) the administrative law judge or court, as applicable, finds the that regulatory action is frivolous.

Effective date: September 1, 2019. The changes in the law addressed in SB 27 apply only to a claim or regulatory action taken on or after September 1st.

[7] Act of May 25, 2019, 86th Leg., R.S., S.B. 27 (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §§105.002; 105.003; and 105.005; TEX. GOV'T CODE ANN. §§2001.058 and 2001.903).

2. *HB 3300 – Award of Costs and Attorney's Fees for Motions to Dismiss*[8]

HB 3300 amends section 30.021 of the CPRC to make the award of costs and attorney's fees following the grant or denial of a motion to dismiss filed under the rules adopted by the Supreme Court pursuant to section 22.004(g) of the Government Code (i.e., TRCP 91a) discretionary instead of mandatory.

Effective date: September 1, 2019. The changes in the law addressed in HB 3300 apply only to a civil action commenced on or after September 1st.

D. Damages

1. *HB 883 – Phishing Against the Elderly*[9]

HB 883 amends section 325.006 of the Business & Commerce Code to authorize a trial court to triple the actual damages awarded under the Anti-Phishing Act if the phishing target is an elderly individual.

Effective date: September 1, 2019.

2. *HB 1693 – Affidavits Concerning the Cost and Necessity of Services*[10]

HB 1693 amends several provisions in CPRC section 18.001. Specifically, the revisions provide that uncontroverted affidavits stating the amount a person charged for a service was reasonable at the time and place that the service was provided and the service was necessary "is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action."

HB 1693 requires the party (or the party's attorney) offering the affidavit into evidence to serve a copy of the affidavit on all other parties no later than the earlier of: (a) ninety (90) days after the date the defendant files an answer; (b) the date the offering party must designate expert witnesses under a court order; or (c) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Regardless of the date the party offering the affidavit in evidence serves a copy of the affidavit, a party intending to controvert a claim reflected by the affidavit is required to serve a copy of the counteraffidavit on all other parties by the earlier of: (a) one hundred twenty (120) days after the date the defendant files its answer; (b) the date the party must designate expert witnesses under a court order; or (c) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure.

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[8] Act of May 24, 2019, 86th Leg., R.S., H.B. 3300 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §30.021).

[9] Act of May 17, 2019, 86th Leg., R.S., H.B. 883 (to be codified as an amendment to TEX. BUS. & COM. CODE ANN. §325.006).

[10] Act of May 24, 2019, 86th Leg., R.S., H.B. 1693 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §18.001).

If services are provided for the first time after the defendant's answer date, the party offering the affidavit must serve a copy of the affidavit on all other parties the earlier of: (a) the date the offering party must designate any expert witness under a court order; or (b) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. A party filing a counteraffidavit in response to affidavits for post-answer services must serve a copy of the counteraffidavit on all other parties by the later of: (a) thirty (30) days after the service of the affidavit on the party offering the counteraffidavit in evidence; (b) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or (c) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure.

If continuing services are provided after a relevant deadline under section 18.001, a party may supplement the initial affidavit on or before the 60th day before the date the trial commences. A party that served a counteraffidavit may supplement the counteraffidavit on or before the 30th day before the date the trial commences.

A party offering affidavits or counteraffidavits into evidence is required to file notice with the court when serving a copy of the affidavit or counteraffidavits on the other party. HB 1693 also expressly authorizes the parties to alter all deadlines under section 18.001 by agreement or with leave of court.

Effective date: September 1, 2019. The changes in the law addressed in HB 1693 apply only to an action commenced on or after September 1st.

3. *HB 2929 – Hospital Liens*[11]

HB 2929 adds section 55.0015 to the Texas Property Code and provides that, for purposes of the hospital lien statute, an injured individual will be considered admitted to a hospital if the individual is allowed access to any department of the hospital for the provision of any treatment, care, or service. A hospital lien described in section 55.002(a) of the Property Code will be "for the lesser of: (1) the amount of the hospital's charges for services provided to the injured individual during the first 100 days of the injured individual's hospitalization; or (2) 50 percent of all amounts recovered by the injured individual through a cause of action, judgment, or settlement described by section 55.003(a)" of the Property Code.

Effective date: June 10, 2019. The changes in the law addressed in HB 2929 were effective on June 10th. The addition of section 55.0015 is intended to clarify rather than change the existing law.

[11] Act of May 25, 2019, 86th Leg., R.S., H.B. 2929 (to be codified as an amendment to TEX. PROP. CODE ANN. §§55.0015 and 55.004).

E. Family Law

1. *HB369 – Jurisdiction in a Suit for Adoption of a Child and the Mandatory Transfer of Certain SAPCR Proceedings.*[12]

HB 369 amends various sections of the Family Code to require a court with continuing and exclusive jurisdiction of a suit affecting the parent-child relationship (SAPCR) with respect to a child for whom adoption is sought to transfer the suit to the county in which the child resides. HB 369 amends current law relating to jurisdiction in a suit for adoption of a child and the mandatory transfer of certain SAPCR proceedings to the court in which a suit for adoption is pending. Under current law, the SAPCR case was not a mandatory transfer into the adoption case.

Effective date: September 1, 2019. The changes in the law addressed in HB 369 apply to SAPCR petitions and motions to transfer filed on or after September 1st.

2. *HB 553 – Notice Regarding Summer Weekend Possession of a Child under a Standard Possession Order in SAPCR Proceedings*[13]

HB 553 amends section 153.312 of the Family Code to require the possessory conservator to give 15 days prior written notice to the managing conservator of the location at which the managing conservator will need to pick-up and return the child(ren) for the designated summer weekend possession under a standard possession order.

Effective date: September 1, 2019. The changes in the law addressed in HB 553 apply to court orders providing for possession of a child rendered on after September 1st.

3. *HB 555 – Right to Apply for, Renew, and Possess Child's Passport*[14]

HB 555 amends the Family Code to provide that control of a child's travel is consistent with the status of being a sole managing conservator and clarifies that, absent a contrary court order, the sole managing conservator's role includes applying for, maintaining, and possessing the child's passport.

Effective date: September 1, 2019. The changes in the law addressed in HB 555 apply to SAPCR proceedings pending in a trial court or filed on or after September 1st.

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[12] Act of May 24, 2019, 86th Leg., R.S., H.B. 369 (to be codified as amendments to TEX. FAM. CODE ANN. §§102.008, 103.001, 155.201, and 155.204).

[13] Act of May 20, 2019, 86th Leg., R.S., H.B. 553 (to be codified as an amendment to TEX. FAM. CODE ANN. §153.312).

[14] Act of May 27, 2019, 86th Leg., R.S., H.B. 555 (to be codified as amendments to TEX. FAM. CODE ANN. §§153.132 and 153.371).

4. *HB 559 – Agreements Incident to Divorce*[15]

HB 559 amends section 7.006 of the Family Code to provide that agreements incident to divorce do not have to be filed with the court as long as the court incorporates the agreement by reference into the decree.

Effective date: May 24, 2019. The change in the law addressed in HB 559 applies to an agreement incorporated by reference in a final decree of divorce or annulment regardless of whether the decree is signed before, on, or after May 24th.

5. *HB 1854 – Continuing, Exclusive Jurisdiction After an Adoption Order*[16]

HB 1854 seeks to clarify that the court with original jurisdiction loses its right to render child custody and support orders once the final order of adoption is rendered by the subsequent court.

Effective date: September 1, 2019. The change in the law addressed in HB 1854 apply only to an adoption order rendered on or after September 1st.

6. *HB 2248 – Disposition of Remains*[17]

HB 2248 amends sections 711.002 and 711.004 to provide that, unless a designation provides otherwise, the authority of spouse to dispose of a decedent's remains is revoked if the marriage is dissolved before the decedent's death. HB 2248 also clarifies that a court with jurisdiction over a decedent's probate proceedings has jurisdiction over a dispute regarding disposition of remains. However, any dispute over removal of a decedent's remains will be heard in a county court in the county where the cemetery is located.

Effective date: September 1, 2019. The changes in the law addressed in HB 2248 apply only to the validity of a document executed on or after September 1st. However, if a judicial proceeding concerning an instrument to which HB 2248 applies is pending on the effective date and the trial court finds that the application of HB 2248 would substantially interfere with the effective conduct of such a judicial proceeding or prejudice the rights of a party to the proceeding, the provisions of HB 2248 do not apply, and the law in effect immediately before September 1st.

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[15] Act of May 14, 2019, 86th Leg., R.S., H.B. 559 (to be codified as an amendment to TEX. FAM. CODE ANN. §7.006).

[16] Act of May 14, 2019, 86th Leg., R.S., H.B. 1854 (to be codified as an amendment to TEX. FAM. CODE ANN. §155.044).

[17] Act of May 25, 2019, 86th Leg., R.S., H.B. 2248 (to be codified as amendments to TEX. HEALTH & SAFETY CODE ANN. §§711.002 and 711.004).

F. Healthcare Liability

HB 2362 – Standard of Proof in Healthcare Liability Claims Involving Emergency Medical Care[18]

HB 2362 amends section 74.153 of the CPRC to modify the standard of proof for claims involving emergency medical care. More specifically, HB 2362 modifies section 74.153 in the following manner: (1) claims involving emergency medical care in an obstetrical unit will apply only to "the initial evaluation or treatment of a patient with an obstetric emergency;" and (2) the standard of proof addressed in 74.153 will not apply to medical care of treatment that is:

- provided when a patient arrives at a health care institution in stable condition or is capable of receiving medical care or treatment as a nonemergency patient;
- provided after the patient is stabilized or capable of receiving medical care or treatment as a nonemergency patient;
- provided in an obstetrical unit if the patient arrives at a hospital for medical care or treatment for a non-obstetric emergency;
- unrelated to the original medical emergency for which the patient initially sought medical care or treatment; or,
- related to an emergency caused wholly or partly by a physician or health care provider who causes a stable patient to require emergency care.

Effective date: September 1, 2019. The changes in the law addressed in HB 2362 apply only to an action commenced on or after September 1st.

G. Judiciary/Judicial Administration

1. *SB 467 – State Commission on Judicial Conduct Procedures*[19]

SB 467 would have amended section 33.005(b) of the Government Code to require the State Commission on Judicial Conduct (SCJC) to include in its annual reports to the Legislature: (1) the number of complaints pending with the SCJC for a year or more for which the SCJC has not issued a tentative decision; and (2) the number of complaints referred to law enforcement. SB 467 would have required the SCJC to notify the person filing the complaint of "any change" in the status of the complaint. The SCJC also would have been required to maintain on its website information about each written complaint filed with the SCJC and to establish guidelines for the imposition of sanctions to ensure that each sanction imposed is proportional to the judicial misconduct.

