SCAC MEETING AGENDA
December 5, 2014
9:00 a.m.

Location: **Texas Association of Broadcasters**
502 E. 11th Street, # 200
Austin, Texas 78701
512-322-9944

1. **WELCOME (Babcock)**

2. **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 October 2013 meeting. Chief Justice Hecht may refer new issues for the committee's study.

3. **COMMENTS FROM OTHER TEXAS SUPREME COURT JUSTICES**

4. **WAYS TO IMPROVE THE CIVIL JUSTICE SYSTEM**
The order of these speakers may be adjusted based on their availability.

1) S. Jack Balagia, General Counsel- Exxon/Mobil: "Views of Corporate Counsel"

2) Wayne Fisher, Partner and Founder - Fisher Boyd Johnson & Hugenard LLP: "Requests For Admissions And Things of Interests To The Plaintiffs' Bar"

3) Peter Vogel, Partner - Gardere, Wynne Sewell LLP: "All Things Electronic"

4) Bruce Bower, Deputy Director - Texas Legal Services Center: "Views Relating To Legal Services For The Poor"

5) Nelson Mock, Human Rights Coordinator & Managing Attorney - Texas RioGrande Legal Aid: "Views Relating To Legal Services For The Poor"

6) Kent Sullivan, Partner, Sutherland Asbill & Brennan LLP - "Spoliation"

7) Judge Tracy Christopher, 14th Court of Appeals
(a) "Motions for New Trial and Mandamus Review"

8) William Dorsaneo, Professor - SMU Dedmon School of Law - "Revision of the Texas Rules of Civil Procedure – The Recodification Project"

9) Kyle Schnitzer, Attorney - Jim Adler & Associates
(b) "Jim Adler correspondence dated March 25, 2014 re: Request for New Ethics Rule Regarding Lawyer Advertising"

10) Don Jackson, President – Texas-ABOTA: "Civility Oath Bill"

11) Kathryn Murphy, Vice Chair - Family Law Bar: "Views Relating To Family Law"

Shanna Dawson

From: Sullivan, Kent <Kent.Sullivan@sutherland.com>
Sent: Thursday, December 04, 2014 2:35 PM
To: undisclosed-recipients
Subject: SCAC - Spoliation Issue
Attachments: 2014-09 Rule 37.pdf; Spoliation 9-30-14.docx

Just FYI - I thought I would forward 2 documents as background information for the anticipated discussion of spoliation (attached).

They are (1) the current draft of the relevant federal rule, Fed.R.Civ.P. 37(e), and (2) the Texas Pattern Jury Charge section on spoliation (not yet published).

Best regards,

KCS

Kent C. Sullivan | *Partner*

SUTHERLAND

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Agenda E-19 (Summary)
Rules
September 2014

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, to take effect on December 1, 2014. . . . . pp. 6-8

2. Approve the proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, and transmit these changes to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.. . pp. 13-18

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

(3) ***Specific Motions.***

* * * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit

inspection — as requested under Rule 34.

* * * * *

(e) Failure to ~~Provide~~Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* * * * *

Committee Note

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for

spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of

devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including

governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;

the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the

information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw

adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to

conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

PJC [1.12/40.12/100.13] Instruction on Spoliation

[Brackets indicate optional, alternative, or instructive text.]

[*Name of spoliating party*] [*destroyed or failed to preserve*] [*describe evidence*]. You [*must/may*] consider that this evidence would have been unfavorable to [*name of spoliating party*] on the issue of [*describe issue(s) to which evidence would have been relevant*].

COMMENT

When to use. The above instruction is recommended for the adverse inference resulting from spoliation. In *Brookshire Bros. v. Aldridge*, No. 10-0846, 2014 WL 2994435 (Tex. July 3, 2014), the Texas Supreme Court has clarified the standards governing spoliation and the parameters of a trial court's discretion to impose spoliation remedies based on the facts of the case. After the trial court has determined evidence was spoliated, it has broad discretion to impose a remedy that is proportionate to the conduct, including, under appropriate circumstances, a spoliation instruction to the jury. *Brookshire Bros.*, 2014 WL 2994435, at *1.

A spoliation instruction is a severe sanction the trial court may use to remedy an act of intentional spoliation that prejudices the nonspoliating party. *Brookshire Bros.*, 2014 WL 2994435, at *9. To find intentional spoliation, the spoliator must have "acted with the subjective purpose of concealing or destroying discoverable evidence." *Brookshire Bros.*, 2014 WL 2994435, at *10. A jury instruction is warranted "[o]nly when the trial court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation." *Brookshire Bros.*, 2014 WL 2994435, at *1.

There may be the exceptional circumstances when a jury instruction is appropriate for the intentional failure to produce evidence, and the instruction should be worded accordingly.

On rare occasions the negligent breach of the duty to reasonably preserve evidence may support the submission of a spoliation instruction. *Brookshire Bros.*, 2014 WL 2994435, at *12. Where the spoliation "so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense," the court has discretion to remedy the extreme prejudice by submitting a spoliation instruction. *Brookshire Bros.*, 2014 WL 2994435, at *1.

Caveat. Because the imposition of a spoliation instruction is considered extremely severe, it should be used cautiously, as the wrongful submission of an instruction may result in a reversal of the case. *Brookshire Bros.*, 2014 WL 2994435, at *1 (citing *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718,

724 (Tex. 2003) ("[I]f a spoliation instruction should not have been given, the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested.")).

Required findings by the court. Whether a spoliation instruction is appropriate is a question of law for the court. *Brookshire Bros.*, 2014 WL 2994435, at *7 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954–55, 960 (Baker, J., concurring)). Before considering whether to instruct the jury on spoliation as a remedy for the loss, alteration, or unavailability of certain evidence, a court must consider—

1. whether there was a duty to preserve the evidence at issue,

2. whether the alleged spoliator breached that duty, and

3. prejudice.

Brookshire Bros., 2014 WL 2994435, at *7.

In evaluating prejudice the court must analyze—

1. relevance of the spoliated evidence to key issues in the case;

2. the harmful effect of the evidence on the spoliating party's case (or conversely, whether the evidence would be helpful to the nonspoliating party's case); and

3. whether the spoliated evidence was cumulative.

Brookshire Bros., 2014 WL 2994435, at *7; *see also Petroleum Solutions, Inc. v. Head*, No 11-0425, 2014 WL 3511509 (Tex. July 11, 2014). Because the imposition of a spoliation instruction is such a severe sanction, courts must first determine whether a direct relationship exists between the conduct, the offender, and the sanction imposed, and the sanction must not be more severe than necessary. *Petroleum Solutions, Inc.*, 2014 WL 3511509, at *5 (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991)).

