

**SCAC MEETING AGENDA**  
**Friday, December 7, 2018**  
**9:00 a.m.**

**Location:** Texas Associations of Broadcasters  
502 E. 11<sup>th</sup> Street, #200  
Austin, Texas 78701  
(512) 322-9944

1. **BREAKFAST: [8:00 a.m.]**
2. **WELCOME AND INTRODUCTION (BABCOCK):** *“Deep Thoughts and Ways To Improve The Justice System In Texas”*
3. **STATUS REPORT FROM JUDGE DAVID NEWELL**

Judge David Newell will report on The Texas Court of Criminal Appeals.
4. ***Richard P. Holme***, Senior Of Counsel-Davis, Graham & Stubbs, LLP; Fellow, American College of Trial Lawyers, 1983-present; Member of ACTL Task Force on Discovery and Civil Justice (2009-2015); Chair, ACTL Judiciary Committee (2016-18) - *“Update On ACTL Projects To Improve The Civil Justice System”*
  - (a) ACTL Judiciary Committee-Resources re: State Court Revisions of Civil Rules
  - (b) Updating Civil Rules of Procedure – 2007-2018
5. ***Senator John Whitmire***, Texas State Senate, District 15; Chair of Senate Criminal Justice Committee; (Houston, TX) – *“Bail Reform”*
6. ***Jerry D. Bullard***, Adams, Lynch & Loftin, P.C.; Co-Chair, Legislative Liaison Committee; State Bar of Texas Appellate Section – *“Overview of Pre-filed Bills”*
  - (c) Hurling Toward the Lege: A Preview of the 86<sup>th</sup> Legislature
7. **STATUS REPORT FROM CHIEF JUSTICE HECHT**

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the September 2018 meetings.
8. **COMMENTS FROM JUSTICE JEFF BOYD**
9. ***David Slayton***, Administrative Director-Office of Court Administration – *“Reporting on the Office of Court Administration”*
10. ***Oscar Rodriguez***, President-Texas Association of Broadcasters – *“Legislation Affecting the Media”*
11. **SCAC- “General Discussion and Ideas”**

Tab A

**ACTL JUDICIARY COMMITTEE –  
RESOURCES RE STATE COURT REVISIONS OF CIVIL RULES**

**What is in this One Drive folder?**

**October 1, 2018**

[https://dgslaw-my.sharepoint.com/personal/richard\\_holme\\_dgslaw\\_com/\\_layouts/15/guestaccess.aspx?folderid=01e9d60391b444d0fb7dc95ab63f0c44e&authkey=AZx2AgXIKG\\_SJitKHwYh6Eo](https://dgslaw-my.sharepoint.com/personal/richard_holme_dgslaw_com/_layouts/15/guestaccess.aspx?folderid=01e9d60391b444d0fb7dc95ab63f0c44e&authkey=AZx2AgXIKG_SJitKHwYh6Eo)

Or

<https://www.actl.com/home/committees/general-committees/judiciary-committee/resources-state-court-revisions-of-civil-rules/>

**To: ACTL Judiciary Committee Members.**

This One Drive folder contains a few selected reports, some research and useful information and materials. We believe these can be of use to you for your own information and to be shared with Supreme Court and other judicial committees who are tasked with considering revisions to your rules of civil procedure. These efforts are generally designed to allow trial courts to increase access to the judicial system by assisting in the process of making cases less expensive and more prompt in reaching resolution.

Below is a listing of the enclosed materials with some brief explanations of their usefulness where their focus is not apparent from their title. A few relevant entities are designated by the following initials:

CCJ/CJI – Counsel of Chief Justices/Civil Justice Improvements Committee

IAALS – Institute for the Advancement of the American Legal System;

NCSC – National Center for State Courts;

SJI – State Justice Institute

Because of limitations on the number of characters allowed to identify some of the documents, the following list does contain the documents' full titles, which may be a little longer than the lists you will see when you proceed into the other sections of this One Drive folder.

**I. Leading Suggestions for Improvements.**

CCJ-CJI – *Call to Action: Achieving Justice for All* – (2016) – Report by Council of Chief Justices urging reform and methods of improving policies and procedures for reform. This report was unanimously approved by the states' Chief Justices.

ACTL-IAALS - *Reforming Our Civil Justice System - A Report on Progress and Promise* – (2015) – Second Final Report with “24 Principles” for reform. This Report was revised following a review of pilot projects undertaken by a number of individual trial courts around the country. The pilot projects were performed to test some of the theories and practices advocated in the initial “Final Report.”