[18] Act of May 25, 2019, 86th Leg., R.S., H.B. 2362 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §74.153).
[19] Tex. S.B. 467, 86th Leg., R.S. (2019); See Veto Message of Gov. Abbott, Tex. S.B. 467, 86th Leg., R.S. (2019).

Status: Governor Abbott vetoed SB 467 on May 27th on the basis that the bill is not needed because it requires the SCJC to take actions that it can already take under current law.

2. *SB 891 – Operation and Administration of and Practice in Courts of the Judicial Branch*[20]

SB 891 amends the Government Code to: (1) create new judicial district courts in Brazoria County (with preference to family law matters), Collin County (one with preference to civil matters and one with preference to family law matters), Comal County, Denton County, Guadalupe County (with preference to civil matters), and Montgomery County; (2) create new statutory county courts in Chambers County, Comal County, Gillespie County, Hidalgo County, Liberty County, and Rockwall County; (3) give the county court at law in Cooke County concurrent family law jurisdiction with the district court; (4) modify the jurisdictions of county courts at law in Bosque County, Chambers County, Gillespie County, Hidalgo County, Potter County, and Rockwall County; (5) create master and magistrate positions in certain counties (Bell and Kerr); and (6) amend various provisions of the Business & Commerce Code, CPRC, and Government Code to address matters relating to court reporters and shorthand reporting firms, such as creating additional responsibilities for the Judicial Branch Certification Commission with respect to court reporter and shorthand reporting firm certification, registration, and licensing. Many of the court reporter-related provisions are similar to those covered in HB 1619, which is summarized in the "Court Reporters/Deposition" section below.

SB 891 also amends various sections of the Business Organizations Code, the Estates Code, the Family Code, and the Government Code to authorize service of citation or notices by publication on a statewide internet website developed and maintained by the Office of Court Administration for the purpose of providing citation by publication (instead of publication in newspapers). The Supreme Court will be required to establish procedures for the submission of public information to the website.

SB 891 also amends Chapter 51 of the CPRC to require that all notices of appeal be served on each court reporter responsible for preparing the reporter's record.

Further, SB 891 amends Chapter 17 of the CPRC to authorize the substituted service of a defendant by way of electronic communication through social media and amends various sections of the Family Code to clarify that certain waivers may be in the form of unsworn

[20] Act of May 27, 2019, 86th Leg., R.S., S.B. 891 (to be codified as amendments to TEX. GOV'T CODE ANN. §§22.017; 22A.002(d); 24.104(b); 24.124; 24.6005; 24.140; 24.598; 24.599; 24.600; 24.6001; 24.60091; 24.60092; 24.60093; 24.60094; 25.0202; 25.0381; 25.0382; 25.0481; 25.0512; 25.0721; 25.0881; 25.0882; 25.1101; 25.1312; 25.1481; 25.1902; 25.2011; 25.2012; 30.00044; 43.105(a); 43.108; 43.123; 44.001; 44.263; 45.126; 46.002; 51.3032; 51.607 (a)-(b); 52.011; 53.002(d); 53.004(c); 53.009(g); 54.101-54.107; 54.2201-54.2216; 54.2301-54.2307; 54.2401-54.2416; 55.015; 55.004; 72.033-72.034; 121.002; 154.001(a); 154.101; 154.1011; 154.1012; 154.102; 154.104; 154.105(a); 154.107; 154.108; 154.110(a); 154.111; 154.113; 154.115; 832.101; 836.006; and 837.101; TEX. CODE OF CRIM. PROC. ART. 2.09, ART. 4.01; TEX. BUS. & COM. CODE ANN. §§9.160(a)-(c); 11.310 (a)-(b); 322.003; TEX. CIV. PRAC. & REM. CODE ANN. §§17.032-17.033; 51.017; TEX. HUM. RES. CODE ANN. §§152.0941; 152.0991(a); 152.2411; TEX. EST. CODE ANN. §§51.054(a)-(b); 51.103(b); 1051.054(a)-(b); TEX. FAM. CODE ANN §§3.305; 31.008(d); 45.107(d); 102.010(a)-(b), (e); and TEX. HEALTH & SAFETY CODE ANN §715.006(c)).

declarations instead of being sworn to and notarized. The bill also includes provisions that clarify the employment of judges when assigned to courts of other counties.

Effective date: Many sections of SB 891 will be effective September 1, 2019. Other provisions, such as those creating new courts or modifying the jurisdictions of existing courts, will be effective on the dates set forth in the bill.

3. *SB 2342 – Practices and Procedures in Civil Cases and Jurisdiction in Civil Courts*[21]

SB 2342 amends multiple sections of the Government Code to do the following:

- Requires the Supreme Court to adopt rules to "promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000." Such rules must be adopted by January 1, 2021.

- Increases the maximum amount-in-controversy jurisdiction to $250,000 for statutory county court exercising civil jurisdiction that is concurrent with the constitutional jurisdiction of the county court and with the district court in civil cases.

- In civil cases pending in statutory county court that involve matters of concurrent jurisdiction with district courts, and in which the matter in controversy is $250,000 or more, juries must be composed of 12 members unless the parties agree to a jury composed of a lesser number of jurors.

- Modifies the jurisdiction and/or jury composition of various county courts at law throughout the state.

Effective Date: September 1, 2020. The changes in the law addressed in SB 2342 apply only to a cause of action filed on or after September 1, 2020.

[21] Act of May 27, 2019, 86th Leg., R.S., S.B. 2384 (to be codified as amendments to TEX. GOV'T CODE ANN. §§22.004; 25.0003(c); 25.0007; 25.0052(a); 25.0102(h); 25.0202(a); 25.0222(m); 25.0362(f); 25.0722(i); 25.0812(k); 25.0862(n); 25.0942(l); 25.1042(h); 25.1132(c) and (o); 25.1142(b); 25.1252(j) and (m); 25.1272(b) and (h); 25.1412(a) and (p); 25.1722(f); 25.1732(l); 25.1802(o); 25.1862(k); 25.2142(v); 25.2232(a); 25.2292(d); 25.2362(i); 25.2412(j); 25.2462(k); 25.2482(l); 25.2512(a); 26.042(a); 27.031(a); and 62.301).

4. *HB 2384 – Judicial Compensation/Judicial Retirement*[22]

HB 2384 does several things to positively impact judicial compensation and retirement. Some of the notable components of the bill are as follows:

- *Base salary*: HB 2384 maintains the current state base salary for all levels of judges (i.e., district court - $140,000; courts of appeals (COA) - $154,000; Texas Supreme Court (SC)/Court of Criminal Appeals (CCA) - $168,000).

- *Tiered pay structure*: HB 2384 establishes a new tiered pay structure based on tenure as a state court judge. The tiered structure will be as follows:

    - Judges with at least 4 years of service credit in the Judicial Retirement System (JRS) will have a state salary that is 110% of the state base salary (i.e., district court judges - $154,000; COA justices - $169,400; SC/CCA justices/judges - $184,800).

    - Judges with at least 8 years of service credit in JRS will have a state salary that is 120% of the state base salary (i.e., district court judges - $168,000; COA justices - $184,800; SC/CCA justices/judges - $201,600).

- *District attorney and professional prosecutor salaries:* District attorney and professional prosecutor compensation will also be subject to the tiered, tenure-based pay structure.

- *Statutory county court judge compensation:* Parameters for compensation for statutory county court judges are addressed in HB 2384.

- *Linked salaries and retirement benefits*: Linked salaries and retirement benefits, such as legislative/elected class retirement, will be maintained at the base salary.

- *Certain associate judge salaries*: HB 2384 will set the salaries for certain associate judges appointed under the Family Code (i.e., for Title IV-D child support and child protection courts) at 90% of a district judge's base salary ($140,000).

- *Regional Presiding Judges*: Regional presiding judge salaries will be linked to a percentage of a district court judge's state base salary (instead of being set amounts as they are under current law). The salaries will be tiered based on the number of judges/courts in the administrative region.

[22] Act of May 27, 2019, 86th Leg., R.S., S.B. 2384 (to be codified as amendments to TEX. FAM. CODE ANN. §§201.105(a); 201.205(a); TEX. GOV'T. CODE ANN. §§25.0005; 25.0015; 25.0023; 25.2607(d); 26.006(a); 41.013; 46.001(2); 46.003; 46.0031(d); 54.653(b); 74.003(b), (c), and (e); 74.051(b)-(c); 74.061(b), (h), and (i); 75.016(c); 659.012; 659.0125; 659.0445(b); 814.103; 815.204(c); 834.001; 834.002; 834.102(a) and (d); 834.304(c); 835.1015(b); 839.102; 839.201(a)-(b); 839.202; 839.2025; 840.102(a); and TEX. INS. CODE ANN. §1551.102(f)).

- *Fiscal impact***:** The estimated biennial cost of HB 2384 will be approximately $34.5 million.

Effective date: September 1, 2019.

5. *HB 2757 – Rule of Decision in State Courts*[23]

HB 2757 amends section 5.001 of the CPRC (entitled "Rule of Decision") to add a new subsection (b), which provides as follows: "In any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are not controlling."

Effective date: September 1, 2019.

6. *HB 3040 – Interim Study Regarding the Method by Which Trial and Appellate Judges are Selected*[24]

HB 3040 creates the Texas Commission on Judicial Selection to study and review judicial selection methods. The Commission will consist of fifteen (15) members: four (4) members appointed by the Governor; four (4) members (of which 3 must be senators) appointed by the Lt. Governor, including one senator from each party; four (4) members (of which 3 must be House members) appointed by the Speaker of the House, including one representative from each party; one (1) member appointed by the Chief Justice of the Texas Supreme Court; one (1) member appointed by the Presiding Judge of the Court of Criminal Appeals; and one (1) member appointed by the board of directors of the State Bar of Texas. The Commission's report will be due by December 31, 2020.

Effective date: June 14, 2019.

