TEXAS HOUSE OF REPRESENTATIVES
SELECT COMMITTEE ON JUDICIAL INTERPRETATIONS OF LAW

INTERIM REPORT TO THE 77TH TEXAS LEGISLATURE

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Committee On
Select Committee on Judicial Interpretations of Law

December 5, 2000

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P.O. Box 2910
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The Honorable James E. "Pete" Laney
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Select Committee on Judicial Interpretations of Law of the Seventy-Sixth Legislature hereby submits its interim report including recommendations for consideration by the Seventy-Seventh Legislature.

Respectfully submitted,

Fred M. Bosse, Chairman

Jim Dunnam

Toby Goodman

Patricia Gray

Peggy Hamric

Juan Hinojosa

Todd Smith

Members: Jim Dunnam; Toby Goodman; Patricia Gray; Peggy Hamric; Juan Hinojosa; Todd Smith; and Burt Solomons

Burt Solomons

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INTRODUCTION

HOUSE SELECT COMMITTEE ON JUDICIAL INTERPRETATIONS OF LAW INTERIM CHARGES

After the 76th Legislative Session, the Honorable James E. "Pete" Laney, Speaker of the House of Representatives, appointed eight members to the Select Committee on Judicial Interpretations of Law. The committee membership includes the following: Fred M. Bosse, Chair; Jim Dunnam; Toby Goodman; Patricia Gray; Peggy Hamric; Juan Hinojosa; Todd Smith; and Burt Solomons

During the interim, Speaker Laney charged the Select Committee on Judicial Interpretations of Law with examining the decisions of Texas appellate courts over the last five years to identify those decisions that:

(1) clearly failed to properly implement legislative purposes;

(2) found two or more statutes to be in conflict;

(3) held a statute to be unconstitutional;

(4) expressly found a statute to be ambiguous; or

(5) expressly suggested legislative action.

The Committee was directed to make recommendations for corrective legislation in response to the Committee's findings. To the extent possible, corrective legislation proposed by the Committee should have the purpose of effectuating the original legislative intent of the statutes considered by the court and should not recommend other substantive changes.

The Committee has completed their hearings and investigations and has issued the following findings. Each member approved all sections of the report.

The Chairman wishes to express appreciation to the Committee members and their staffs; Jonathan Davis, Texas Legislative Council; and any other Texas Legislative Council staff members who provided valuable information for this report.

Select Committee on Judicial Interpretations of Law
Interim Report to the
77th Legislature

Review of Identified Appellate Court Decisions

I. DECISIONS CLEARLY FAILING TO PROPERLY IMPLEMENT LEGISLATIVE PURPOSES

FLEMING FOODS OF TEXAS, INC., v. RYLANDER, 6 S.W.3d 278 (Tex. 1999).

Issue: Can a taxpayer who pays sales tax to a vendor, not directly to the state, request a tax refund from the state under a provision in the Tax Code drafted by the Texas Legislative Council as part of the statutory revision program if the codified provision is phrased differently from the prior law, which did not permit the taxpayer to request such a refund?

Holding: A taxpayer is entitled to request a tax refund under the law as drafted by the legislative council and enacted by the legislature, notwithstanding departure from prior law. Where specific provisions of a "*nonsubstantive*" codification prepared by the Texas Legislative Council pursuant to Section 323.007, Government Code, and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification, rather than the prior, repealed statute must be given effect, even if a mistake is made in the nonsubstantive codification and the codification process results in a substantive change to the prior law.

> In the final analysis, it is the Legislature that adopts codifications, not the Legislative Council, and it is the Legislature that specifically repeals prior enactments. The codifications enacted by the Legislature are the law of this State, not the prior, repealed law. When there is no room to interpret or construe the current law as embodying the old, we must give full effect to the current law. General statements of the Legislature's intent cannot revive repealed statutes or override the clear meaning of a new, more specific statute.

JOYNER v. STATE, 921 S.W.2d 234 (Tex. Crim. App. 1996); ***RAY v. STATE***, 919 S.W.2d 125 (Tex. Crim. App. 1996).

Issue: Whether the failure of a trial judge to admonish a defendant of the consequences of a violation of deferred adjudication probation as specifically required by Section 5(a), Article 42.12, Code of Criminal Procedure [as that section existed at the time of trial and before amendment], rendered involuntary a defendant's guilty plea. Section 5(a) specifically required a trial judge to "inform the defendant orally or in writing of the possible consequences under Subsection (b) of this section of a violation of probation."