IAALS, ACTL - *Final Report on the Joint Project of the ACTL Task Force on Discovery and IAALS* (2010) – This is the initial Final Report resulting from extensive discussions and debate among members of the ACTL Task Force on Discovery and Civil Justice and IAALS. This version contains the initial set of “29 Principles” proposed for reforming civil adjudication. It was revised in 2015 by *Reforming Our Civil Justice System - A Report on Progress and Promise*.

IAALS - *Creating the Just, Speedy, and Inexpensive Courts of Tomorrow: Ideas for Impact from IAALS’ Fourth Civil Justice Reform Summit* – (2016). This document reports ideas from a conference attended by a substantial, selected group of judges, academics, civil trial lawyers and court personnel to discuss and analyze the status of the civil justice reform efforts of the preceding decade.

## **II. Preparation for Reform and Fact Gathering.**

IAALS, ACTL - *Survey of Experienced Litigators Finds Serious Cracks in U.S. Civil Justice System; Survey* (2008). Published in *Judicature*, Vol. 92, No. 2, September-October 2008. Report of initial extensive survey of ACTL members. This is the report of the initial survey of Fellows of the American College of Trial Lawyers concerning their understandings and concerns about the state of civil justice litigation throughout the country. In many respects, this was the match that lit the wildfire of judicial reform.

IAALS - *Managing Toward the Goals of Rule 1* (2009). A Federal Courts Law Review article discussing the ACTL Survey and lessons to be drawn therefrom about improved judicial case management.

IAALS, NCSC, SJI, - *Transforming Our Civil Justice System: A Roadmap for Reform* – A brief outline of steps and methods of generating and managing reforms.

IAALS – *Change the Culture, Change the System: Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow* (2015).

NCSC – *Civil Justice Initiative – A Questionnaire for State Courts* (2016). A list of issues that may be considered by a state to assist in evaluating policies and procedures appropriate for that state.

NCSC/SJI – *Civil Justice Initiative – the Landscape of Civil Litigation in State Courts* (2014). A national overview of the types of “civil” litigation and their relative sizes or amounts in controversy and the types of courts of limited jurisdiction in each state.

### **III. Legal and Factual Research.**

IAALS - *Rule Reform, Case Management, and Culture Change: Making the Case for Real and Lasting Reform* (2015) – Law review article written by Rebecca Kourlis, former Justice of the Colorado Supreme Court and Executive Director of IAALS and Brittany Kauffman, Director of IAALS' *Rule One Initiative*.

IAALS – *Summary of Empirical Research on the Civil Justice Process – 2008-2013* (2014) – An extensive listing of empirical research on many aspects of civil litigation including pleadings, case management conferences, disclosures, discovery, motion practice, trials, and case differentiation, among others.

### **IV. Rules, Policies and Practices**

*Federal Rules of Civil Procedure, Rule 26 and 2015 Comments, effective Dec. 1, 2015.* These rules and comments made significant changes to the breadth of allowable civil case discovery and elevate the importance of proportionality in dealing with the scope of discovery.

*Colorado Rules of Civil Procedure, Amendments, effective July 1, 2015.* One state's efforts to reform its civil rules. Following a four-year pilot for business related civil cases (Civil Access Pilot Project – CAPP), Colorado adopted rules based on the results of the pilot that were positively received and dropped parts that did not prove to be effective. New rules require additional information be provided before initial case management conferences and adopt most federal rules changes to Rule 26 relating to disclosures and discovery.

R. Holme, - *Proposed New Pretrial Rules for Civil Cases [Colorado] – Part I: A New Paradigm* (2015). This article discusses reasons rule revisions are needed, explosion of pilot projects and national efforts at rules reforms, impact of CAPP, and widespread interest in improving access to justice

R. Holme, - *New Pretrial Rules for Civil Cases [Colorado] – Part II: What is Changed* (2015). This article details the specific rules changes and their impact on litigation.

R. Holme – *Back to the Future – New Rule 16.1 [Colorado] – Simplified Procedure for Cases up to \$100,000* (2004). This rule would have sharply curbed pretrial discovery for most smaller dollar, but was rarely used for other than collection cases because it was voluntary. A newly revised and mandatory simplified procedure rule is presently pending before the Colorado Supreme Court.