Use of "may" or "must." In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury "must" or "may" consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 2014 WL 2994435, at *19. The overarching guideline, as with any sanction, remains proportionality. *Brookshire Bros.*, 2014 WL 2994435, at *1 ("Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive."). Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

Memorandum

To: SCAC

From: Tracy Christopher

Date: December 1, 2014

Re: Motions for New Trial and Mandamus Review

The Texas Supreme Court has held that in a mandamus proceeding, an appellate court *may* conduct a "merits review" of the *correctness* of a new-trial order setting aside a jury verdict. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 757–59 (Tex. 2013) (orig. proceeding) (emphasis added). The court did not say when an appellate court could decline such a review.[1] The court explained that if, despite conformity with the procedural requirements, a trial court's articulated reasons were not "actually true," the new-trial order may be an abuse of discretion. *Id.* at 758. In *Toyota*, the court held that the record conflicted with the trial court's express reason for granting the new trial: improper jury argument. *Id.* at 761. In *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600, 602 (Tex. 2014) (orig. proceeding) (per curiam), the court held that a new trial was not warranted for jury misconduct after a juror talked to a corporate representative of the defendant during the trial but there was no evidence that the misconduct probably caused injury. In *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 598 (Tex. 2014) (orig. proceeding) (per curiam), the court reversed the trial court's grant of a new trial due to a juror's failure to disclose information in voir dire because there was no evidence that the nondisclosure probably caused injury.

[1] The Fourteenth Court of Appeals declined mandamus review when the relator failed to provide a complete trial record. *See In re Wyatt Field Serv. Co.*, No. 14-13-00811-CV, 2013 WL 6506749, at *3 (Tex. App.—Houston [14th Dist.] Dec. 10, 2013, orig. proceeding) (mem. op.) (per curiam). The relator refiled the petition with the complete record.

The supreme court seems to be applying a traditional interlocutory-appeal standard in support of the jury verdict rather than an abuse-of-discretion standard that defers to the trial court. I have spoken to several trial judges who have concluded that a trial judge must grant a mistrial rather than wait until after the jury verdict in the event of violations of a limine order or improper argument or if evidence of jury misconduct surfaces before a verdict.

After *Toyota,* the Sixth Court of Appeals reviewed an order granting a new trial on the ground that the jury's finding in favor of the defendants was against the great weight and preponderance of the evidence. *See In re Baker*, 420 S.W.3d 397, 400 (Tex. App—Texarkana 2014, orig. proceeding). The appellate court framed the issues in the case as whether the plaintiffs had met their burden to prove that the relator had breached his duty of care and that such negligence was a proximate cause of their injuries. *Id.* at 400. The court set forth the factual-sufficiency standard of review; reviewed all the evidence; observed that the case turned on the relator's credibility; and held that evidence was factually sufficient to support the adverse finding because the evidence was such that reasonable minds could differ on its meaning or the inferences and conclusions to be drawn from it. *Id.* at 402–04. The court therefore concluded that "the grant of the new trial improperly intruded on the jury's province," and that the trial court should have rendered judgment on the verdict. *Id.* at 404. In other words, the appellate court gave no deference to the trial judge's review of the evidence.

The Fifth Court of Appeals similarly has concluded that there is no reason to treat a factual-sufficiency challenge raised in a mandamus proceeding any differently than the same challenge raised in an appeal. "Thus, when a trial court incorrectly determines the evidence is factually insufficient and orders a new trial on that basis, it abuses its discretion. " *In re Zimmer, Inc.*, No. 05-14-00940-CV, 2014 WL 6613043, at *8 (Tex. App.—Dallas Nov. 21, 2014, orig. proceeding).

Given the state of the law, it appears that an interlocutory appeal may be the better route for review of an order granting a motion for new trial. This approach would clarify the standard of review and resolve the question of when an appellate court can decline mandamus review. If we want to maintain mandamus review, we should articulate the circumstances under which an appellate court can defer to a trial judge's decision or decline mandamus review.

I have not undertaken a thorough review of federal case law but federal courts generally review the grant of a new trial on appeal after the second trial. They also consider whether the grant of a new trial can be upheld on any ground—even if not articulated by the trial court. A decision to grant a new trial is accorded less deference than a decision denying the motion for new trial. In reviewing a grant of a new trial on the ground that the verdict is against the great weight of the evidence, some courts consider the simplicity of the issues, the extent to which the evidence is disputed, and whether any other undesirable occurrence happened at trial. *See Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930–31 (5th Cir. 1982).

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March 25, 2014

Via CMRRR: *7106 4575 1292 4840 3080*
Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
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Via CMRRR: *7106 4575 1292 4840 3097*
Nathan L. Hecht
Chief Justice, Supreme Court of Texas
201 West 14th Street
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RE: *Request for New Ethics Rule*

Dear Sirs,

I write to draw your attention to an unethical advertising practice, used with sadly increasing frequency in this State, but not yet squarely addressed by existing ethics rules. As heads of the organizations entrusted with rulemaking authority for Texas attorneys, it is within your power to address this omission. I respectfully request your consideration of the below-discussed problem and swift action to prohibit an unethical practice in Texas.

Summary of the Problem:

Internet search engines (such as Google, Bing, and Yahoo) offer advertisements on a "Pay Per Click" (PPC) basis. Generally speaking, a PPC advertising program allows potential advertisers to select specific keywords or phrases for their ads—when a potential customer uses the search engine to search for the selected words or phrases, the advertiser's ads appear at the top or to the side of the results page. These PPC ads are brief, often containing little more than a link to a website and a few words of description. Thus, a search for "luxury cars" will produce a PPC link to the Mercedes website if Mercedes has selected that phrase to trigger its advertisements. However, a PPC advertiser does not purchase the exclusive rights to specific words or phrases, and specific words or phrases can be selected by any number of advertisers. This leaves open the possibility of the following scenario:

Attorney A and Attorney B practice in the same geographic area in the same field of law but are otherwise unaffiliated and in fact compete to represent potential clients. Attorney B's name is trademarked. Attorney A initiates a PPC campaign, selecting Attorney B's name as one of his keywords. As a result, when an internet user searches for the term "Attorney B," advertisements with a link to Attorney A's website are displayed along with the actually sought-for search results. Nothing in Attorney A's advertisement indicates he is unaffiliated with Attorney B.

I believe that this type of advertising practice violates a number of existing Texas Ethics Rules by implication and I have filed a formal request with the Professional Ethics Committee for a ruling to that effect. A copy of that request is enclosed with this letter as an exhibit. However, I recognize that the existing rules do not expressly address PPC advertising and that further clarity is needed. The balance of this letter explains why a new ethics rule should expressly prohibit the misuse of PPC advertising by Texas attorneys.

Arguments and Authorities:

Attorney A's PPC Advertisements Undermine the Protections of Trademark Law:

Any given trademark has two intended purposes, to identify the provider of a service so that the public may be confident it is acquiring the service it expects, while also protecting the trademark owner's investment of energy, time, and money in the mark from free-riders. *See Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 163-64 (1995). By using Attorney B's trademarks as PPC keywords, Attorney A's advertisements undercut both these purposes.

First, Attorney A's failure to indicate anywhere in his ads that he is unaffiliated with Attorney B undermines the protection that trademark law offers the public. An internet user who enters Attorney B's trademarks into a search engine expects to see results connected to Attorney B. But thanks to Attorney A's PPC campaign, the internet user is also presented with generic links to a lawyer purporting to practice in Attorney B's field. The user must click on the generic link to learn that it does not go to Attorney B's website, and even then there mere may be an expectation that this new lawyer is somehow affiliated with Attorney B. Trademarks are intended to reduce consumer confusion; Attorney A's advertisements do the exact opposite. If this letter results in no other action, the State Bar should at a minimum require that attorneys place appropriate disclosures in their PPC advertisements.