7. *HB 3233 – Amendments to the Judicial Campaign Fairness Act*[25]

HB 3233 amends multiple sections of the Judicial Campaign Fairness Act (JCFA) in the Election Code. In addition to campaign contribution limits already existing under state law, HB 3233 does the following:

- Adds the terms "law firm", "law firm group," and "member of a law firm" to the list of definitions in the JCFA. "Law firm" means "a partnership, limited liability partnership, limited liability company, professional corporation, or other entity organized for the practice of law". "Law firm group" is defined as: (a) a law firm; (b) a general-purpose committee established or controlled by the law firm or

[23] Act of May 27, 2019, 86th Leg., R.S., H.B. 2757 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §5.001).
[24] Act of May 24, 2019, 86th Leg., R.S., H.B. 3040.
[25] Act of May 25, 2019, 86th Leg., R.S., H.B. 3233 (to be codified as amendments to TEX. ELEC. CODE ANN. §§253.152; 253.1541; 253.155; 253.157-253.159; 253.1601; 253.161(a)-(b); 253.1612; 253.162(a) and (c); 253.1621; 253.167; 253.171; 253.176(a); and 254.0611(b)).

a member of the law firm; (c) a member of the law firm; and (d) the spouse of a member of the law firm. A "member of a law firm" means: (a) a person designated "of counsel" or "of the firm"; (b) a partner or shareholder of the law firm, whether an individual or an entity; (c) an associate of the law firm; or (d) an employee of the law firm.

- Prohibits a judicial candidate or officeholder from knowingly accepting political contributions from a general-purpose committee that, in the aggregate, exceed the contribution limits prescribed by the JCFA in connection with an election in which the judicial candidate's name appears on the ballot. The contribution limits will be: (1) $25,000 for a statewide judicial office, and (2) $5,000 for any other judicial office.

- In addition to the contribution limits described above, a judicial candidate or officeholder will be prohibited from accepting a political contribution in excess of $50 from a general-purpose committee if the contribution, when aggregated with all political contributions from all general-purpose committees in connection with an election, exceeds: (1) $300,000 for a statewide judicial office; (2) for the office of chief justice or justice, court of appeals: (a) $75,000, if the population of the judicial district is more than one million; or (b) $52,500, if the population of the judicial district is one million or less; or (3) for an office other than an office described in (1) or (2) above: (a) $52,500, if the population of the judicial district is more than one million; (b) $30,000, if the population of the judicial district is 250,000 to one million; or (c) $15,000, if the population of the judicial district is less than 250,000.

- Amends the Election Code to provide that a contribution by an individual's spouse will not be considered to be a contribution by the individual; however, contributions by an individual's child that is under the age of 18 will still be considered as a contribution by the individual.

HB 3233 also amends the JCFA by adding new section 253.1612, which provides that the Code of Judicial Conduct may not prohibit, and a judicial candidate may not be penalized for, a joint campaign activity conducted by two or more judicial candidates.

Further, HB 3233 amends section 253.162 (i.e., "Restrictions on Reimbursement of Personal Funds and Payment on Certain Loans") of the JCFA to state that a judicial candidate or officeholder "who accepts one or more political contributions in the form of a loan, including an extension of credit or guarantee of a loan or extension of credit, from one or more persons related to the candidate or officeholder within the second degree of affinity or consanguinity" may not repay those loans from political contributions in amounts that, in the aggregate, exceed the limits currently existing in the JCFA.

HB 3233 also amends section 253.171 ("Contribution From or Direct Campaign Expenditure by Political Party") to provide that a political expenditure made by the principal political committee of the state executive committee or a county executive committee of a political party for a generic get-out-the-vote campaign or "to create and distribute" a written list

of two or more candidates will not be considered a contribution to a judicial candidate who benefits from the get-out-the-vote campaign or is included in the written list."

Effective date: June 2, 2019

H. Litigation Involving Governmental Entities

1. *HB 1734 – Litigation Involving Defects in School District Facilities and Enforcement of Duties*[26]

HB 1734 amends the Education Code to address a school district's ability to sue for damages for the defective design or construction of a district facility. Under HB 1734, a school district will be required to provide the commissioner of education with written notice of the school district's lawsuit within thirty (30) days after the lawsuit is filed. Failure to provide notice of the lawsuit by registered/certified mail will result in the dismissal of the action.

HB 1734 authorizes the commissioner to join in an action involving a facility financed by bonds that include state assistance. Any recovered proceeds must be used to repair the facility and an accounting of the repairs must be provided to the commissioner. A violation of the requirements imposed by HB 1734 authorizes the AG to bring an action for relief that includes, but is not limited to, a civil penalty against the district for up to $20,000 for each violation, payment of reasonable costs for investigation and prosecuting the violation, and the state's share of the proceeds.

Effective date: September 1, 2019. The changes in the law addressed in HB 1734 apply only to an action brought on or after September 1st.

2. *HB 1999 – Construction Liability Claims Involving Public Buildings and Public Works*[27]

HB 1999 amends the Government Code to, among other things, require governmental entities to submit a report to potential opposing parties and provide such parties with an opportunity to inspect and correct any construction defects before filing suit in connection with the defect. More specifically, before bringing an action asserting a construction defect claim, HB 1999 requires a governmental entity to provide a written report to each party with whom the entity had a contract for the design or construction of an affected structure. The report must identify the specific construction defect on which the claim was based; describe the present physical condition of the affected structure; and describe any modification, maintenance, or repairs to the structure made by the governmental entity or others since the structure's initial use or occupation.

[26] Act of May 27, 2019, 86th Leg., R.S., H.B. 1734 (to be codified as amendments to TEX. EDUC. CODE ANN. §§44.151-44.152.

[27] Act of May 27, 2019, 86th Leg., R.S., H.B. 1999 (to be codified as amendments to TEX. GOV'T CODE ANN. §§2272.001-2272.009.

Under HB 1999, each party must be given a reasonable opportunity to inspect any construction defect or related condition identified in the report for a period of thirty (30) days after the report was sent. The parties will have one hundred twenty (120) days after the inspection either to correct any construction defect or related condition identified in the report or to enter into a separate agreement with the governmental entity to make the corrections. If a party provides written notice of an alleged construction defect or report to the party's insurer, the insurer is required to treat the notice or report to the party as the filing of a suit asserting that claim against the party for purposes of the relevant policy terms.

HB 1999 requires a court, arbitrator, or other adjudicating authority to dismiss without prejudice an action asserting a construction defect claim if the governmental entity had not submitted a report or provided an opportunity for inspection and correction as required under the bill. After an action has been dismissed without prejudice, if a second action is brought and the governmental entity still has not complied with the requirements under the bill, the action must be dismissed with prejudice.

Effective date: June 14, 2019. The changes in the law addressed in HB 1999 apply only to any action that accrued on or after June 14th and to any insurance policy delivered, issued for delivery, or renewed on or after January 1, 2020.

3. *HB 2826 – Procurement of a Contingent Fee Contract for Legal Services for Government Entities*[28]

HB 2826 amends the Government Code to change the approval process for certain political subdivisions seeking to enter into contingent fee contracts for legal services by requiring that such contracts be reviewed and approved by the AG. Political subdivisions covered by the bill include districts, authorities, counties, municipalities, other political subdivisions of the state, and local government corporations or other entities acting on behalf of a political subdivision in the planning and design of construction projects.

HB 2826 also imposes additional requirements on political subdivisions relating to the selection of outside attorneys for contingent fee contracts, acceptable indemnification provisions, and the political subdivision's approval process for these contracts. Political subdivisions and attorneys hired under contingent fee contracts also will be subject to the requirements that currently apply to such contracts when entered into by state governmental bodies. Political subdivisions will be required to select well-qualified attorneys for contingent fee contracts on the basis of demonstrated competence, qualifications, and experience in the requested services and to negotiate a contract for a fair and reasonable price. Attorneys cannot be selected for a contingent fee contract on the basis of competitive bids.

A political subdivision can require attorneys under contingent fee contracts to indemnify or hold harmless the political subdivision from claims and liabilities resulting from the negligent acts or omissions of the attorney or law firm. However, attorneys cannot be required to

[28] Act of May 24, 2019, 86th Leg., R.S., H.B. 2826 (to be codified as amendments to TEX. GOV'T CODE ANN. §§2254.101-2254.103; 2254.1032-2254.1038; 2254.104(b)-(d); 2254.108(d); 2254.109(a) and (c); 2254.110).

indemnify, hold harmless, or defend political subdivisions for claims or liabilities resulting from negligent acts or omissions of the subdivisions unless the contract was for such defense.

Before entering into a contingent fee contract, political subdivisions must provide public notice and hold an open meeting to consider and approve the contract. The public notice must state:

- the reasons for pursuing the matter for which the attorney would be retained and the desired outcome;
- the competence, qualifications, and experience demonstrated by the attorney;
- the nature of any relationship between the political subdivision and the attorney;
- the reasons the political subdivision was unable to pursue the matter by itself without retaining an attorney on a contingent fee basis;
- the reasons the legal services reasonably could not be obtained from an attorney under a hourly fee contract; and
- the reasons that entering into a contingent fee contract would be in the best interest of the political subdivision's residents.

The meeting to approve the contract would be called to consider the need for obtaining the legal services; the contract's terms; the competence, qualifications, and experience of the attorney; and the reasons the contract was in the best interest of the political subdivision's residents.

Upon approval, the governing body of the political subdivision is required to state in writing that the political subdivision has found that:

- there was a substantial need for the legal services;
- the legal services could not be performed adequately by the political subdivision;
- the legal services reasonably could not be obtained from an attorney under an hourly fee contract because of the nature of the matter or because of lack of funds to pay the estimated fees under an hourly fee contract; and
- the relationship between the political subdivision and the attorney was not improper and would not appear improper to a reasonable person.

Contingent fee contracts approved by political subdivisions will not be effective until the contracts received attorney general approval. Expedited review of the can be requested by the political subdivision. Political subdivisions would be required to file the contracts with the attorney general along with:

- a description of the matter to be pursued by the political subdivision;
- a description of the interest that the state or any other governmental entity might have in the matter;
- a copy of the public notice described above and a statement regarding the method and date of providing notice;
- a copy of the governing body's statement upon approval of the contract; and
- any supporting documentation required by the attorney general.

The AG can refuse to approve a contract if a matter presented questions of law or fact in common with a matter the state has addressed or is pursuing and the political subdivision's pursuit of the matter would not promote a just and efficient resolution. The attorney general also can refuse approval if a political subdivision failed to comply with all requirements relating to the political subdivision's approval of the contract or made findings in connection with such approval that were not supported by the documents provided to the attorney general. A contract submitted to the attorney general will be considered to be approved unless the attorney general sends a notification of refusal within ninety (90) days of receiving the request for approval.

Political subdivisions will not be required to obtain attorney general approval of contingent fee contracts for the collection of delinquent property taxes or the issuance of public securities. However, these contracts will be subject to the above requirements relating to the selection of attorneys, indemnification, political subdivision approval, and public information.

A contract entered into in violation of HB 2826 will be void as against public policy. No fees can be paid under the contract.