IAALS, ACTL - *Working Smarter, Not Harder: How Excellent Judges Manage Cases* (2015) – Summary of personal interviews with 27 state and federal trial judges from across the country about their practices and policies for moving cases faster and with less cost to litigants. Their discussions include early assessment of cases and initial case management, streamlined motion practice, and emphasis on collegiality and civility.

R. Holme – “*No Written Discovery Motions*” *Technique Reduces Delays, Costs and Judge’s Workloads* (2013). In collaboration with four trial judges, this article explains the substantial benefits of requiring personal discussions of discovery motions with the judge before written motions are allowed. This was also a substantial theme in “Working Smarter,” above, and now most Colorado trial judges and a substantial number of judges around the country have adopted this practice and are enthusiastic supporters of the requirement.

NCSC – *Civil Justice Initiative – Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts* (2015). The NCSC undertook a review of cases to examine the effect of the 2011 revisions to Utah’s Rule 26, including reviews of case dockets and files, and interviews with lawyers and judges.

Commission on the Future of California’s Court System: *Report to the Chief Justice* (2017). Contains a series of recommendations for Civil cases; Criminal and Traffic cases; Family and Juvenile cases; Fiscal and Court Administration matters; and Technology enhancements. This One Drive site only includes the Civil Recommendations. (The remaining recommendations consist of more than 200 pages, and are available on the California Judicial Branch web site.)

Tab B

## UPDATING CIVIL RULES OF PROCEDURE – 2007-2018

- 2006 Institute for the Advancement of the American Legal System (IAALS) is formed as a national independent research center at the University of Denver headed by former Colorado Supreme Court Justice, Rebecca Love Kourlis.
- 2007 IAALS and the American College of Trial Lawyers (ACTL) form a Joint Task Force. Task Force contains about 30 ACTL Fellows with significant civil trial experience for both plaintiffs and defendants, and several federal and state trial judges
- 2008 IAALS and ACTL undertake a large survey of ACTL members which reflects substantial concerns about status of civil litigation and access to justice. *See Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers*(<http://iaals.du.edu/rule-one/publications/interim-report-joint-project-actl-task-force-discovery-and-iaals>). Subsequent similar survey by ABA Litigation Section, reaches similar conclusions.
- 2009 IAALS and ACTL publish the *Final Report* (<http://iaals.du.edu/rule-one/publications/final-report-joint-project-actl-task-force-discovery-and-iaals>) containing 29 principles for consideration in revised civil rules.
- 2010 Conference is held at Duke University with about two hundred trial lawyers, state and federal judges and academics to discuss what can and should be done to deal with recognized problems in civil litigation.
- 2008-2013 The “firestorm” for change gathers momentum. *See, Summary of Empirical Research on the Civil Justice Project – 2008-2013*, IAALS (<http://iaals.du.edu/rule-one/publications/summary-empirical-research-civil-justice-process-2008-2013>).
- 2011-2015 Several states undertake pilot projects to test some of those theories and proposals. *E.g.*, Colorado’s Civil Action Pilot Project (CAPP) was one of those pilots. New Hampshire (<http://iaals.du.edu/blog/new-hampshires-pad-pilot-project-rules-be-implemented-statewide>) and Utah (<http://iaals.du.edu/rule-one/utah-rules-civil-procedure>) actually revise their civil rules to incorporate many of those reports’ recommendations.
- 2015 Based on studies and reviews of pilot projects and new rules, IAALS and ACTL revise the 2009 *Final Report*, reduce the number of “principles” to 24, and encourage states to act. *See Reforming Our Civil Justice System: A Report on Progress and Promise* (<http://iaals.du.edu/rule-one/publications/reforming-our-civil-justice-system-report-progress-and-promise>).

- 2012-2015 The Federal Judicial Conference Committee on Rules of Practice and Procedure studies and recommended changes to the Federal Rules of Civil Procedure, which became effective in December 2015. These amendments adopt a substantial number of the IAALS-ACTL principles.
- 2015 Colorado adopts substantial amendments to Rules 16 (case management) and 26 (disclosure and discovery) which include many of the changes to the Federal Rules and the IAALS-ACTL principles. See Holme, “Proposed New Pretrial Rules for Civil Cases – Part I: A New Paradigm,” 44 *The Colorado Lawyer* 43 (April 2015); Holme, “New Pretrial Rules for Civil Cases – Part II: What is Changed,” 44 *The Colorado Lawyer* 111 (July 2015).
- 2016 After significant study and deliberation the Council of Chief Justices adopts and promulgates “*Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee*” (“*Call to Action*”), <http://www.ncsc.org/sitecore/content/microsites/civil-justice-initiative/home/CCJ-Reports.aspx>.
- 2018 Colorado Civil Rules Committee proposed revisions to Rule 16.1, Simplified Procedure, for cases with damages not exceeding \$100,000. Initial Rule 16.1 was solely voluntary and rarely used. Effective September 1, 2018, Colorado Supreme Court revised Rule 16.1 making it mandatory unless exempted by trial court order for good cause. Discovery is dramatically restricted and mandatory disclosures are substantially increased.