But even regulation of PPC content does not protect the second purpose of trademark law from Attorney A's practice. Attorney B will have invested substantial resources in establishing and maintaining his trademarks in the public consciousness. By using those trademarks as PPC keywords, Attorney A is able to "jump to the front of the line" so to speak, achieving the same penetration of public consciousness without a concomitant investment. Whenever a link to Attorney B's website is provided, Attorney A's website will appear too, yet only Attorney B must work to maintain the trademark. This unfairness weighs in favor of the State Bar rejecting trademark PPC advertising in its entirety.

As PPC advertising is a relatively new technology, the law in this area is not fully developed in the United States. However, several other jurisdictions, from Europe to New Zealand, have begun to prohibit the use of trademarks as PPC keywords on the basis of these concerns. *See, e.g.* Interflora v. Marks & Spencer, [2013] EWHC (Ch) 1291 (High Court of England and Wales recognizing that trademarked PPC keywords can cause consumer confusion). Thus, while this is not a problem limited to Texas, the State Bar can and should act to address it within Texas.

Attorney A's Advertisements are Inconsistent with the Ethical Standard for Texas Attorneys:

Separate and apart from any trademark law issues, keyword selection for PPC advertisements implicates ethical concerns. As the Supreme Court of Texas and Court of Criminal Appeals so eloquently declared when they promulgated the Texas Lawyer's Creed in 1989, a lawyer's conduct should be characterized at all times by honesty, candor, and fairness, aspiring to the "highest degree of ethical and professional conduct." There can be little question that Attorney A's advertising practice violates the spirit of this charge.

As I expressed in my letter to the Professional Ethics Committee, enclosed as an exhibit hereto, the misrepresentation and dishonest aura surrounding this type of PPC advertising (especially the use of trademarked keywords) seems to fall within the ambit of several existing ethics rules. I respectfully direct you to that letter for a richer discussion of these concerns. But even if the Ethics Committee ultimately determines there is no technical violation of the existing rules, those like Attorney A should have no defense—hiding in the murky gray between technicalities is far from the ethical standard to which Texas attorneys are called. A new, explicit rule will be necessary to directly address PPC advertising and flush out any possible refuge for this practice in Texas.

Models for such a rule already exist. The North Carolina State Bar recently determined that Attorney A's behavior would violate the ethics rules for that state. *See* N.C. State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012). And the National Association of Realtors has expressly prohibited its members from "deceptively using metatags, keywords or other devices/methods to direct, drive, or divert Internet traffic." NAR Code of Ethics Article 12-10. If realtors are held to such a standard, attorneys surely should be too. Our ethical obligations should be proportionate to our weighty responsibilities.

Conclusion:

Though the ethical concerns guiding Texas attorneys are timeless, the rules guiding and guarding the expression of those concerns must advance with the times. PPC advertising based on trademarked keywords is a newer technology, but attorneys who abuse this technique should not escape oversight on the basis of novelty alone. I trust that this Honorable Court and its Rules Committee will act swiftly to shore up the appropriate ethics rules and ensure that the practice of law in Texas remains subject to the highest ethical standards.

Sincerely,

Jim S. Adler

Enclosures: as stated

Jim S. Adler
William S. Adler
Angie Boone
Ryan B. Evans
David Feldman
Robert A. FitzPatrick
J. Martin Futrell * ♣ † ♦
Michael Gomez Φ
Javier Gonzalez
Justin H. King
John T. Kovach
Lora R. Lozano
Φ Member – College of the State Bar of Texas
♦ Also Licensed in Colorado
** Also Licensed in New Jersey*

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Phillip J. Orth, III
Debra L. Paiz
Frank W. Robertson
Kyle D. Schnitzer
§ James D. Skelton
Langdon Smith
Aaron Spahr
Chelsea R. Tucker
♦ P. Andrew Wilbur
§ Licensed in Minnesota
♣ Also Licensed in New York
† Also Licensed in North Carolina
♦ Also Licensed in Pennsylvania

March 27, 2014

Via CMRRR:
Michelle Jordan, Attorney Liaison
State Bar of Texas
Office of the Chief Disciplinary Counsel
P.O. Box 12487
Austin, Texas 78711

COPY

RE: *Request for Ethics Opinion*

Dear Ms. Jordan,

I write to you in order to request an ethics opinion from the Texas State Bar Professional Ethics Committee. Pursuant to the guidelines posted on the State Bar website for such a request, please find the following included below in this letter:

1. A scenario of background facts;
2. The questions presented;
3. A discussion of applicable authority.

I further certify that the questions presented are not, to the best of my knowledge, currently in litigation.

Scenario of Background Facts:

Attorney A participates in an Internet search engine company's search-based advertising program. The program allows advertisers to select specific words or phrases that should trigger their advertisements. An advertiser does not purchase the exclusive rights to specific words or phrases. Specific words or phrases can be selected by any number of advertisers.

One of the keywords selected by Attorney A for use in the search-based advertising program was the name of Attorney B, a competing lawyer in Attorney A's town with a similar practice. Attorney A's keyword advertisement caused a link to his website to be displayed on the search engine's search results page any time an Internet user searched for the term "Attorney B" using the search engine. Attorney A's advertisement may appear to the side of or above the sought-for search results, in an area designated for "ads" or "sponsored links."

Attorney B never authorized Attorney A's use of his name in connection with Attorney A's keyword advertisement, and the two lawyers have never formed any type of partnership or engaged in joint representation in any case. However, nothing in Attorney A's advertisement indicates he is unaffiliated with Attorney B.

Question Presented:

Does Attorney A's selection of a competitor's name as a keyword for use in a search engine company's search-based advertising program violate the Rules of Professional Conduct? Would it make a difference if Attorney A's advertisement prominently indicated that he is not affiliated with or endorsed by Attorney B? Would it make a difference if Attorney B's name was trademarked?

Discussion of Applicable Authority:

The aforementioned fact scenario would seem to implicate at least two different provisions of the Texas Rules of Disciplinary Conduct. The first is Rule 7.02(a), which prohibits any "false or misleading communication about the qualifications or the services of any lawyer or firm." A communication is further defined as "false or misleading" if it "omits a fact necessary to make the statement considered as a whole not materially misleading." Tex. Disciplinary R. Prof. Conduct 7.02(a)(1). Comment 3 to Rule 7.02 explains that "[a] truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

Under these facts, there would seem to be a substantial likelihood that a reasonable person would conclude Attorney A is somehow affiliated with, endorsed by, or otherwise professionally linked to Attorney B. In reality, there is no reasonable factual foundation for this conclusion, as Attorney B never even authorized the use of his name in connection with Attorney A's advertisement, much less coordinated business with Attorney B. Thus, Attorney A's advertisement misleads Attorney B's prospective clients about the nature of Attorney A's services. Rule 7.02 does not require evidence of actual confusion by a prospective client; deceptive advertising in and of itself violates the rule. *See Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 612 (Tex. App.—Fort Worth 2004, pet. denied).