Effective date: September 1, 2019. The changes to the law addressed in HB 2826 will apply only to a contract entered into on or after September 1st.

I. Public Information Act

SB 943 - Disclosure of Certain Contracting Information under the Public Information Act[29]

SB 943 amends the Government Code to make certain contracting information public information that must be released under the Texas Public Information Act (PIA) unless excepted from disclosure under state law. Under certain circumstances, SB 943 excludes from the PIA an economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts. SB 943 includes the following as a governmental body subject to the law:

[29] Act of May 25, 2019, 86th Leg., R.S., S.B. 943 (to be codified as amendments to TEX. GOV'T CODE ANN. §§552.003; 552.0222; 552.104(a); 552.110; 552.1101; 552.131; 552.305(a) and (d); 552.321; and 552.371-552.376).

- a confinement facility operated under a contract with any division of the Texas Department of Criminal Justice;

- a civil commitment housing facility owned, leased, or operated by a vendor under a state contract; and

- an entity that receives public funds in the current or preceding state fiscal year to manage the daily operations or restoration of the Alamo, or an entity that oversees such an entity.

SB 943 excepts from the PIA's "public availability" requirement certain qualifying proprietary contracting information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification. SB 943 sets forth provisions relating to the assertion of a disclosure exception and the refusal of a governmental body to release the applicable information. The bill makes the disclosure exception inapplicable to the following:

- information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or

- information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on the governmental body's behalf.

SB 943 revises the exception to the "public availability" requirement for certain information related to competition or bidding to exempt information from the disclosure requirement if a governmental body demonstrates that the release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation, a particular competitive situation where the governmental body establishes that the situation at issue is set to reoccur, or when there is a specific and demonstrable intent to enter into the competitive situation again in the future.

SB 943 also revises the exception to the "public availability" requirement for trade secrets to set out what constitutes a trade secret and to exempt information from that requirement if it is demonstrated based on specific factual evidence that the information is a trade secret. SB 943 makes this exception and the exception provided for proprietary information inapplicable to specified types of contracting information.

SB 943 authorizes an economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts to assert the exception to the "public availability" requirement for certain economic development information with respect to information that is in the economic development entity's custody or control by submitting in writing to the AG the reasons why the information should be withheld.

SB 943, in a provision applicable to a contract that has a stated expenditure of at least $1 million in public funds for the purchase of goods or services by a governmental body or that results in the expenditure of at least $1 million in public funds for the purchase of goods or services in a governing body's fiscal year, requires a governmental body that is a party to such a contract that receives a written request for public information related to the contract to request that the applicable entity provide the requested information to the governmental body if the written request is for contracting information that is in the possession of the entity and not maintained by the governmental body. SB 943 establishes certain procedural deadlines in service of that requirement, sets out the circumstances under which that requirement does not apply, and establishes that nothing in these provisions affects the deadlines or duties of a governmental body relating to a request for an AG decision under the PIA regarding whether requested information may be withheld from public disclosure under an authorized exception, including contracting information.

SB 943 does the following with respect to such a contract:

- sets out provisions relating to the contents of the contract and contract bids of entities;

- prohibits a governmental body from accepting a bid for or awarding the contract to certain bad actors unless the governmental body determines and documents that the entity has taken adequate steps to ensure future compliance with applicable requirements;

- provides for certain notice of noncompliance with provisions of the bill applicable to the contract;

- provides for the termination of the contract for continued noncompliance; and

- sets out the circumstances under which a governmental body may not terminate the contract.

The bill establishes that its provisions relating to such a contract do not prevent a governmental body from including and enforcing more stringent requirements in a contract to increase accountability or transparency and do not create a cause of action to contest a bid for or the award of a state contract with a governmental body. SB 943 authorizes a requestor to file suit for a writ of mandamus compelling a governmental body or an entity to comply with the requirements of the bill provisions.

Effective date: January 1, 2020. The changes in the law addressed in SB 943 apply only to a request for public information that is received by a governmental body or an office of public information on or after January 1, 2020. The provisions dealing with contracting information apply only to a contract described in SB 943 that is executed on or after January 1st.

J. Revenge Porn" Law

HB 98 – Civil and Criminal Liability for Unlawful Disclosure of Intimate Visual Material[30]

HB 98 amends CPRC section 98B.002 and Texas Penal Code (TPC) section 21.16(b) to add intent requirements to both statutes. More specifically, in order to impose civil and criminal liability on a defendant, HB 98 modifies the intent requirements for both criminal and civil liability to be as follows: (1) the defendant discloses intimate visual material without the consent of the depicted person and "with the intent to harm that person;" and (2) the defendant, at the time of the disclosure, "know[] or has reason to believe that" the intimate visual material was obtained or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private. [**Note:** HB 98 was one of several bills filed in response (at least in part) to *Ex Parte: Jordan Bartlett Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. – Tyler May 16, 2018, pet. granted), in which the Twelfth Court of Appeals held that section 21.16(b) of the Texas Penal Code was unconstitutionally overbroad.]

Effective date: September 1, 2019. The changes in the law addressed in HB 98 apply only to a civil cause of action that accrues or a criminal offense committed on or after September 1st.

K. Texas Citizens Participation Act

HB 2730 – Amendments to the Texas Citizens Participation Act[31]

HB 2730 amends various sections of Chapter 27 of the CPRC (i.e., the Texas Citizens Participation Act (TCPA)) to do the following:

- Modifies the definition of "exercise of the right of association" to mean "to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern;"

- Modifies the definition of "matter of public concern" to mean "a statement or activity regarding (a) public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; (b) a matter of political, social, or other interest to the community; or (c) a subject of concern to the public;"

- Adds a deadline to file a response to a motion to dismiss no later than seven (7) days before the date of the dismissal hearing;

[30] Act of May 21, 2019, 86th Leg., R.S., H.B. 98 (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §98B.002; TEX. PENAL CODE ANN. §21.16(b).

[31] Act of May 20, 2019, 86th Leg., R.S., H.B. 98 (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §27.001 (2), (6) and (7); 27.003(a)-(b), (d)-(e); 27.005(a)-(b), (d); 27.006; 27.007; 27.0075; 27.009; and 27.010).

- Modifies the standard of proof to prevail on a motion to dismiss to require the moving party to establish "an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law";

- Makes sanctions against the party not moving for dismissal under the TCPA discretionary instead of mandatory;

- Excludes from the definition of "legal action" post-judgment enforcement actions, alternative dispute resolution proceedings, and procedural actions taken/motions made "in an action that does not does not amend or add a claim for legal, equitable, or declaratory relief;"

- Expands the list of claims that are excepted from the TCPA, such as trade secret and non-compete claims, eviction suits, and attorney disciplinary actions and proceedings.

Effective date: September 1, 2019. The changes to the law addressed in HB 2730 apply only to an action filed on or after September 1st.

III. LEGISLATION THAT FAILED

A. Arbitration

HB 1744 – Limitation Periods in Arbitration Proceedings[32]

HB 1744 sought to amend Chapter 171 of the CPRC by adding section 171.004, which provided that "a party may not assert a claim in an arbitration proceeding if the party could not bring suit for the claim in court due to the expiration of the applicable limitations period." However, under the proposed section 171.004, the party "may assert a claim in an arbitration proceeding after expiration of the applicable limitations period if: (1) the party brought suit for the claim in court before the expiration of the applicable limitations period; and (2) a court ordered the parties to arbitrate the claim."

B. Architects and Engineers

HB 1211 – Agreements by Architects and Engineers in Connection with Construction Contracts[33]

HB 1211 sought to amend section 130.002(b) of the CPRC to add to the existing list of void and enforceable construction-related contractual obligations any obligation placed on an architect or engineer to *defend* against damage claims arising from the negligence of any person other than the architect or engineer. Currently, section 130.002 states that obligations requiring an architect or engineer to "indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an

[32] Tex. H.B. 1744, 86th Leg., R.S. (2019).
[33] Tex. H.B. 1211, 86th Leg., R.S. (2019).

owner's agent or employee" are void and unenforceable. HB 1211 also sought to add section 130.0021 to the CPRC to state that a "contract for engineering or architectural services must require a licensed engineer or registered architect to perform services with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license."

C. Attorney's Fees

1. *HB 370 – Recovery of Attorney's Fees in Civil Cases*[34]

HB 370 sought to amend section 38.001 of the CPRC to provide that a person may recover reasonable attorney's fees "from an individual or a corporation, or other organization…" HB 370 further provided that the term "organization" would have the meaning assigned by section 1.002 of the Business Organizations Code, which defines "organization" as "a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign. [**Note:** Since 2014, Texas courts of appeals have consistently held that a trial court cannot order limited partnerships, limited liability companies, or limited liability partnerships to pay attorney's fees because section 38.001 of the CPRC does not permit such a recovery. *See, e.g., CBIF Limited Partnership, et al. v. TGI Friday's, Inc., et al.*, No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas April 21, 2017, pet. denied) (mem. op.); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Fleming & Associates, LLP v. Barton*, 425 S.W.3d 560 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). In response to these decisions, legislators filed bills in 2015 and 2017 to expand the scope of the statute to include all business organizations. However, the bills failed to pass.]

2. *HB 790 – Recovery of Attorney's Fees in Civil Cases*[35]

HB 790 sought to amend section 38.001 of the CPRC to add "the state, an agency or institution of the state, or a political subdivision of the state" to the list of individuals or entities from which attorney's fees can be recovered.

3. *HB 2376 – Recovery of Attorney's Fees in Certain Civil Actions*[36]

HB 2376 sought to repeal section 38.006 of the CPRC and remove the exemptions under Chapter 38 (attorney's fees statute) that would otherwise apply to insurance policies subject to Title 11 and Chapters 541 and 542 of the Insurance Code (i.e., the Unfair Methods of Competition and Unfair or Deceptive Acts or Practices).

[34] Tex. H.B. 370, 86th Leg., R.S. (2019).
[35] Tex. H.B. 790, 86th Leg., R.S. (2019).
[36] Tex. H.B. 2376, 86th Leg., R.S. (2019).

4. *HB 2437 – Recovery of Attorney's Fees in Certain Civil Cases*[37]

HB 2437 sought to amend section 38.001 of the CPRC and permit the recovery of attorney's fees under section 38.001 only if the person is the prevailing party.

5. *HB 2533 – Recovery of Attorney's Fees in Certain Civil Cases*[38]

HB 2533 sought to amend section 38.001 of the CPRC to add "an organization, as defined by Section 1.002, Business Organizations Code" to the list identifying those from whom attorney's fees can be recovered under the statute.