## Colorado Civil Courts and Updated Civil Rules

The following is a very brief description of the Colorado judicial system as it is relevant to analyzing the efficiency of the Colorado judicial system as well as its efforts to increase access to justice for ordinary citizens.

### Small Claims Courts-Division of County Courts (C.R.C.P. 501-521)

Jurisdiction – damages up to \$7,500

Parties file only a short statement of claim and a response. No motions allowed. No discovery allowed. No jury trials; trials before magistrates; rules of evidence not strictly applied; several standardized forms available for parties to use. Appeals allowed to District Court. In general, attorneys are not allowed to represent parties.

Some cases with higher damages are filed in Small Claims Courts to take advantage of simplicity and speed, even though subject to the jurisdictional limitation on damages.

### County Courts (C.R.C.P. 301-412)

Jurisdiction – damages up to \$15,000 (increased to \$35,000 in 2018)

Pleading forms are available and required to be short; motions are allowed on a limited basis; disclosures of witnesses and brief description of their testimony, and of documents may be sought if requesting party provides same information at time of making the request; discovery may be requested if court pretrial conference is held subject to court's limitations; depositions to preserve testimony are allowed. Appeals allowed to District Court. E-filing permitted and encouraged.

Some cases with higher damages are filed in County Courts to take advantage of simplicity and speed, even though subject to the jurisdictional limitation on damages.

### District Courts (C.R.C.P. 1-122)

Jurisdiction – trial courts of general jurisdiction; Public Trustee real estate foreclosures; appeals from Small Claims and County Courts, administrative hearings, and governmental quasi-judicial proceedings.

Generally, follows Fed. R. Civ. P.

Has adopted a significantly new Rule 16 to increase substantially early and direct judicial supervision and control of pretrial discovery and motion practice. Strongly urges those judges to require personal contact with judge before written motions may be filed.

Adopted Fed. R. Civ. P. changes to Rule 26, including more complete disclosures, limits on discoverable matters and proportionality of discovery.

Rule 16.1 – Simplified Procedure. A special rule for handling civil cases with damages of not more than \$100,000. Includes dramatically reduced discovery, but more detailed disclosures of expected trial testimony. Originally adopted as a purely voluntary; but effective 9/1/2018, Supreme Court’s revisions make it as mandatory unless specifically excluded by court order.

Domestic Relations – adopted a Rule 16.2 to facilitate judicial case management and create specificity and clarity to financial disclosures and limited discovery.

Foreclosures of real estate. Significant revisions have been made to Rule 120 requirements for proper handling of Public Trustee foreclosures.

Forcible Entry and Detainer. Statutory provisions expedite handling of landlord/tenant disputes. Smaller cases in County Court, larger ones in District Court.

E-filing is mandated for all district court filings.

#### Other Specialized Courts with Unique Rules.

Water courts – a division of a district court in each of Colorado’s seven water sheds designated to deal with matters relating to disputes over water rights.

Probate court – a district court level court only in the City and County of Denver, dealing only with estate and probate matters and disputes.

# Tab C

## Hurling Toward the Lege: A Preview of the 86<sup>th</sup> Legislature

*Jerry D. Bullard*

*Adams, Lynch & Loftin, P.C.*

*Vice-Chair, State Bar of Texas Appellate Section*

*Co-Chair, Legislative Liaison Committee, State Bar of Texas Appellate Section*

*Member, Legislative Committee, State Bar of Texas Litigation Section*

### A. Pre-Filed Bills

On November 12, 2018, legislators began filing bills for the 2019 legislative session. As of November 30<sup>th</sup>, 638 bills have been filed. Of that total, only a handful relate to the civil justice system. Some of the more notable bills are as follows:

#### 1. Attorney's Fees

##### [HB 370 - Recovery of Attorney's Fees in Civil Cases](#)

- **Summary:** HB 370, filed by [Rep. Briscoe Cain \(R – Baytown\)](#), would amend Chapter 38.001 of the Civil Practice and Remedies Code (CPRC) to provide that a person may recover reasonable attorney's fees "from an individual or a corporation, or other organization...". HB 370 further provides that the term "organization" has 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 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 [14<sup>th</sup> Dist.] 2016, pet. denied); *Fleming & Associates, LLP v. Barton*, 425 S.W.3d 560 (Tex. App.—Houston [14<sup>th</sup> 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, for various reasons, the bills failed to pass.