The second potentially violated provision of the Disciplinary Conduct Rules would be Rule 8.04(a)(3), which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." Of course, any "false or misleading" statement under Rule 7.02 would concurrently violate the "misrepresentation" provision of Rule 8.04. But Attorney A's conduct in the described facts could also independently violate the "dishonesty" provision of this rule. Under these facts, Attorney A is targeting not merely potential clients who have searched for an attorney in a general field, like "personal injury" or "criminal defense," but those potential clients who have expressly searched for Attorney B. In other words, Attorney A's advertisement dishonestly piggybacks on the recognition associated with Attorney B's name, an unfair business practice that exploits the commercial value of Attorney B's name in order to benefit Attorney A. Indeed, in the scenario where Attorney B's name is trademarked, Attorney A's unauthorized use of that name as a keyword "meta tag" could be outright trademark infringement. *See I & JC Corp. v. Helen of Troy L.P.*, 164 S.W.3d 877, 888 (Tex. App.—El Paso 2005, pet. denied).

Even in the absence of trademark infringement, it is worth noting that the North Carolina State Bar found, under substantially identical facts, that Attorney A's behavior would constitute a violation of North Carolina Rule of Professional Conduct 8.4(c). *See* N.C. State Bar 2010 Formal Ethics Opinion 14 (Apr. 27, 2012), available at <http://www.ncbar.com/ethics/ethics.asp>. The language of North Carolina's Rule 8.4(c) is virtually identical to Texas Disciplinary Rule 8.04(a)(3).

In any event, this discussion of applicable authorities is not intended to be exhaustive and there may be other Rules of Disciplinary Conduct implicated by the aforementioned fact scenario. I leave it to the sound discretion of the Professional Ethics Committee to consider any other potential disciplinary rule violations.

Conclusion:

As attorney advertising on the internet proliferates, I believe the scenario in this letter is an increasingly common one, both within Texas and across the nation. A search of existing ethics opinions in Texas did not reveal any authority on-point. As a result, the guidance of the Professional Ethics Committee on the ethical ramifications of this behavior remains sorely needed.

I thank you for your consideration of this scenario, and I look forward to your swift response.

Sincerely,

Jim S. Adler

TEX-ABOTA's Proposed Amendment to Texas Government Code § 82.037 "Oath of Attorney"

Presented to the Texas Supreme Court Advisory Committee

ABOTA's Mission of Civility and Professionalism

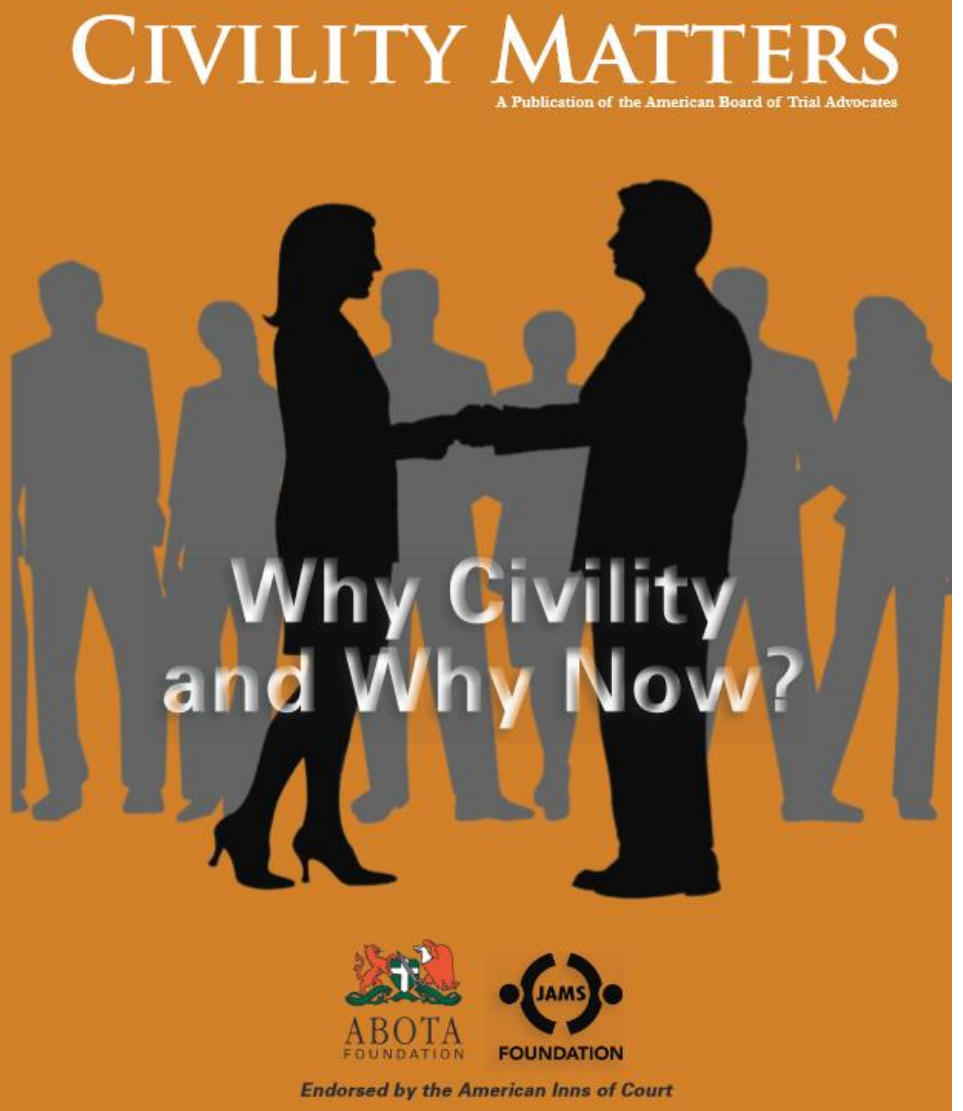
- The purpose of TEX-ABOTA is "to elevate the standards of integrity, honor, and courtesy in the legal profession."
- ABOTA Code of Professionalism:

"As a member of [ABOTA], I shall ... Always remember that my word is my bond and honor my responsibilities to serve as an officer of the court ... Resolve matters and disputes expeditiously, without unnecessary expense, and through negotiation whenever possible ... Be respectful in my conduct toward my adversaries ... Honor the spirit and intent, as well as the requirements of applicable rules or codes of professional conduct and encourage others to do so."