6. *SB 471 – Recovery of Attorney's Fees in Certain Civil Cases*[39]

SB 471 sought to amend section 38.001 of the CPRC to remove "an individual or corporation" from the statute and replace it with "another person." The remainder of Chapter 38 would remain unchanged.

D. Attorneys – Practice of Law

HB 1359 – Attorney Access to Courthouses[40]

HB 1359 sought to amend the Government Code and permit Texas-licensed attorneys to enter a building that houses a justice court, municipal court, county court, county court at law, or district court without passing through security services by presenting a State Bar of Texas (SBOT) membership card instead of an identification card issued by a county or municipality. HB 1359 did not include the appellate courts. In committee, HB 1359 was revised to permit an attorney to apply for an identification card through the SBOT. The card would have included the attorney's photo and could have been used in any county. The SBOT would have created a committee to accept applications and vet applicants, which would have included a criminal background check to be repeated annually. Each applicant would have paid a fee to cover the cost of issuing the cards. A part of the fee would go back to the lawyer's home county to be spent on court security.

E. Contracts

HB 1957 – Contract Provisions that Conflict with State Law[41]

HB 1957 sought to add Chapter 275 to the Business & Commerce Code and expressly state that, in the event of a conflict between Texas law and any term or condition in a contract, Texas law would control. HB 1957 also provided that the resolution of any conflict between a

[37] Tex. H.B. 2437, 86th Leg., R.S. (2019).
[38] Tex. H.B. 2533, 86th Leg., R.S. (2019).
[39] Tex. S.B. 471, 86th Leg., R.S. (2019).
[40] Tex. H.B. 1359, 86th Leg., R.S. (2019).
[41] Tex. H.B. 1957, 86th Leg., R.S. (2019).

contract term or condition and Texas law will "not be a construed to authorize the impairment of any contract in violation of the Texas Constitution or the United States Constitution."

F. Court Costs

1. *SB 39 – Consolidation and Allocation of State Court Costs*[42]

SB 39 was an omnibus bill intended to: (1) simplify the civil filing fee and criminal court cost structure; (2) ensure that filing fees and court costs are going to support the judiciary; and (3) ensure that fees being collected for a purpose are actually being used for that intended purpose.

2. *HB 1021 – Prohibition on the Imposition of Court Costs and Filing Fees on Certain Indigent Parties*[43]

HB 1021 sought to add Chapter 104 to the Government Code and require a judge or justice of a court who determined that a defendant or plaintiff (whether in a criminal or civil proceeding) was indigent to waive all court costs, including costs of conviction, and all filing fees and other fees imposed by law on the indigent defendant or plaintiff. For purposes of this statutory amendment, "indigent" would have meant an individual whose household income is at or below 125% of the federal poverty guidelines as determined by the U.S. Department of Health and Human Services.

3. *SB 1215 – Recovery of Medical or Healthcare Expenses in Civil Actions (Companion: HB 3832)* [44]

SB 1215 and HB 3832 sought to amend section 41.0105 of the CPRC to add the following subsection (b): "The trier of fact shall consider a claimant's failure to seek reimbursement for medical or health care expenses that are obligated to be paid on the claimant's behalf a failure to mitigate the claimant's damages."

G. Court Reporters/Depositions

1. *HB 1619 – Court Reporters and Shorthand Reporting Firms and Fees (Companion: SB 2094)* [45]

HB 1619 and SB 2094 sought to amend various provisions of the Business & Commerce Code, CPRC, and Government Code to address matters relating to court reporters and shorthand reporting firms, such as creating additional responsibilities for the Judicial Branch Certification Commission (JBCC) with respect to court reporter and shorthand reporting firm certification, registration, and licensing. HB 1619 and SB 2094 would have also provided for the following:

[42] Tex. S.B. 39, 86th Leg., R.S. (2019).
[43] Tex. H.B. 1021, 86th Leg., R.S. (2019).
[44] Tex. S.B. 1215, 86th Leg., R.S. (2019); Tex. H.B. 3832, 86th Leg., R.S. (2019).
[45] Tex. H.B. 1619, 86th Leg., R.S. (2019); Tex. S.B. 2094, 86th Leg. R.S. (2019).

- The transmission, preparation, completion, enforceability, and admissibility of a document that is: (a) produced by an appointed court reporter, certified court reporter, or registered shorthand reporting firm for use in the state or federal judicial system; or (b) governed by rules adopted by the Texas Supreme Court would not be subject to Chapter 322 of the Business & Commerce Code (i.e., the Uniform Electronic Transactions Act)(amends section 322.003);

- In addition to the requirements for service of notices of appeal imposed by TRAP 25.1(e), notices of appeal would have to be served on each court reporter responsible for preparing the reporter's record (amends Chapter 51 of the CPRC); and

- A court reporter or shorthand reporting firm would be subject to disciplinary action for "repeatedly committing to provide at a specific time and location court reporting services for an attorney in connection with a legal proceeding and unreasonably failing to fulfill the commitment under the terms of that commitment." (amends section 154.111 of the Government Code).

2. *HB 2181 – Non-Stenographic Recording of Oral Depositions*[46]

HB 2181 sought to amend Chapter 20 of the CPRC to allow parties to record oral depositions by methods other than a stenographic recording (such as video recording).

H. Experts

HB 2825 – Disclosures and Discovery Regarding Expert Witnesses[47]

HB 2825 sought to amend Chapter 22 of the CPRC to add requirements for the designation of expert witnesses and related disclosures, including the following:

- In addition to any other disclosure required by the Texas Rules of Civil Procedure, a party would be required to disclose to the other parties the identity of any person the party may use to present expert testimony at trial.

- Except as otherwise stipulated or ordered by the court, if the witness was retained or specially employed by a party to provide expert testimony in the case or was a person whose duties as the party's employee regularly involved giving expert testimony, the disclosure required by the statute must be accompanied by a written report prepared and signed by the witness. The report had to include: (1) a complete statement of all opinions to be expressed by the witness and the basis and reasons for those opinions; (2) the facts or data considered by the witness in forming the opinions; (3) copies of any exhibits to be used to summarize or support the opinions; (4) the witness's qualifications, including a list of all publications authored by the witness in the preceding ten years; (5) a list of any

[46] Tex. H.B. 2181, 86th Leg., R.S. (2019).
[47] Tex. H.B. 2825, 86th Leg., R.S. (2019).

other cases in which the witness has testified as an expert at trial or by deposition in the preceding four years; and (6) a statement of the compensation to be paid for study and testimony in the case.

- For expert witnesses not required to provide a written report under the statute, the required disclosures had to state: (1) the subject matter on which the witness is expected to present expert testimony; and (2) a summary of the facts and opinions to which the witness is expected to testify.

- A party would be required to make disclosures at the times and in the sequence the court orders. Except as otherwise stipulated or ordered by the court, a required disclosure would have to be made: (1) no later than the 90th day before the date set for trial; or (2) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party in a report or disclosure provided under the statute, no later than the 30th day after the date the other party's disclosure is made.

- A party would be required to supplement disclosures made by the party: (1) in a timely manner if the party learns that in some material respect the disclosure is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (2) as ordered by the court.

- A court in a civil action could not order discovery of communications made in anticipation of litigation or deposition or for trial between a party's attorney and a witness expected to provide expert testimony in the action, regardless of the form of the communication and regardless of whether the witness provides an expert affidavit or a written report. However, such limitations would not bar discovery to the extent a communication: (1) relates to compensation for the witness's study or testimony; (2) identifies facts or data that the party's attorney provided and that the witness considered in forming the opinions to be expressed; or (3) identifies assumptions that the party's attorney provided and that the witness relied on in forming the opinions to be expressed.

- A court would not be permitted to order discovery of any draft of a written report or other disclosure required by the statute, regardless of the form in which the draft is recorded.

I. Healthcare Liability

1. *HB 765 – Liability Limits in a Health Care Liability Claim*[48]

HB 765 sought to amend sections 74.301 and 74.302 of the CPRC so as to provide for an adjustment to the noneconomic damages caps based on the consumer price index (CPI). More

[48] Tex. H.B. 765, 86th Leg., R.S. (2019).

specifically, the bill provided that, when there is an increase or decrease in the CPI, the liability limit prescribed by the noneconomic damage limitation sections would be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the CPI that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average--All Items), between September 1, 2003, and the time at which damages subject to such limits are awarded by final judgment or settlement.

2. *HB 3186 – Service of Expert Reports in Health Care Liability Claims*[49]

HB 3186 sought to amend section 75.351 of the CPRC to add the following expert report requirements in health care liability claims in which pleadings were amended to assert direct liability against a defendant: "Not later than the 60th day after the date the claimant files an amended or supplemental pleading that asserts a theory of direct liability against a defendant against whom the claimant had previously asserted only a theory of vicarious liability, serve on that defendant or that defendant's attorney: (A) an expert report that addresses at least one theory of direct liability asserted against that defendant in the amended or supplemental pleading; and (B) a curriculum vitae of each expert listed in that expert report."

J. Insurance

1. *HB 649 – Disclosure by Liability Insurers and Policyholders to Third Party Claimants*[50]

HB 649 sought to amend the Insurance Code and require an insurance carrier and a policyholder to disclose to a third party claimant certain information about the insurance coverage of the party against who a claim is being made. More specifically, HB 649 would have required an insurance carrier to provide the claimant with a sworn statement of an officer or claims manager of the insurer that contained the following information for each policy known by the insurer that provides or may provide relevant coverage, including excess or umbrella coverage: (a) the name of the insurer; (b) the name of each insured; (c) the limits of liability coverage; (d) any policy or coverage defense the insurer reasonably believes is available to the insurer at the time the sworn statement is made; and (e) a copy of each policy under which the insurer provides coverage. An insurer that failed to comply with the request would be subject to an administrative penalty up to $500. An insured who received such a request had to: (a) disclose to the claimant the name of and type of coverage provided by each insurer that provides or may provide liability coverage for the claim; and (b) forward the claimant's request to each insurer included in the disclosure.

[49] Tex. H.B. 3186, 86th Leg., R.S. (2019).
[50] Tex. H.B. 649, 86th Leg., R.S. (2019).