#### 2. Immunity from Civil Liability

##### [HB 119 - Liability for Automated Motor Vehicles](#)

- **Summary:** HB 119, filed by [Rep. Ina Minjarez \(D – San Antonio\)](#), would add section 545.457 to the Transportation Code and provide that an automated motor vehicle manufacturer is not liable for damages arising from an accident involving the vehicle if a person other than the manufacturer modified or attempted to modify the vehicle without the manufacturer's consent and the modification or attempted modification: (1) was the direct cause of the accident; or (2) interfered with the normal operation of the vehicle. HB 119 would further provide that immunity from liability does not apply to damages arising from an accident involving an automated motor vehicle caused by a defect that was present at the time of the vehicle's manufacture or first sale.

3. Court Costs

**[SB 39 - Consolidation and Allocation of State Court Costs](#)**

- **Summary:** SB 39, filed by [Sen. Judith Zaffirini \(D – Laredo\)](#), is 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.

4. Probate Proceedings

**[SB 192 - Transfer of Probate Proceedings to County in Which Executor/Administrator of Estate Resides](#)**

- **Summary:** SB 192, filed by [Sen. Charles Perry \(R – Lubbock\)](#), would add section 33.1011 to the CPRC to provide that, after the issuance of letters testamentary or administration to the executor or administrator of an estate, the court, on motion of the executor or administrator, may order that the proceeding be transferred to another county in which the executor or administrator resides if no immediate family member of the decedent resides in the same county in which the decedent resided. SB 192 also defines “immediate family member” to be the parent, spouse, child, or sibling of the decedent.

5. Redistricting

**[HB 312/HJR 25 - Creation of Texas Redistricting Commission](#)**

- **Summary:** HB 312 and HJR 25, filed by [Rep. Donna Howard \(D – Austin\)](#), would create the Texas Redistricting Commission (“TRC”), which would be 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 the state of Texas following each federal census. The TRC also would be responsible for reapportioning judicial districts in the event the Judicial Districts Board failed to reapportion the districts.

6. “Revenge Porn” Statute

Two bills have been 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.

**[SB 97 - Prosecution of Criminal Offense of Unlawful Disclosure or Promotion of Intimate Visual Material](#)**

- **Summary:** SB 97, filed by [Rep. José Menéndez \(D – San Antonio\)](#), would amend section 21.16(b) of the Texas Penal Code (“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.

**[HB 98 - Civil and Criminal Liability for Unlawful Disclosure or Promotion of Intimate Visual Material](#)**

- **Summary:** HB 98, filed by [Rep. Mary Gonzalez \(D – El Paso\)](#), would amend CPRC section 98B.002 and TPC section 21.16(b) to add intent requirements to both statutes. More specifically, in order to impose civil liability on a defendant, HB 98 would add requirements that (1) the defendant disclose intimate visual material without the consent of the depicted person and “with the intent to harass, annoy, alarm, abuse, torment, or embarrass that person,” and (2) the defendant “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.

In order to impose criminal liability on a perpetrator, HB 98 would amend section 21.16(b) of the TPC to add language requiring a perpetrator to disclose intimate visual material “with an intent to harass, annoy, alarm, abuse, torment, or embarrass that person” and that the perpetrator “know[] 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.

7. Various Local Ordinance-Related Bills

**[SB 86 - Regulation of Raising or Keeping Six or Fewer Chickens](#)**

- **Summary:** SB 86, filed by [Sen. Bob Hall \(R – Canton\)](#), would add Section 251.007 to the Agriculture Code and prohibit a political subdivision from imposing a requirement that prohibits an individual from raising or keeping six or fewer chickens in the boundaries of the political subdivision. However, a municipality would be permitted to impose reasonable requirements that do not have the effect of prohibiting the raising or keeping of six or fewer chickens within the boundaries of the municipality, such as: (1) limiting the number of chickens an individual may raise or keep in excess of six; (2) prohibiting the breeding of poultry; (3) prohibiting the raising or keeping of roosters; or (4) establishing a minimum distance that an individual must maintain between a chicken coop and a residential structure.