TEX-ABOTA's Advocacy for Civility in the Practice of Law

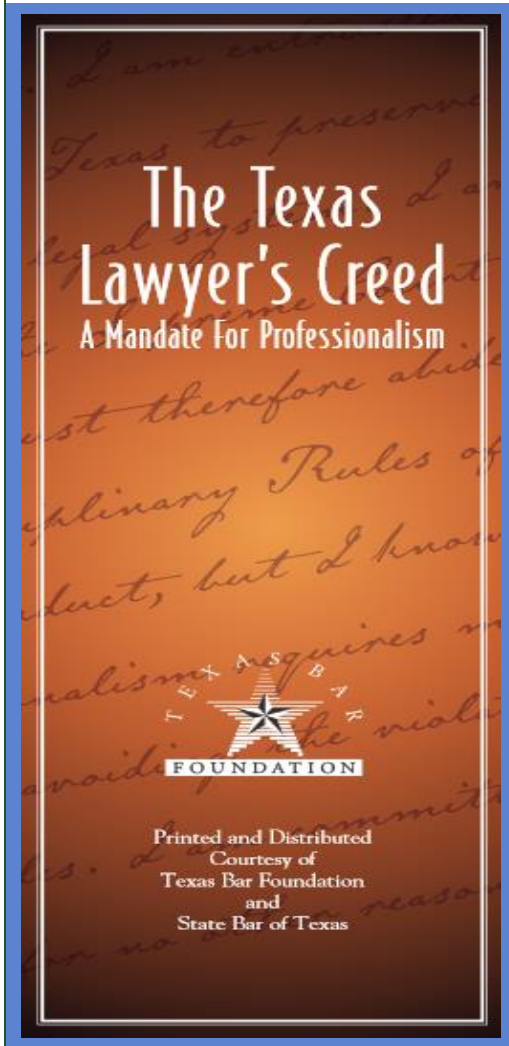
- ABOTA recently produced an new program called Civility Matters, an effort to promote the first specific purpose in ABOTA's constitution: "To elevate the standards of integrity, honor and courtesy in the legal profession."

- ABOTA created "Civility Matters" with the hope that the program would be presented at all ABOTA educational activities, other bar and professional programs, and, especially, in every law school in the country.



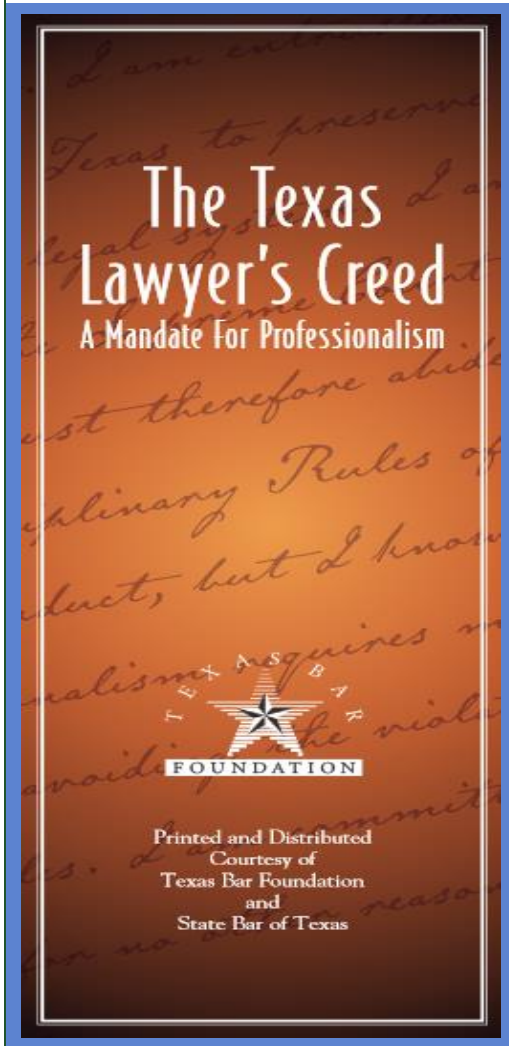
Broad Support for Civility Matters

The Texas Lawyer's Creed – Order of Adoption



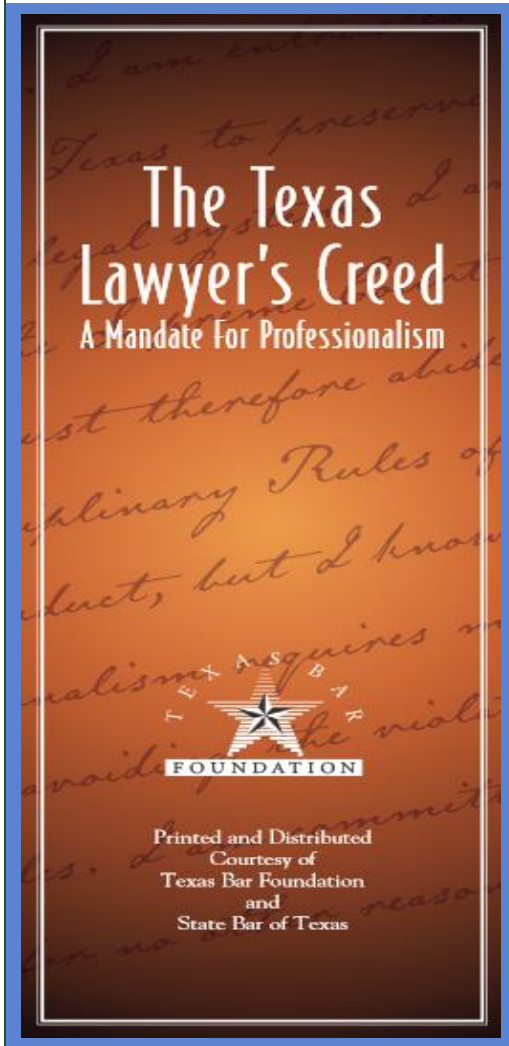
- "The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness."
- "The Supreme Court and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics."
- "The abusive tactics range from lack of civility to outright hostility and obstructionism."