2. *HB 1739 – Recovery under Uninsured and Underinsured Motorist Insurance Coverage*[51]

HB 1739 sought to amend the Insurance Code to, among other things, expressly: (1) define, at least to some degree, what constitutes sufficient notice under the Insurance Code for uninsured/underinsured motorists (UIM) claims; (2) state that an insurer may not require, as a prerequisite to asserting a claim under UIM coverage, a judgment or other legal determination establishing the other motorist's liability or uninsured/underinsured status; (3) state that an insurer may not require, as a prerequisite to payment of UIM benefits, a judgment or other legal determination establishing the other motorist's liability or the extent of the insured's damages before benefits are paid; and (4) require an insurer to attempt, in good faith, to effectuate a prompt, fair, and equitable settlement of a claim once liability and damages have become reasonably clear. HB 1739 would have amended the Insurance Code to address when prejudgment begins to accrue on UIM claims and when a claim for attorney's fees is considered to be "presented" for UIM claim purposes.

3. *HB 2371 – Offset for Amounts Paid Under Personal Injury Protection Coverage*[52]

HB 2371 sought to amend section 1952.159 of the Insurance Code (Personal Injury Protection Coverage) to provide that, with respect to a claim made by a guest or passenger against the owner or operator of the motor vehicle in which the guest or passenger was riding or against the owner's or operator's liability insurer, "[t]he owner's or operator's liability insurer is not entitled to an offset, credit, or deduction if the insurer has not paid, in relation to the accident, the full amount of the applicable liability policy limit under the owner's or operator's policy."

4. *HB 2372 – Mandatory Personal Injury Protection Coverage*[53]

HB 2372 sought to amend section 1952.152 of the Insurance Code and remove the option for insureds to reject the personal injury protection coverage provided under an automobile liability insurance policy.

5. *HB 2373 – Required Amount of Personal Injury Protection Coverage*[54]

HB 2373 sought to amend section 1952.153 of the Insurance Code and increase to $5,000 the maximum amount of personal injury protection coverage that an insurer can provide under an automobile liability insurance policy.

6. *HB 2374 – Claims Settlement for Automobile Liability Insurance*[55]

HB 2374 sought to add Chapter 1955 to the Insurance Code and provide that a release entered into by a claimant injured by a motorist would be voidable by the claimant if: (1) the

[51] Tex. H.B. 1739, 86th Leg., R.S. (2019).
[52] Tex. H.B. 2371, 86th Leg., R.S. (2019).
[53] Tex. H.B. 2372, 86th Leg., R.S. (2019).
[54] Tex. H.B. 2373, 86th Leg., R.S. (2019).
[55] Tex. H.B. 2734, 86th Leg., R.S. (2019).

claimant entered into the release on or before the 45th day after the date the cause of action that is the basis for the released claim accrued; and (2) the claimant was not represented by an attorney at the time the claimant entered into the release.

HB 2374 also provided that, no later than the first anniversary after the date the release was entered into, a claimant could void a release by providing written notice of the claimant's intent to void the release to each person released (releasee). Any consideration paid to the claimant by or on behalf of the releasee in exchange for a voided release would be credited against any award or payment made in connection with a claim against the releasee arising from the cause of action that is the basis for the previously released claim.

K. Judiciary/Judicial Administration

1. *SB 561 – Jurisdiction/Qualifications of Judges and Justices of the Peace for Certain Courts*[56]

SB 561 sought to amend multiple sections of the Government Code and, among other things, do the following:

- Increase the minimum amount in controversy for district courts to $10,000;
- Increase the minimum amount in controversy for county courts at law to $10,000 (though I understand that amount will likely be changed to $5,000 in order to be consistent with the Texas Judicial Council's recommendations);
- Increase the maximum amount in controversy for justice of the peace court to $20,000; and
- Increase the minimum age for county court at law and statutory probate court judges from 25 to 30 years of age.

2. *SB 1069 – Additional Qualifications of Justices and Judges of Certain Courts*[57]

SB 1069 sought to amend section 21.0045 of the Government Code to require that, in addition to the qualifications required by Article V of the Texas Constitution or any other law, a person would not be eligible to be a candidate for or to serve as a justice of the supreme court or a court of appeals or a judge of the court of criminal appeals, a district court, a statutory county court, or a statutory probate court unless the person had: (1) served for at least one year as a justice or judge of a court; or (2) practiced for at least one year in a court of equivalent or greater jurisdiction than the court in which the person will serve.

[56] Tex. S.B. 561, 86th Leg., R.S. (2019).
[57] Tex. S.B. 1069, 86th Leg., R.S. (2019).

3. *SB 1979 – Annual Salary of a Statutory Probate Court Judge*[58]

SB 1979 sought to provide that a statutory probate court judge would be entitled to an annual salary, not including contributions and supplements paid by the state or county, in an amount equal to the salary to which a district judge with the same number of years of service credit in the Judicial Retirement System of Texas Plan One or the Judicial Retirement System of Texas Plan Two is entitled.

4. *SJR 25 – Eligibility to Serve as a District Judge*[59]

SJR 25 sought to amend the Texas Constitution and specifically provide that, in order to be eligible to serve as a district judge, a person must be licensed to practice law in Texas and, at the time of election, have been a practicing lawyer in Texas for at least ten years. The current requirement is four years. The constitutional amendment would take effect on January 1, 2020 and would apply only to a person elected on or after that date to serve as a judge.

5. *SJR 35 – Constitutional Amendment to Increase Amount of Time for Judges to be a Practicing Lawyer*[60]

SJR 35 sought to amend the Texas Constitution and specifically provide that in order to be eligible to serve as a supreme court justice, court of criminal appeals judge, and court of appeals justice, a person must be licensed to practice law in Texas and, at the time of election, have been a practicing lawyer in Texas for at least twelve years. District judges had to be a practicing lawyer for at least eight years. The constitutional amendment would have taken effect on January 1, 2020 and applied only to a person elected on or after that date to serve as a judge or justice.

6. *HB 1033 – Jurisdiction of County and Justice Courts in Civil Matters (Companion: SB 793)*[61]

HB 1033 and SB 793 sought to amend sections 26.042(a) and 27.031(a) of the Government Code to increase the jurisdictional limits of the justice courts to $20,000. A similar bill (HB 1380) was filed that not only addressed an increase in justice court jurisdiction, but also consolidated justice and small claim court fees.

7. *HB 1222 – Increase in Annual Salaries of the Chief Justice or Presiding Judge of an Appellate Court*[62]

HB 1222 sought to amend section 659.012 of the Government Code to provide that the Chief Justice of the Texas Supreme Court and the Presiding Judge of the Court of Criminal Appeals would be entitled to an annual salary that is $10,000 more than the salary provided for other justices or judges of those courts. A chief justice of a court of appeals would be entitled to

[58] Tex. S.B. 1979, 86th Leg., R.S. (2019).
[59] Tex. S.J.R. 25, 86th Leg., R.S. (2019).
[60] Tex. S.J.R. 35, 86th Leg., R.S. (2019).
[61] Tex. H.B. 1033, 86th Leg., R.S. (2019); Tex. S.B. 793, 86th Leg. R.S. (2019).
[62] Tex. H.B. 1222, 86th Leg., R.S. (2019).

an annual salary that is $5,000 more than the other justices on those courts. Under current law, chief justices and the presiding judge receive $2,500 more than the other justices and judges.

8. *HB 1624 – Annual State Contribution to Counties for Statutory Probate Court Judge Salaries*[63]

HB 1624 would have required the State of Texas to annually compensate each county, in an amount equal to 60% of the state salary of a district court judge in the county, for each statutory probate court judge in the county.

9. *HB 2854 – Judicial Deference to Interpretation of Law by a State Agency (Companion: SB 2371)* [64]

HB 2854 and SB 2371 sought to amend the Government Code and add the following provisions:

- Section 311.0231 (Code Construction Act): "A court may not give deference to any construction of a statute by the state agency responsible for the statute's administration or implementation."

- Section 2001.042 (Administrative Procedure Act): In a judicial proceeding, "a court may not give deference to a legal determination made by a state agency regarding the construction, validity, or applicability of a rule adopted by the state agency responsible for the rule's administration or implementation."

- Section 2001.1721 (APA – Judicial Review of Contested Cases): A reviewing court must "decide all questions of law by trial de novo, including the interpretation of constitutional provisions, statutory provisions, or rules adopted by a state agency, without giving deference to any legal determination by a state agency."

10. *HB 3061 – Interim Study Regarding the Method by Which Trial and Appellate Judges are Selected*[65]

HB 3061 sought to create an interim commission on judicial selection (consisting of thirteen (13) members: four (4) members appointed by the Governor; three (3) members from both the House and Senate; two (2) members appointed by the Chief Justice of the Texas Supreme Court; and one (1) member appointed by the president of the State Bar of Texas) to study and review the method by which statutory county court, district and appellate justices/judges are selected for office. The interim commission would have been subject to the Texas Open Meetings Act and Texas Public Information Act and would be required to report its findings and recommendations to the governor, lieutenant governor, and speaker of the House by January 11, 2021.

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[63] Tex. H.B. 1624, 86th Leg., R.S. (2019).
[64] Tex. H.B. 2854, 86th Leg., R.S. (2019); Tex. S.B. 2371, 86th Leg. R.S. (2019).
[65] Tex. H.B. 3061, 86th Leg., R.S. (2019).

11. *HB 3104 – Public Access to Certain Court Proceedings*[66]

HB 3104 sought to amend section 54.08 of the Family Code to require a juvenile justice court to permit public access to all proceedings unless the court, on the motion of any party and based on the evidence presented, determined that: (1) there existed a reasonable and substantial basis for believing that public access to the proceeding could harm the child, endanger the child's right to a fair trial, or endanger a victim of the conduct of the child; (2) the potential for harm to the child or a victim outweighed the benefits of public access to the proceeding; and (3) the harm could be remedied only by excluding the public from the proceeding.

HB 3104 would have required that the motion filed by a party be in writing and served on all parties not later than the third day before the date the proceeding is scheduled to occur. On receipt of a motion to exclude the public from a proceeding, the court would have been required to conduct an evidentiary hearing in open court on the motion to determine whether exclusion of the public from the proceeding is warranted. General considerations, including concern for rehabilitation of the child, would be insufficient to warrant exclusion of the public from a proceeding.

Further, upon conclusion of the evidentiary hearing, the court would have been required to order the proceeding to be open to the public unless the court issued written findings of fact and conclusions of law stating that the evidence of potential harm to the child or to a victim presented clearly outweighs the public interest in a proceeding that is open to the public.

Under HB 3104, any party or member of the public had standing to appeal an order of the court excluding the public from a proceeding, provided that the notice of appeal was filed no later than the seventh day after the date the order was entered or the date the public was excluded from a proceeding. The filing of a notice of appeal would have stayed further proceedings pending the disposition of the interlocutory appeal.

The amendments proposed by HB 3104 would not have applied to proceedings involving children under the age of 14.