**[SJR 10 - Constitutional Amendment to Restrict Power of Legislature to Mandate Requirements on a County or Municipality](#)**

- **Summary:** SJR 10, filed by [Sen. Dawn Buckingham \(R – Lakeway\)](#) and [Sen. Charles Perry \(R – Lubbock\)](#), would propose a constitutional amendment that prohibits the Legislature from enacting any law on or after January 1, 2020 that requires a municipality or county to expend revenue unless the Legislature appropriates or otherwise provides, from a source other than the revenue of the municipality or county, for the payment or reimbursement of the costs incurred by the municipality or county in complying with the requirement.

**[HB 234 - Local Regulation of the Sale of Lemonade or Other Beverages by Children](#)**

- **Summary:** HB 234, filed by [Rep. Matt Krause \(R – Fort Worth\)](#), would prohibit a municipality, county, or other local public health authority from adopting or enforcing an ordinance, order, or rule that prohibits someone under 18 years of age from temporarily selling lemonade or other nonalcoholic beverages from a stand on private property.

## B. Anticipated/Possible Bills

### 1. Bills that failed to pass in prior sessions

Several civil justice system bills that failed to pass in previous legislative sessions may be resurrected during the 2019 session. Examples of legislation that may be re-filed include the following:

#### **(a) Affidavits Concerning the Cost and Necessity of Services**

In 2017, [HB 2301](#) attempted to amend several provisions in section 18.001 of the CPRC. Specifically, the proposed revisions provided that, absent a controverting affidavit, an initial affidavit stating (1) the amount a person charged for a service was reasonable at the time and place that the service was provided, and (2) the service was necessary may be admitted as evidence that the amount charged was reasonable or that the service was necessary. The affidavit would not create a presumption that the amount charged was reasonable or that the service was necessary.

HB 2301 would have also required the party (or the party's attorney) offering the affidavit into evidence to serve a copy of the affidavit on each of the other parties to the case no later than the earlier of: (1) sixty (60) days before the date the trial commences; or (2) the date the offering party must designate any expert witnesses under the Texas Rules of Civil Procedure. Further, the party (or party's attorney) offering the affidavit into evidence must file notice with the court no later than the latest date for serving a copy of the affidavit under 18.001.

Under HB 2301, 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 had to serve a copy of the counter affidavit on each other party or the party's attorney of record by the earlier of: (1) 30 days before the date the trial commences, or (2) the date the party must designate expert witnesses under the Texas Rules of Civil Procedure. The counter affidavit must have: (1) given reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit; (2) been taken before a person authorized to administer oaths; and (3) been made by: (a) the party (or party's attorney) that seeks to offer the counter affidavit if the initial affidavit was made by a person described in the statute; or (b) a person qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

HB 2301 died in committee. Legislation addressing these issues will likely be filed again, especially in light of the Texas Supreme Court's recent decision in *Gunn v. McCoy*, 554 S.W.3d 645 (Tex. 2018), in which the Court held that section 18.001 affidavits executed by subrogation agents for health insurance carriers that pay a plaintiff's medical expenses are proper.

#### **(b) Recovery of Medical/Health Care Expenses as Damages in Civil Actions**

In 2017, [HB 2300](#) sought to amend section 41.0105 of the CPRC to provide that the recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant. More specifically, under HB 2300, the amount actually paid or incurred by or on behalf of the claimant for medical or health care expenses incurred for treatment by a physician would have been limited to the amount the treating physician normally would be paid for similar services in a non-litigation context, determined as follows (to the extent applicable):

- if the claimant was covered by health insurance or any other form of health benefits, including workers' compensation, Medicare, or Medicaid, that would pay or reimburse the expenses and the claimant accessed those benefits in obtaining the services, then the amount actually paid or incurred by or on behalf of the claimant is limited to the amount that the payor of the benefits paid or would pay for the services, plus any cost-sharing amount for which the claimant is responsible, up to the allowed amount on which the payor's payment is or would be based; or

- if the claimant did not have health benefits as described above or did not access those benefits in obtaining the services, then the amount actually paid or incurred by or on behalf of the claimant is limited to 125 percent of the Medicare reimbursement rate for the services.