The Texas Lawyer's Creed – Commitments



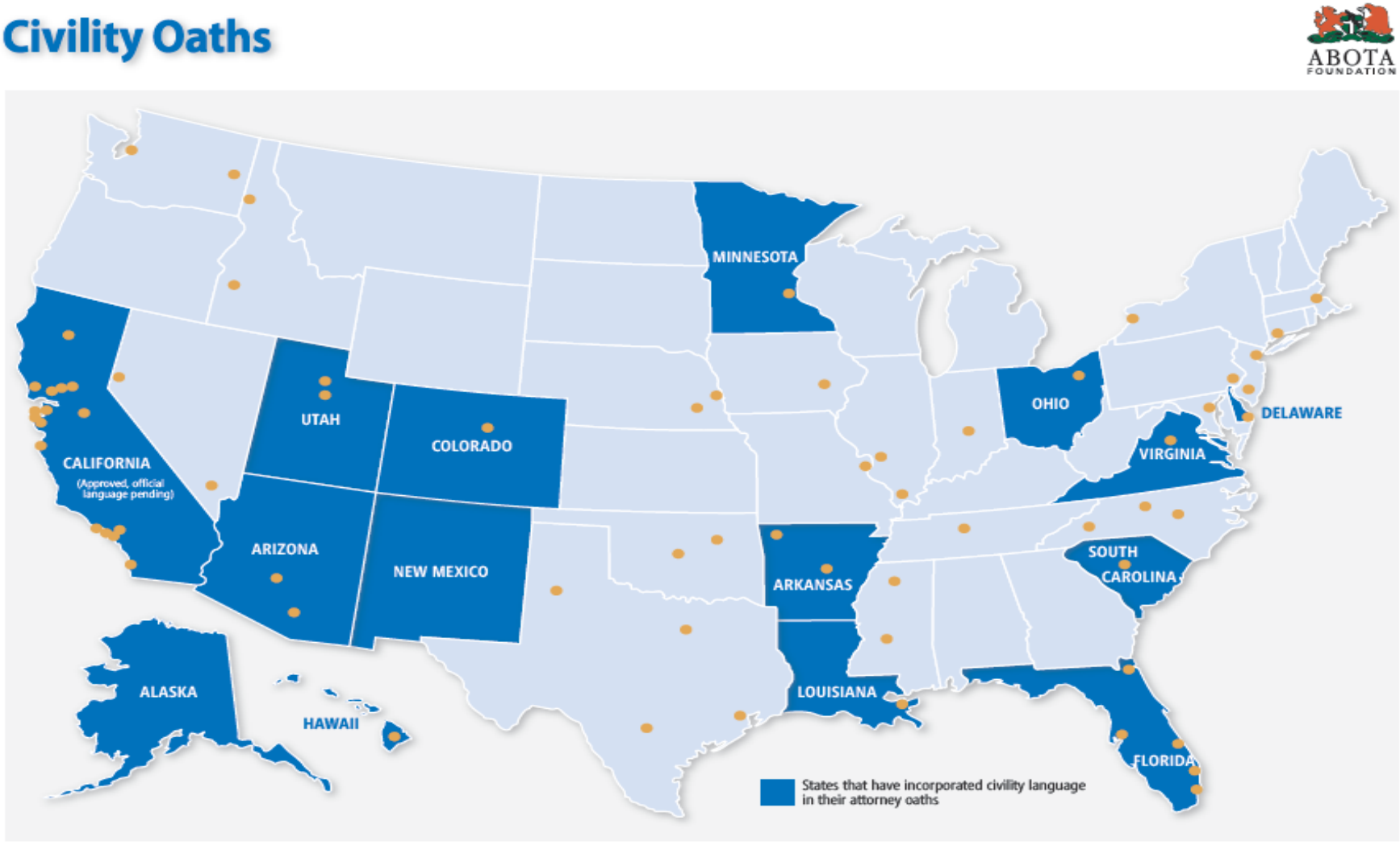
- "A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism."
- "I am passionately proud of my profession. Therefore, my word is my bond."
- "I will advise my client that civility and courtesy are expected and are not a sign of weakness."
- "I will treat adverse parties and witnesses with fairness and due consideration."

The Texas Lawyer's Creed – Commitments



- "A lawyer owes to opposing counsel ... courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings."
- "I will be courteous, civil, and prompt in oral and written communications."
- "I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility."

National Movement to Include Civility in the Attorney Oath



National Movement to Include Civility in the Attorney Oath

- South Carolina, Florida, Louisiana, and Arkansas: *"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."*
- New Mexico: *"I will maintain civility at all times."*
- Utah: To *"discharge the duties of an attorney … with honesty, and fidelity, professionalism, and civility."*

South Carolina Bar — Advancing Justice, Professionalism and Understanding of the Law

The Florida Bar — 1950

Arkansas Bar Association — Tradition. Integrity. Trust.

Louisiana State Bar Association — Serving the Public. Serving the Profession.

Utah State Bar — Organized 1931

State Bar of New Mexico

Proposed Bill

By: _____ __.B. No. _____

A BILL TO BE ENTITLED
AN ACT

relating to the oath of a person admitted to practice law in the State of Texas.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 82.037, Government Code, is amended to read as follows:

Proposed Bill

(a) Each person admitted to practice law shall, before receiving a license, take an oath that the person will:

(1) support the constitutions of the United States and this state;

(2) honestly demean **~~himself~~ oneself** in the practice of law; ~~and~~

(3) discharge the attorney's duty to his client to the best of the attorney's ability; and

(4) conduct **~~himself~~ oneself** with integrity and civility in dealing and communicating with all parties.

Proposed Oath

"I, _____,
do affirm that I will support the Constitution of the United States, and of this State; that I will honestly demean myself in the practice of law, that I will discharge my duties to my clients to the best of my ability, *and that I will conduct myself with integrity and civility in dealing and communicating with all parties.*"

Conclusion

TEX-ABOTA respectfully seeks the input and support of the Texas Supreme Court Advisory Committee for this proposal.

Thank you.

TEXAS LEGAL
SERVICES CENTER

PROVIDING ACCESS TO JUSTICE FOR
SENIORS, VETERANS, AND OTHER UNDESERVED TEXANS

December 5, 2014

Charles L. "Chip" Babcock
Chair, Supreme Court Rules
Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Hon. Nathan L. Hecht
Chief Justice
Supreme Court of Texas
201 West 14th Street
P.O. Box 12248
Austin, TX 78711

Re: Views Relating to Legal Services for the Poor

Dear Sirs:

Thank you for the opportunity to address the Supreme Court Rules Advisory Committee regarding legal services for the poor. Under the tireless leadership of Chief Justice Hecht, and former Chief Justice Jefferson, and going back to the successful efforts of former Chief Justice Phillips and former Chief Justice Pope, the Supreme Court of Texas has an unparalleled reputation as a champion of access to justice for the poor. As liaison to the Texas Access to Justice Commission, Justice Guzman exemplifies the Court's continued role as a national leader in access to justice.

Texas Legal Services Center is a provider of legal assistance, without charge, to Texans of modest means. We provide legal assistance to Veterans, victims of sexual assault, seniors and persons with disabilities, persons denied pensions they have earned, and persons in need of health care.

Texas has various "tools in the toolbox" to assist in access to justice. For that reason, coordinating and expanding the use of existing tools can further the cause of access to justice.

Recently, several counties in Texas have established various types of self-help centers, among them Fort Bend, Harris, Hidalgo, Lubbock, McLennan, Nacogdoches, Smith, and Travis. But a State more junior than Texas has an "attorney-serviced self-help center to assist self-represented with a variety of legal issues" in each county. See "A Quick Reference Guide to the California Courts' Self-Help Centers and Family Law Facilitators," http://courts.ca.gov/selfhelp.htm/ Given the evident value of self-help centers where they exist in Texas, their expansion will be a positive step. (The statewide existence of self-help centers can co-exist with high levels of compensation for attorneys, see http://www.abajournal.com/magazine/article/what_americas_lawyers_earn.)