12. *HB 3238 – Transfer Due to Improper Joinder*[67]

HB 3238 sought to amend Chapter 15 of the CPRC by adding a new section 15.0635, which would have provided as follows:

- On a defendant's motion that was filed and served concurrently with or before the filing of the defendant's answer, a court must transfer an action to another county of proper venue if the court found, based on the petition and affidavits submitted by the parties, that: (1) a defendant was joined in the action for the primary purpose of establishing venue in a county that would not otherwise be a county of proper venue; or (2) the facts pleaded concerning a defendant whose connection

[66] Tex. H.B. 3104, 86th Leg., R.S. (2019).
[67] Tex. H.B. 3238, 86th Leg., R.S. (2019).

to a county is the primary basis for establishing venue in the county are materially false.

- In determining whether a defendant was joined for the primary purpose of establishing venue in a particular county, a court could have considered whether: (1) a trier of fact would impose significant liability on the defendant; or (2) the plaintiff that joined the defendant has a good faith intention to prosecute the action and seek judgment against the defendant.

13. *HB 4149 – Creation of a Business Court and a Court of Business Appeals (Companion: SB 2259)* [68]

HB 4149 and SB 2259 sought to create a statewide specialized civil trial court and an appellate court to hear certain business-related litigation cases, such as actions against businesses, accusations of wrongdoing by businesses or their members, disputes between businesses, violations of the Business Organizations Code, Finance Code, and Business & Commerce Code, and business-related disputes in which the amount in controversy exceeds $10 million. The proposed "business court" would not have had jurisdiction over governmental entities (absent the government entity invoking or consenting to jurisdiction), personal injury cases, or cases brought under the Estates Code, Family Code, the DTPA, and Title 9 (Trusts) of the Property Code, unless agreed to by the parties and the court. Some of the other notable components of the bill were:

- The business court would have been composed of seven (7) judges who were appointed by the governor for staggered six (6) year terms. The judges would have been selected from a list of qualified candidates compiled by a bipartisan advisory council (Business Court Nominations Advisory Council) and would have been required to have at least 10 years of experience in complex business law;

- The court clerk would have been located in Travis County, but individual judges could be based in the county seat of their respective counties;

- Current venue rules would have applied, but cases could be heard in an agreed-upon county or where the court decided to be more convenient or necessary;

- There would have been a removal procedure for cases filed in a district court;

- The business court would have been required to provide rates for fees associated with filings and actions in the business court, and such fees had to be set at a sufficient amount to cover the costs of administering the business court system; and

- The Court of Business Appeals, which would have handled appeals from the business trial court, would have been composed of seven (7) justices who were

[68] Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. S.B. 2259, 86th Leg. R.S. (2019).

appointed by the governor based on a list of qualified candidates compiled by the advisory council. Justices would serve six (6) year terms and hear cases in panels of three (3) randomly-selected justices. Appeals from the Business CA would have gone to the Supreme Court.

HB 4149 and SB 2259 were substantially similar to the version of the 2015 chancery court bill (HB 1603) that was voted out of committee (but failed to pass in the House) and the 2017 chancery court bill (HB 2594) that was filed and referred to committee, but never received a hearing.

14. *HB 4207 – Jurisdiction of a Statutory County Court in Civil Cases*[69]

HB 4207 sought to increase the jurisdiction of a statutory county court exercising civil jurisdiction concurrent with the district court to hear cases in which the amount in controversy does not exceed $250,000.

15. *HB 4504/HJR 148 – Appointment/Non-Partisan Election of Certain Judicial Offices*[70]

HB 4504 and HJR 148 sought to change the manner in which Texas selects certain district judges and appellate court judges and justices. Some of the highlights of HB 4504 and HJR 148 were as follows:

- All state appellate court judges and justices and all district judges in a judicial district: (1) that contained a county with a population that exceeded 500,000, or (2) in which the voters of the district voted to have district judge vacancies filled by appointment would be subject to an appointment/non-partisan retention election process that is triggered by a vacancy.

- All vacancies would be filled by gubernatorial appointment and appointees would then face a non-partisan retention election during the 4th and 8th years of their 12-year terms.

- During the retention election, if a majority of the votes received were for the retention of the judge or justice, the judge or justice would be entitled to continue the term. However, if a majority of the votes received were to not retain the judge or justice, the resulting vacancy would be filled by gubernatorial appointment based on the recommendation of the Judicial Appointments Advisory Board.

- The Judicial Appointments Advisory Board (Board) would review the qualifications of gubernatorial nominees and advise the Senate on whether the Board believes the appointee is "unqualified," "qualified," or "highly qualified."

- The Board would have been composed of eleven (11) members: three (3) members appointed by the majority party of the House; two (2) members

[69] Tex. H.B. 4207, 86th Leg., R.S. (2019).
[70] Tex. H.B. 4504, 86th Leg., R.S. (2019); Tex. H.J.R. 148, 86th Leg., R.S. (2019).

appointed by the minority party of the House; two (2) members appointed by the majority party of the Senate; two (2) members appointed by the minority party of the Senate; one (1) member appointed by the Chief Justice of the Texas Supreme Court; and one (1) member appointed by the Presiding Judge of the Court of Criminal Appeals. Members of the Board would serve staggered six (6) year terms.

- Current judges and justices would have been permitted to complete their current terms before facing a nonpartisan retention election.

L. Limitations

HB 1737 – Statutes of Limitation/Repose for Claims Involving Equipment/Construction on Real Property[71]

HB 1737 sought to amend CPRC section 16.008 (addressing limitation periods relating to certain claims against architects, engineers, interior designers, and landscape architects) and section 16.009 (addressing limitation periods relating to certain claims against persons furnishing construction or repair of improvements to real property) to: (a) reduce the limitations period for bringing certain claims against the individuals covered by the statutes from ten (10) years to eight (8) years; and (b) add a four-year limitations period for claims arising out of latent or patent deficiencies in real property, improvements to real property, or equipment attached to real property.

M. Litigation Financing

HB 2096 – Mandatory Disclosure of Third Party Litigation Financing Agreements (Companion: SB 1567) [72]

HB 2096 and SB 1567 sought to require the Supreme Court to adopt rules to provide for the mandatory disclosure of third-party litigation financing agreements to parties in the civil action in connection with which third-party litigation financing is provided. HB 2096 and SB 1567 defined "third-party litigation financing" to mean "the provision of financing with repayment being conditioned on and sourced from the person's or group's proceeds from the civil action, regardless of whether the proceeds are obtained through collection of a judgment, payment of a settlement, or otherwise." However, the term would not have included a contingent fee arrangement or an extension of credit to any attorney or law firm when the obligation of the attorney or law firm to repay the loan is required by the loan agreement and is not contingent on the outcome of a lawsuit or a portfolio of lawsuits. Under HB 2096 and SB 1567, "financing" would have meant "the provision of monetary or in-kind support to a person or group of persons who have or will file or prosecute a civil action, including a payment to an attorney who represents the person or group, a payment to a fact or expert witness, a payment of the costs of the civil action, or the provision of funds or credit to be used in the future to support the civil

[71] Tex. H.B. 1737, 86th Leg., R.S. (2019).
[72] Tex. H.B. 2096, 86th Leg., R.S. (2019); Tex. S.B. 1567, 86th Leg. R.S. (2019).

action." The term would have included the provision of monetary or in-kind support, regardless of whether the support was called a loan, an advance, a purchase, or another term.

N. Probate Proceedings

SB 192 – Transfer of Probate Proceedings to County Where Executor/Administrator of Estate Resides[73]

SB 192 sought to add section 33.1011 to the CPRC to provide that, after the issuance of letters testamentary/administration to the executor or administrator of an estate, the court, on motion of the executor or administrator, could order that the proceeding be transferred to the county in which the executor or administrator resides if no immediate family member of the decedent resided in the same county in which the decedent resided. SB 192 also defined "immediate family member" to be the parent, spouse, child, or sibling of the decedent.

O. Public Education

SB 933 – Creation of the Office of Inspector General at the Texas Education Agency[74]

SB 933 sought to amend the Education Code to expressly authorize the Texas Education Agency (TEA) and the commissioner of education to investigate and take action regarding instances of fraud, waste, and abuse by school districts, open-enrollment charter schools, regional education service centers, and other entities subject to the commissioner's regulatory authority. SB 933 also would have created the office of inspector general (OIG) carry out the investigations on behalf of the commissioner. More specifically, SB 933 would have provided the OIG with responsibility to investigate, prevent, and detect criminal misconduct, wrongdoing, fraud, waste, and abuse in the administration of public education by TEA, the State Board of Education (SBOE), school districts, open-enrollment charter schools, regional education service centers, and other local education agencies. Early iterations of the bill included provisions that authorized the OIG to: (1) attend any meeting or proceeding of the TEA, the SBOE, a school district, an open-enrollment charter school, a regional education service center, or other local education agency, including a meeting or proceeding that is closed to the public; (2) inspect the records, documents, and files of the TEA, the SBOE, a school district, an open-enrollment charter school, a regional education service center, or other local education agency, including any record, document, or file that is an attorney-client communication between a member of the SBOE, the executive leadership of TEA, the board of trustees of a school district, the governing body of an open-enrollment charter school, the board of directors of a regional education service center, or the executive leadership of another local education agency and the attorney of the entity by which the person is employed; and (3) issue subpoenas to compel the attendance of witnesses and the production of documents in connection with its investigation.

[73] Tex. S.B. 192, 86th Leg., R.S. (2019).
[74] Tex. S.B. 933, 86th Leg., R.S. (2019).

P. Redistricting

HB 312/HJR 25 – Creation of Texas Redistricting Commission[75]

HB 312 and HJR 25 sought to create the Texas Redistricting Commission ("TRC"), which would have been responsible for adopting redistricting plans for the election of the Texas House of Representatives, the Texas Senate, and members of the United States House of Representatives elected from Texas following each federal census. The TRC also would have been responsible for reapportioning judicial districts in the event the Judicial Districts Board failed to reapportion the districts. A similar joint resolution (SJR 56) was filed in the Senate.

Q. "Revenge Porn" Law

SB 97 – Prosecution of Criminal Offense of Unlawful Disclosure/Promotion of Intimate Visual Material[76]

SB 97 sought to amend section 21.16(b) of the TPC to add language requiring a perpetrator to disclose intimate visual material "with an intent to harm that person" and that the perpetrator "knows or has reason to believe that" the visual material was obtained or created under circumstances in which the person depicted in the visual material had a reasonable expectation that the visual material would remain private.