HB 2300 died in committee. However, legislation addressing this issue may be re-filed, especially in light of the Supreme Court's decision in *In re North Cypress Medical Center*, No. 16-0851, 2018 Tex. Lexis 346, 2018 WL 1974376 (Tex. April 27, 2018) in which the Court declined to grant a hospital's request for mandamus relief and left undisturbed a trial court's order requiring a health care facility to produce (1) all insurance company "contracts regarding negotiated or reduced rates for the hospital services provided to plaintiff..."; and (2) documentation of Medicare reimbursement rates for the services provided.

**(c) Award of Costs and Attorney's Fees in a Motion to Dismiss Actions that Have No Basis in Law or Fact**

Currently, section 30.021 of the CPRC requires a trial court to award costs and attorney's fees to the party who prevails following the filing of a motion to dismiss, but does not require that the party awarded with costs and attorney's fees be the movant. In 2017, the House considered [HB 1038](#), which would have amended section 30.021 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 under section 22.004(g) of Government Code (i.e., TRCP 91a) discretionary instead of mandatory. The original version of the bill also would have required a court to award costs and reasonable and necessary attorney's fees to the prevailing party if the prevailing party was the party that filed the motion to dismiss.

SB 1946, the companion to HB 1038, also would have amended section 30.021 of the Government Code 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 under section 22.004(g) of Government Code (i.e., TRCP 91a) discretionary instead of mandatory. Both bills died in committee.

**(d) Creation of the Chancery Court and Court of Chancery Appeals**

In 2015 and 2017, bills were introduced that 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. The proposed "chancery court" did not have 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 chancery court would be composed of seven (7) judges who are appointed by the governor for staggered six (6) year terms. The judges would be selected from a list of qualified candidates compiled by a bipartisan advisory council (Chancery Court Nominations Advisory Council) and have at least 10 years of experience in complex business law;
- The court clerk would be located in Travis County, but individual judges would be based in the county seat of their respective counties;
- Current venue rules would apply, but cases could be heard in an agreed-upon county or where the court may decide to be more convenient or necessary;
- There would be a removal procedure for cases filed in a district court; and

- The Court of Chancery Appeals, which would handle appeals from the chancery trial court, would be composed of seven (7) justices who are appointed by the governor based on a list of qualified candidates compiled by the advisory council. Justices would serve six (6) year terms and would hear cases in panels of three (3) randomly-selected justices. Appeals from the Chancery CA would go to the Supreme Court.

The chancery court bill filed in 2017 ([HB 2594](#)) was virtually identical to the version of the 2015 bill ([HB 1603](#)) that was voted out of committee, but failed to pass in the House. The 2017 bill was never scheduled for hearing and died in committee.

## 2. Texas Judicial Council Resolutions

In September, the Texas Judicial Council adopted several [civil justice resolutions](#) that memorialize the Council's legislative priorities for 2019. These resolutions include, but are not limited to, requests for the Legislature do the following:

- Seek to ensure that the judiciary is able to attract the best and brightest minds to promote a fair and experienced judiciary by:
  - considering alternatives to the current method of selection of judges;
  - proposing a constitutional amendment to modify the qualifications to serve as justices/judges; and
  - increasing judicial compensation to an amount sufficient to “attract the most highly qualified individuals in the state, from a diversity of life and professional experiences, to serve in the judiciary without unreasonable economic hardship and with judicial independence unaffected by financial concerns.”
- Examine the structure and jurisdiction of the courts to increase efficiency by:
  - simplifying the trial court structure by establishing consistent jurisdiction among the various trial courts across the state, such as
    - increasing the civil jurisdiction floor for district courts from \$200 to \$10,000;
    - increasing the civil jurisdictional floor of the statutory county courts in Section 25.0003 of the Texas Government Code from \$200 to \$5,000; and
    - for counties with increased justices of the peace qualifications, the Legislature should increase the maximum civil jurisdiction of the justice courts from \$10,000 to \$20,000.
  - Simplifying the courts of appeals' structure and reducing the need for transfer among the courts of appeals.
- Clarify the unauthorized practice of law and barratry statutes to differentiate between providing legal information and legal advice and amend the unauthorized practice of law and barratry statutes to authorize legal assistance software applications that provide legal information.
- Increase funding for civil legal aid services throughout the state.