Holding: In *RAY*, the court opined that the order of proceedings in a criminal case supports the

view that a defendant need not be informed of the Section 5(b) consequences until after the defendant is placed on probation and that there is no policy reason to require a trial court to inform every defendant who pleads guilty of the possible consequences of a violation of deferred adjudication, because unless the trial court decides to defer adjudication, there is no reason to tell the defendant what might happen if the defendant violates the terms and conditions of probation. In *JOYNER*, the court affirmed the defendant's adjudication of guilt and sentence following revocation of probation "based on this Court's recent ruling in *Ray*."

> We conclude that Sec. 5(a) does not require, either in felonies or misdemeanors, that the defendant entering an open plea of guilty or nolo contendere be informed prior to his plea of the possible consequences under Sec. 5(b) of a probation violation. Therefore, the failure to provide the information does not render such a plea involuntary. 919 S.W.2d 125, 127

II. DECISIONS FINDING TWO OR MORE STATUTES TO BE IN CONFLICT

NIXSON v. MOBIL OIL CORPORATION, 928 S.W.2d 245 (Tex. App.--Houston [14th Dist.] 1996, no writ).

Statutes found in conflict: Article 6432, Revised Statutes, imposing liability on railroad companies for injuries to their employees, and Section 406.034(b), Labor Code, a provision in the Workers' Compensation Act, requiring an election by an injured employee to preserve a cause of action at common law or under a statute.

Holding: Looking at the object sought to be obtained by the statutes, the circumstances under which the statutes were enacted, the legislative history of the statutes, and the consequences of the alternative constructions, the court held that Section 406.034(b), Labor Code, controls over Article 6432, Revised Statutes.

EVANS v. C. WOODS, INC., 1999 WL 787399 (Tex. App.--Tyler 1999, no pet.).

Statutes found in conflict: Subsection (b), Section 51.014, Civil Practice and Remedies Code, "Appeal From Interlocutory Order," and a portion of Rule 683, Texas Rules of Civil Procedure, "Form and Scope of Injunction or Restraining Order." Section 51.014(b) provides that "[a]n interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal." In pertinent part, Rule 683 provides that "[t]he appeal of a temporary injunction shall constitute no cause for delay of the trial."

Holding: The conflict between these two provisions lies in whether the trial date is to be stayed pending an interlocutory appeal. Both provisions, however, presuppose that a trial date has been set in the temporary injunction order as required by Rule 683. Thus, the court held that Section 51.014(b) does not absolve a trial court from its Rule 683 duty to include in a temporary injunction order an order setting the cause for trial on the merits. The court did not address whether the trial date is to be stayed pending an interlocutory appeal.

LEDERMAN v. ROWE, 3 S.W.3d 254 (Tex. App.--Waco 1999, no pet.); ***GASKILL v. SNEAKY ENTERPRISES, INC.***, 997 S.W.2d 296 (Tex. App.--Fort Worth 1999, rev. denied); ***DAVIS v. COVERT***, 983 S.W.2d 301 (Tex. App.--Hous. [1st Dist.] 1998, rev. dism'd w.o.j.).

Statutes found in conflict: Subsection (d), Section 28.053, Government Code, "Hearing on

Appeal," which provides that the judgment of the county court or county court at law on the appeal from a small claims court is final, and Section 51.012, Civil Practice and Remedies Code, "Appeal or Writ of Error to Court of Appeals," which gives a court of appeals jurisdiction over cases in which the amount in controversy exceeds $100.

Holding: When statutes conflict, the specific statute controls. In this instance, the specific provisions of Section 28.053(d), Government Code, prevail over the general provisions of Section 51.012, Civil Practice and Remedies Code.

BURKE v. STATE, 6 S.W.3d 312 (Tex. App.--Fort Worth 1999, pet. filed).

Statutes found in conflict: Section 22.02(a)(1), Penal Code, "Aggravated Assault," a felony of the second degree, and Section 49.07, Penal Code, "Intoxication Assault," a felony of the third degree.

Holding: In cases where a special statute provides for the prosecution of conduct otherwise punishable under a general statute, an "*irreconcilable conflict*" exists and due process and due course of law dictate that the accused be prosecuted under the special provision, in keeping with presumed legislative intent. The court held that in circumstances as before the court, Section 49.07, the specific intoxication assault statute, prevails over Section 22.02(a)(1), the general aggravated assault statute.

STATE v. SALINAS, 982 S.W.2d 9 (Tex. App.--Houston [1st Dist.] 1997, pet. ref'd).