A more long-standing tool in the toolbox is mediation. Texas' public dispute resolution centers can be adept at separating parties' positions from their interests. Once the interests of parties can be identified and focused on, disputes may be capable of resolution. Well-trained dispute resolution staff and volunteers can be alert for and can address power imbalances that would otherwise make a fair outcome unlikely. Since parties cannot be required to reach a mediated settlement, mediation preserves access to the courts, although mediation also often does indeed result in an agreed resolution. A relatively recent development in mediation is the use of distance means to mediate, sometimes referred to as "e-mediation." Although e-mediation is said to offer convenience, it also results in loss of "cues" that face-face mediation affords. See "*Dispute Resolution Using Online Mediation*," by Keith Lutz, in Mediation, October 25, 2014. One of the benefits for people of modest means, in the context of a mediation conducted by a trained and alert mediator, is the above-mentioned leveling of power imbalances. If e-mediation is to garner increased acceptance, it will be necessary to preserve that ability to address power imbalances. Although PayPal has on-line mediation, this has not received universal acclaim. See "*Online Dispute Resolution Creating Unhappy Customers*," http://www.mediation.com/articles/online-dispute-resolution-at-the-paypal-site.aspx. The main point though is not that absolutely all users of online mediation should be guaranteed a happy outcome. Rather the main point is that Texas' public dispute resolution centers can provide excellent service, including to poor persons, and that standard of excellence should be preserved as they develop e-mediation as one of their approaches. Maintaining the ability to separate parties' interests from their positions, and maintaining the ability to level power imbalances will be important, if e-mediation is to be useful for poor persons.

Even more long-standing than public dispute resolution centers has been the State Bar of Texas with its encouragement of volunteer lawyering. The State Bar of Texas encourages volunteer lawyering, and the Pro Bono College of the State Bar is a means to that end. Many local bar associations support volunteer lawyer programs, often in coordination with the private attorney involvement programs of Texas' Legal Services Corporation field programs. The Pro Bono College of the State Bar and the local volunteer lawyer programs give recognition to the significant efforts of large numbers of Texas lawyers to help meet the unmet need of the poor for civil legal services.

These tools – the recently established self-help centers, the more long-standing public dispute resolution centers, and the decades-long tradition of volunteerism by Texas lawyers – are accompanied by an even more ancient tool. That is the authority of Texas courts to appoint counsel to represent poor persons in civil matters. The U.S. Supreme Court has seen this authority of Texas judges as emblematic of "[m]any human and enlightened States," referring to "Tex.Rev.Stat., Art. 1125 (1879) (enacted 1846)." *Mallard v. United States District Court for the Southern District of Iowa et al.*, 490 U.S.

296 at 303, 109 S. Ct. 1814 at 1819 (1989). This authority rooted in the earliest days of our State is now codified at Texas Government Code §24.016 (for District Courts) and Texas Government Code §26.049 (for County Courts).

It is thus settled law that Texas courts have the authority to appoint counsel "to attend to the cause of a party who makes affidavit that he is too poor to employ counsel to attend to the cause." Texas Government Code §24.016, cf. Texas Government Code §26.049 ("The county judge may appoint counsel to represent a party who makes affidavit that he is too poor to employ counsel"). In view of the "humane and enlightened purpose" of such authority, *Mallard*, what could be more fully developed would be criteria for the exercise of the authority. At present, there is one criterion, albeit an overarching one: That the cause constitute "exceptional circumstances." *Gibson v. Tolbert*, 102 S.W.3d 710 at 713 (2003), citing *Travelers Indemnity Co. v. Mayfield*, 923 S.W.2d 590 (1996).

The Court stated in *Gibson v. Tolbert* that "Only by evaluating the unique circumstances of a given civil case could a court ever determine that it has no reasonable alternative but to appoint counsel." *Gibson v. Tolbert*, 102 S.W.3d 710 at 713 (2003). Additional guidance could, though, aid in lessening time-consuming review of whether discretion was abused. There have also been developments since *Gibson v. Tolbert* that support consideration of providing guidance for the exercise of discretion.

For instance, House Bill 75 of the 80th Texas Legislature, in 2007, enacted in Texas what is called "state court judicial review of final administrative decisions" regarding eligibility for services under Texas Human Resources Code Chapter 32 (Medical Assistance) and Chapter 33 (Nutritional Assistance). These judicial reviews involve the State and its attorney opposing an individual seeking to meet very basic needs. They can involve highly complex state and federal rules.

An even more recent development occurred on Tuesday of this week when the Supreme Court of Montana decided *In the Matter of the Adoption of A.W.S. and K.R.S., Minor Children; J.N.S., Petitioner and Respondent v. A.W., Respondent and Appellant*, 2014 MT 322, December 2, 2014. The Montana Supreme Court ruled that equal protection is violated when state law provides for appointed counsel for an indigent parent if the state is pursuing termination of parental rights, but not when it is a private party pursuing the termination of parental rights. Because in either case "a parent stands to lose the same fundamental constitutional right by a judicial determination…" and given the "strict scrutiny" applicable under an equal protection analysis, and given the absence of a compelling governmental interest to justify the distinction, the Montana Supreme Court found that the state's equal protection clause was violated. In effect, state action was supplied by the involvement of the judiciary in decision-making, even though the state was not the party seeking to terminate parental rights.

While it is clear that *Gibson v. Tolbert* anticipated there would be "unique circumstances" in civil cases, there could be benefit from guidelines to signal to indigent litigants when it is worthwhile to move for appointed counsel in civil cases. The guidelines could include, just by way of examples, whether the matter is one that a member of the private bar would handle on a contingent fee basis; whether the matter can be stayed while mediation is attempted; whether legal aid or volunteer lawyering is available; whether the matter concerns basic human needs; whether the state is the opposing party; whether the opposing party is represented; whether the matter involves a fundamental constitutional right; whether the matter itself is otherwise complex; whether the presentation and investigation of the matter justify appointed counsel; whether there is likely to be conflicting testimony; whether the indigent litigant's unfamiliarity with the law justifies appointed counsel; and whether appointment of counsel will benefit the court and the parties by shortening the trial and assisting in just determination of the cause.

Given the increasing availability of courthouse self-help centers, and the prospect of mediation as a tool, and the encouragement of volunteer lawyering by the State Bar and local bar associations, the adoption of guidelines for Texas Government Code §§24.016 and 26.049 need not undermine the "rarity" of the exercise of discretion to appoint counsel, *Gibson v. Tolbert*, 102 S.W.3d 710 at 713 (2003). Rather such guidelines could signal to indigent unrepresented litigants whether it is even worth it to move for appointed counsel.

Templates already exist by which an indigent unrepresented litigant can move for appointed counsel. Attachment A (Motion), Attachment B (Affidavit), Attachment C (Order).

In view of ongoing developments in the law, there would be benefit to having guidelines regarding Texas Government Code §§24.016 and 26.049.

In sum, it is a tribute to the founders of this great State that one of their earliest enactments – providing for appointed counsel for indigent litigants – exemplified a "humane and enlightened State." *Mallard v. United States District Court for the Southern District of Iowa et al.*, 490 U.S. 296 at 303, 109 S. Ct. 1814 at 1819 (1989). It is a tribute to the Supreme Court of Texas and the State Bar of Texas and the Texas Legislature that access to justice has continued to improve. That is also a reflection of the day-in, day-out volunteer lawyering of many Texas attorneys, and the work of Texas' legal aid programs. It is suggested that consideration be given to the establishment of guidelines for Texas Government Code §§24.016 and 26.049, so that they can be even better coordinated with the other tools in the toolbox of access to justice.

Thank you for your consideration.