- Provide adequate funding to:
  - Support core services to the judicial branch, as outlined in the legislative appropriations requests for the state-funded courts and judicial branch agencies;
  - Provide sufficient judicial education to the over 3,300 judges of this state;
  - Retain and recruit knowledgeable and dedicated employees through targeted salary increases at the courts and judicial branch agencies;
  - Protect Texas children by creating new child protection courts for growing CPS caseloads;
  - Fund an expansion of the Guardianship Compliance Project to prevent fraud and abuse committed against the elderly and incapacitated; and
  - Ensure access to justice is available to individuals seeking justice through continued funding for basic civil legal services and increased funding for basic civil legal services for veterans and their families; and
- Adopt recommendations of the Judicial Compensation Commission to:
  - Increase judicial compensation of the justices and judges of the supreme court, court of criminal appeals, courts of appeals, and district court judges by 15 percent;
  - Reduce the number of years required to receive judicial longevity pay from sixteen years of service to four years of service and to provide the judge or justice 0.2 percent of their current monthly state salary for every two years of judicial service; and
  - Fund an increase in the salaries of the Children’s Court Associate Judges at 90 percent of a district judge’s salary.

### 3. Interim Charges

Following the 2017 legislative session, Speaker Joe Straus and Lt. Governor Dan Patrick issued several interim charges for House and Senate committees to study before the Legislature convenes in January 2019. Some of the charges addressed the civil justice system. They were as follows:

- **Senate Committee on State Affairs**
  - *Court Fees*: Examine the structure of court fees and make recommendations to ensure statutory filing fees and court costs are appropriate and justified. Provide recommendations for proper agency oversight of fee collection.
  - *Campus Free Speech*: Ascertain any restrictions on Freedom of Speech rights that Texas students face in expressing their views on campus along with freedoms of the press, religion, and assembly. Recommend policy changes that protect First Amendment rights and enhance the free speech environment on campus.
  - *Religious Liberty*: Monitor the implementation of legislation that protects citizens' religious freedoms, including Senate Bill 24 (sermon safeguard) and House Bill 555 (religious liberty of county clerks), and make recommendations for any legislation needed to ensure that citizens' religious freedoms are not eroded by local ordinances or state or federal law.

- **House Committee on Business and Industry**
  - *Consumer Rights and Protection Laws:* Review all existing law concerning consumer rights and protections, including but not limited to statutes that address deceptive practices, landlord/tenant agreements, and homeowner/contractor disputes; determine whether the provisions offer adequate guidance and protections in disaster and recovery situations.
- **House Committee on General Investigating and Ethics**
  - *Judicial Campaign Fairness Act:* Examine the Judicial Campaign Fairness Act and identify opportunities to improve the Act.
- **House Committee on Judiciary and Civil Jurisprudence**
  - *Non-Traditional Methods of Resolving Legal Disputes:* Examine the increasing use of non-traditional methods of resolving legal disputes and interacting with the legal system, and the implications of this trend both for the parties involved and the legal system as a whole. Include an examination of the availability and use of self-help resources, recent efforts by the Legislature and courts to increase access to justice for unrepresented litigants, and the use of online dispute resolution.
  - *Fee Statutes:* Evaluate the statutes prescribing fees in civil and criminal matters, and examine opportunities to simplify and improve the fee structure. Identify fees that may be challenged on grounds similar to those raised in *Salinas v. Texas* (Tex. Crim. App., March 8, 2017), and recommend any necessary changes.
  - *Specialty Courts:* Study the increased use of specialty courts across the state. Examine the role these courts play in the judicial system and recommend improvements to ensure they continue to be appropriately and successfully utilized.
  - *Jurisdictional Thresholds of Texas Trial Courts:* Examine the jurisdictional thresholds of the justice, county, and district courts, including how these limits and other factors impact the caseload of the courts. Study possible improvements in the efficient organization and operation of the court system.
  - *Statewide Electronic Court Record Database:* Monitor the implementation of the statewide electronic database of court records (i.e., “re:SearchTX”).

Here is a full list of the charges issued by both chambers: [House Interim Charges](#) [Senate Interim Charges - Part 1](#) and [Part 2](#). Committee reports on the interim charges will be published prior to the start of the 2019 legislative session.

### C. Summary

As in past sessions, the 86<sup>th</sup> Legislature will likely consider several bills that could significantly impact the judicial branch, the civil justice system, and the practice of law as a whole. The Legislature has yet to convene so it is unclear whether any of the anticipated bills will successfully move through the legislative process.

As a service to interested members of the bench and bar, the author 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 in Austin 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 D. Bullard at either of the following addresses: [jdb@all-lawfirm.com](mailto:jdb@all-lawfirm.com) or [j.bullard1@verizon.net](mailto:j.bullard1@verizon.net).