R. Settlement

HB 2500 – Settlement Offers in Certain Civil Actions[77]

HB 2500 sought to amend CPRC Chapter 43 (offer of settlement provisions) and to change all references to "defendant" to "party" so as to make the offer of settlement provisions apply to all parties to civil actions.

S. State Sovereignty

HB 1347 – Texas Sovereignty Act[78]

HB 1347 sought to amend the Government Code to do the following:

- Establish a 12-member Joint Legislative Committee on Constitutional Enforcement as a permanent joint committee of the Texas Legislature to review specified federal actions that challenge the state's sovereignty and that of the people for the purpose of determining if the federal action is unconstitutional. The bill would have authorized the committee to review any applicable federal action to determine whether the action was an unconstitutional federal action and establish the factors the committee was required to consider when reviewing a

[75] Tex. H.B. 312, 86th Leg., R.S. (2019); Tex. H.J.R. 25, 86th Leg. R.S. (2019).
[76] Tex. S.B. 97, 86th Leg., R.S. (2019).
[77] Tex. H.B. 2500, 86th Leg., R.S. (2019).
[78] Tex. H.B. 1347, 86th Leg., R.S. (2019).

federal action. The bill would have required the committee, no later than the 180th day after the date the committee held its first public hearing to review a specific federal action, to vote to determine whether the action was an unconstitutional federal action and to authorize the committee to determine that a federal action was an unconstitutional federal action by majority vote.

- Require the Speaker of the House of Representatives and the Lieutenant Governor to appoint the initial committee members no later than the 30th day following the bill's effective date and would have required the Secretary of State, no later than the 30th day following the bill's effective date, to forward official copies of the bill to the President of the United States, the Speaker of the U.S. House of Representatives, the President of the U.S. Senate, and to all members of the Texas congressional delegation with the request that the bill be officially entered in the Congressional Record. The bill would have required the Speaker and the Lieutenant Governor to forward official copies of the bill to the presiding officers of the legislatures of the several states no later than the 45th day following the bill's effective date.

- Require the committee to report its determination that a federal action was an unconstitutional federal action to the Texas House of Representatives and to the Texas Senate during the current legislative session if the legislature was convened when the committee made the determination, or the next regular or special legislative session if the legislature had not convened when the committee made the determination. The bill would have required each house of the legislature to vote on whether the federal action was an unconstitutional federal action and, if a majority of the members of each house determined that the federal action was an unconstitutional federal action, would have required the determination to be sent to the Governor for approval or disapproval as provided by the Texas Constitution regarding the approval or disapproval of bills. The bill would have established that a federal action was declared by the state to be an unconstitutional federal action on the day the Governor approved the vote of the legislature making the determination or on the day the determination would have become law if presented to the Governor as a bill and not objected to by the Governor. The bill would have also required the Secretary of State to forward official copies of the declaration to the President of the United States, the Speaker of the U.S. House of Representatives, the President of the U.S. Senate, and to all members of the Texas congressional delegation with the request that the declaration of unconstitutional federal action be entered in the Congressional Record.

- Establish that a federal action declared to be an unconstitutional federal action under the bill's provisions regarding such a legislative determination has no legal effect in Texas and prohibit such an action from being recognized by the state or a political subdivision of the state as having legal effect. The bill's provisions regarding the enforcement of the United States Constitution expressly did not prohibit a public officer who had taken an oath to defend the United States Constitution from interposing to stop acts of the federal government which, in the

officer's best understanding and judgment, violated the United States Constitution.

- Authorize the AG to defend the state to prevent the implementation and enforcement of a federal action declared to be an unconstitutional federal action. The bill would have authorized the AG to prosecute a person who attempted to implement or enforce a federal action declared to be an unconstitutional federal action and to appear before a grand jury in connection with such an offense.

- Amend the CPRC to establish that any court in Texas had original jurisdiction of a proceeding seeking a declaratory judgment that a federal action effective in Texas was an unconstitutional federal action. The bill would have entitled a person to declaratory relief if the court determined that a federal action was an unconstitutional federal action and would have prohibited the court, in determining whether to grant declaratory relief to the person, from relying solely on the decisions of other courts interpreting the United States Constitution. The bill would have also required the court to rely on the plain meaning of the text of the United States Constitution and any applicable constitutional doctrine as understood by the framers of the Constitution.

T. Texas Citizens Participation Act

1. *HB 3547 – Amendments to the Texas Citizens Participation Act*[79]

HB 3457 sought to amend the TCPA and do the following:

- Modify the definition of "exercise of the right of association" to exclude "a communication that is the basis of a claim asserting a misappropriation of a trade secret or a breach of a covenant not to compete."

- Exclude governmental entities and governmental officials/employees acting in an official capacity from being able to file a motion to dismiss under the TCPA.

- Allow the parties to agree to extend the time to file a motion to dismiss.

- Require a party moving for dismissal to provide the non-moving party with written notice of the date and time of the dismissal hearing no later than fourteen days before the date of the hearing.

- Require a party responding to a motion to dismiss to file a response no later than the 7th day before the date of the hearing.

- Provide that the court must rule on the motion no later than the 30th day after the date on which the hearing on the dismissal motion concludes.

[79] Tex. H.B. 3547, 86th Leg., R.S. (2019).

- State that the court is required to grant the dismissal motion if the moving party establishes that the "legal action fails as a matter of law (instead of by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim).

- Add "admissible evidence submitted by the parties" to the types of evidence that a court must consider in ruling on the motion to dismiss.

- State that a court's ruling on a motion to dismiss, or the fact that the court made the ruling, is not admissible in evidence at any later stage of the proceeding. Further, the court's ruling on the motion would affect a party's burden of proof.

- Provide that the trial court: (1) "shall" award to the moving party court costs and reasonable attorney's fees incurred in defending against the action (eliminating "other expenses" and "as justice and equity may require"; and (2) "may" award sanctions to the party moving for dismissal.

- Add that the TCPA does not apply to an action filed under Title 1, 2, 4, or 5, Family Code, or an application for a protective order under Chapter 7A, Code of Criminal Procedure. However, it would apply to "a legal action against a person based on the creation, dissemination, exhibition, advertisement, or other similar promotion of a dramatic, literary, musical, political, or other artistic work, including a motion picture or television program, or an article published in a newspaper or magazine of general circulation."

2. *HB 4575 – Amendments to the Texas Citizens Participation Act*[80]

HB 4575 sought to amend the TCPA and do the following:

- Modify the definition of "exercise of the right of association" to expressly provide that communications related to "public participation in governmental or official proceedings."

- Modify the definition of "legal action" to state that the term does not include alternative dispute resolution procedures (such as arbitration), a petition under TRCP 202, and a discovery request in litigation (including subpoena requests).

- Modify the definition of "matter of public concern" to expressly state that it refers to "public" issues.

- State that, once a motion to dismiss is filed, all discovery related to "the claim that is the subjection of the motion" is suspended until the court rules on the motion.

[80] Tex. H.B. 4575, 86th Leg., R.S. (2019).

- Require a party moving for dismissal to provide the non-moving party with written notice of the date and time of the dismissal hearing no later than fourteen days before the date of the hearing.

- Require a party responding to a motion to dismiss to file a response no later than the 7th day before the date of the hearing.

- State that the court is required to grant the dismissal motion if, in addition to establishing by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim, the moving party also proves that there is no material fact in dispute regarding each essential element described of the defense.

- Add "evidence obtained from discovery" to the types of evidence that a court must consider in ruling on the motion to dismiss and add that the court may hear testimony or require the parties to submit affidavits to determine any amounts awarded.

- Provide that discovery is suspended during an interlocutory appeal only for the part of the legal action that is the subject of the motion to dismiss, but it does not affect discovery related to a motion filed before a motion to dismiss is filed under the TCPA.

- Provide that, if a party intends to appeal any other procedural ruling, the appealing party must include in the appeal an appeal of the trial court's order on the motion to dismiss.

- Provide that the trial court "may" award to the moving party court costs and reasonable attorney's fees incurred in defending against the action or sanctions against the party who brought the legal action.

- Add that the TCPA does not apply to a deceptive trade practice under Chapter 17 of the Business & Commerce Code or a covenant not to compete.

3. *SB 1981 – Amendments to the Texas Citizens Participation Act*[81]

SB 1981 sought to amend the TCPA and do the following:

- Remove the definition of "exercise of the right of association" and replace it with the "exercise of the constitutional right to petition, speak freely, or associate freely," which would be defined as "the exercise of the right to petition, speak freely, or associate freely as those rights are provided by the constitutions of this state and the United States, as applied by the courts of this state and the United States."

[81] Tex. S.B. 1981, 86th Leg., R.S. (2019).

- Exclude from the definition of "legal action" a "motion made or procedural action taken during a suit that does not amend or add a claim for legal or equitable relief."

- Provide that a party may file a motion to dismiss if the legal action is based on, relates to, or is in response to a party's "exercise of the right to petition, speak freely, or associate in a place or context that is open to the public."

- Amend section 27.006(a) to add "admissible evidence submitted by the parties" to the types of evidence that a court must consider in ruling on the motion to dismiss.

- Provide that a court must award court costs, reasonable attorney's fees, and other expenses "to a moving party or responding party that prevails on the matter of a motion to dismiss" under the TCPA.

- Provide that, if the court orders dismissal of a legal action under the TCPA, the court may issue sanctions against the responding party as the court may determine to be sufficient to deter the party from bringing similar actions in the future.

- Provide that the TCPA does not apply to a suit to dissolve a marriage; a suit affecting the parent-child relationship; an application for a protective order under the Family Code; a suit for misappropriation of trade secrets; or a suit for breach of a covenant not to compete.

- Eliminate the following definitions: "communication;" "exercise of the right of free speech"; "exercise of the right to petition"; "governmental proceeding"; "matter of public concern"; "official proceeding"; and "public servant."

U. Wrongful Birth Claims

HB 4199 – Elimination of Wrongful Birth Cause of Action[82]

HB 4199 sought to amend the CPRC to expressly prohibit a cause of action and damages arising on a claim that "but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted." The bill also expressly provided that the law should not be construed to eliminate any duty of a physician or health care practitioner that exists under applicable law.

IV. NOTE

As a service to interested members of the bench and bar, during each legislative session, Jerry D. Bullard produces an e-newsletter that includes summarized information and links to relevant bills in order to keep recipients up to date on what is happening at the Capitol in Austin

[82] Tex. H.B. 4199, 86th Leg., R.S. (2019).

and how proposed legislation might affect the practice of civil trial and appellate lawyers and the judiciary. For those interested in receiving the e-newsletter, please contact Jerry Bullard at either of the following addresses: jdb@all-lawfirm.com or j.bullard1@verizon.net.