Respectfully submitted,

Bruce P. Bower

Bruce P. Bower

Attachment A

Motion for Appointment of Counsel and Notice of Hearing on Motion

NAME OF PETITIONER	)	IN THE DISTRICT COURT FOR
	)	THE _____ DISTRICT
VS.	)	_____ COUNTY, TEXAS
	)	
NAME OF DEFENDANT	)	
	)	CASE NO. _____

MOTION FOR APPOINTMENT OF COUNSEL AND NOTICE OF HEARING ON MOTION

Comes now NAME OF PARTY, PETITIONER/DEFENDANT herein, and pursuant to the Government Code of Texas, Section 24.016, Vernon's Texas Statutes Annotated, moves that the Court appoint counsel to attend to movant's cause herein. Grounds for this motion are:

(1) Section 24.016 of the Government Code of Texas allows a District Judge to appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend to the cause.

(2) The affidavit required by Section 24.016 of the Government Code of Texas accompanies this motion and is incorporated herein by reference.

(3) Movant is too poor to employ counsel to attend to movant's cause herein. As set forth in the accompanying Affidavit, this case presents exceptional circumstances warranting appointment of counsel.

WHEREFORE, pursuant to Section 24.016 of the Government Code of Texas, movant moves that the Court grant this motion for appointment of counsel.

Date:_____ Respectfully submitted,

Signed:_____
FULL NAME

STREET ADDRESS
CITY, TX ZIP
PHONE.: (A.C.) ###-####

NOTICE OF HEARING ON MOTION FOR APPOINTMENT OF COUNSEL

To: _____

Take notice that the foregoing Motion will be heard in the _____ District Court, in Room _____ of the _____ County Courthouse at _____in the City of _____, Texas on the _____ day of _____, 20____, at _____ _.m.

Date:_____ Respectfully submitted,

Signed:_____

FULL NAME
STREET ADDRESS
CITY, TX ZIP
PHONE.: (A.C.) ###-####

CERTIFICATE OF SERVICE

A copy of the foregoing with the Affidavit in Support and the proposed Order, were mailed to the opposing party, or the opposing party's attorney (if the opposing party is represented) by first class certified mail, U.S. postage pre-paid, on the _____ day of _____, 20____.

Signed:_____

Attachment B

Affidavit in Support of Motion for Appointment of Counsel

NAME OF PETITIONER	)	IN THE DISTRICT COURT FOR
	)	THE _____ DISTRICT
VS.	)	_____ COUNTY, TEXAS
	)	
NAME OF DEFENDANT	)	
	)	CAUSE NO. _____

AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

Comes now NAME OF PARTY, PETITIONER/DEFENDANT herein, and pursuant to the Government Code of Texas, Section 24.016, Vernon's Texas Statutes Annotated, makes this Affidavit in support of the Motion for Appointment of Counsel herein.

I am eighteen (18) years of age or older, and I have personal knowledge of the following: I am too poor to employ counsel to attend to my cause herein.

A. My monthly income is from the sources checked, and in the amounts indicated per month (if none, check "none"):

[ ] None

[ ] Social Security. Amount: _____

[ ] Supplemental Security Income.

Amount: _____

[ ] Veteran's Benefits. Amount: _____

[ ] Net earnings from employment.

Amount: _____

[ ] Other income. Amount: _____

[ ] Spouse's income per month.
Amount: _____

B. I am responsible for, and do support the following dependents (if none, check "none"):

[ ] None

Name:_____ Relation:_____
Name:_____ Relation:_____
Name:_____ Relation:_____

C. My equity interests in property (fair market value, less any encumbrances such as loans) are as follows)(if none, check "none"):

[ ] None

1. Cars and/or Trucks (if none, "none"):

a. Year/Make/Value of My Interest:

_____

b. Year/Make/Value of My Interest:

_____

D. My checking and/or savings accounts are as follows (if none, check "none"):

[ ] None

1. Checking. Bank name(s) and location(s), account number(s), current balance(s):

_____

_____

2. Savings/IRAs/CDs. Bank name(s) and location(s), account number(s), current balance(s):

_____

_____

E. Cash on hand: $_____

F. Other property, excluding homestead. Description, location, estimated value (if none, check "none"):

[ ] None

_____

_____

_____

G. Monthly expenses:

1. Rent/mortgage: _____

2. Car payment: _____

3. Transportation: _____

4. Clothing/laundry: _____

5. Food: _____

6. Child care: _____

7. Medical/dental: _____

8. Utilities: _____

9. Other (describe and list cost):

_____

_____

TOTAL MONTHLY EXPENSES: _____

H. Debts and child support obligations (exclude houses and automobile):

Creditor:	Monthly payment:
1. _____	
2. _____	
3. _____	
4. _____	
5. _____	

I am not a lawyer, I am unschooled in the law, and I believe that adequate presentation of my cause requires the appointment of

counsel. This case involves exceptional circumstances and the public and private interests are such that the administration of justice will be best served by appointing an attorney to represent me. These circumstances include following (check and explain ***all*** that apply):

[ ] I need an attorney appointed because of the type and complexity of this case (explain):

_____

_____

_____

_____

_____

_____

_____.

[ ] I need an attorney appointed because of my limited ability to adequately present and investigate this case (explain):

_____

_____

_____

_____

_____

_____

_____.

[ ] There will be evidence largely consisting of conflicting testimony

so as to require skill in presentation of evidence and cross-examination. I expect that there will be conflicting testimony on these issues:

_____

_____

_____

_____

_____

_____

_____.

[ ] I am unfamiliar with the law in regard to these issues in this case:

_____

_____

_____

_____

_____

_____

_____.

[ ] I believe that appointed counsel will benefit me in my presentation of my side of this case, and will benefit the court and will benefit the other party(ies) in this case by shortening the trial and assisting in the just determination of the case.

Based on the above, I request that the Court grant my motion for appointment of counsel. Further affiant sayeth naught.

_____

Sworn to and subscribed before me, this _____ day of

_____, 20____._____Notary Public

My commission expires:

_____

Attachment C

Order for Appointment of Counsel

NAME OF PETITIONER	)	IN THE DISTRICT COURT FOR
	)	THE _____ DISTRICT
VS.	)	_____ COUNTY, TEXAS
	)	
NAME OF DEFENDANT	)	
	)	CASE NO. _____

ORDER FOR APPOINTMENT OF COUNSEL

The Court, having considered the Motion of NAME of PARTY herein, pursuant to the Government Code of Texas, Section 24.016, and the file in this matter grants said Motion. The Court finds and concludes that exceptional circumstances exist warranting appointment of counsel, due to (check all that apply):

- ☐ The type and complexity of this case.
- ☐ The movant's limited ability to adequately present and investigate this case.
- ☐ The expectation that there will be evidence largely consisting of conflicting testimony so as to require skill in presentation of evidence and cross-examination.
- ☐ The movant's unfamiliarity with the law in regard to issues in this case.
- ☐ _____

_____.

The Court appoints the following counsel for movant:

Name of Attorney: _____

Address of Attorney: _____

_____

Phone number of Attorney: _____

The Court further schedules this matter for

_____
(Name of next proceeding)

on the _____ day of _____, 20__, and directs that movant forthwith consult with the above-appointed counsel to prepare for said next scheduled proceeding herein.

SO ORDERED this _____ day of _____, 20__.

_____
District Judge