Statutes found in conflict: Section 37.02, Penal Code, "Perjury," a Class A misdemeanor, and Section 254.041, Election Code, "Criminal Penalty for Untimely or Incomplete Report," a Class C misdemeanor.

Holding: Section 254.041 supersedes the perjury statute in the Penal Code. Where, as here, the narrow provision (Section 254.041) provides for a lesser range of punishment than the general (Section 37.02), an irreconcilable conflict exists and due process and due course of law dictate that the accused be prosecuted under the special provision. The special provision prevails as an exception to the general provision.

STATE ex rel. O'CONNELL, 976 S.W.2d 902 (Tex. App.--Dallas 1998, no pet.).

Statutes found in conflict: In only one particular and only to the extent they both relate to a defendant's waiver of trial by jury, Article 1.13(a), Code of Criminal Procedure, which requires that a defendant's waiver be made "*in person* by the defendant in writing in open court" and Article 27.14(a),

Code of Criminal Procedure, which provides that in a misdemeanor case a jury may be waived and a plea of guilty made either by "the defendant *or his counsel*."

Holding: Because the defendant personally signed a jury waiver and personally appeared, the issue was not before the court, and the court expressly did not decide which statute would control.

DAVILA v. STATE, 961 S.W.2d 610 (Tex. App.--San Antonio 1997, no pet.).

Statutes found in conflict: Section 481.106, Health and Safety Code (Controlled Substances Act), at the time the case was decided and before repeal in 1993, providing that delivery of the amount of cocaine specified in indictment punishable by imprisonment and by fine not to exceed *$20,000*, and Section 12.32, Penal Code, providing that first degree felony punishable by imprisonment and by fine not to exceed *$10,000*.

Holding: The general rule is that the specific statute controls over the general statute. Since there was an irreconcilable conflict as to the possible fine, the special provision of Section 481.106, Health and Safety Code, prevailed over the general provision of Section 12.32, Penal Code.

STATE ex rel. CURRY v. GILFEATHER, 937 S.W.2d 46 (Tex. App.-- Fort Worth 1996, no writ).

Statutes found in conflict: Section 25.0012, Government Code, "Exchange of Judges in Certain County Courts at Law and County Criminal Courts," and Section 74.121, Government Code (Texas Court Administration Act), "Transfer of Cases; Exchange of Benches."

Holding: Because Section 74.121 was enacted later in time than Section 25.0012, Section 74.121 prevails. Section 311.025(a), Government Code (Code Construction Act).

GREENWOOD v. STATE, 948 S.W.2d 542 (Tex. App.--Fort Worth 1997, no pet.); ***DITTOE v. STATE***, 935 S.W.2d 164 (Tex. App.--Eastland 1996, no pet.).

Statutes found in conflict: Section 2(a), Article 42.03, Code of Criminal Procedure, and Sections 15(h)(2) and (3), Article 42.12, Code of Criminal Procedure, relating to credit for jail time between arrest on revocation warrant and revocation of community supervision.

Holding: Following the instructions in Section 311.026, Government Code (Code Construction Act), the court held that Sections 15(h)(2) and (3), Article 42.12, the specific statute, control over Section

2(a), Article 42.03, the more general statute.

STATE v. WARNER, 915 S.W.2d 873 (Tex. App.--Houston [1st Dist.] 1995, pet. ref'd), *abrogated by* ***SMITH v. STATE***, 960 S.W.2d 372 (Tex. App.--Houston [1st Dist.] 1998, pet. ref'd); ***STATE v. MANCUSO***, 903 S.W.2d 386 (Tex. App.--Houston [1st Dist.] 1995, pet. granted), *aff'd*, 919 S.W.2d 86 (Tex. Crim. App. 1996).

Statutes found in conflict: Section 15, Article 42.12, Code of Criminal Procedure, the mandatory community supervision law, and Section 12.42(d), Penal Code, the habitual offender law.

Holding: Both statutes were enacted in the same bill, Senate Bill No. 1067 (Chapter 900), Acts of the 73rd Legislature, Regular Session, 1993. Applying the canons of statutory construction cited, the court held that the specific provisions of the mandatory community supervision law control over the general provisions of the habitual offender law.

MELTON v. STATE, 993 S.W.2d 95 (Tex. 1999).

Statutes found in conflict: Subsection (a), Section 74.301, Property Code, "Delivery of Property to Comptroller," and Article 17.02, Code of Criminal Procedure, "Definition of 'Bail Bond'."

Holding: Section 74.301(a), Property Code, which requires a holder of abandoned property to deliver the property to the comptroller, is a general provision. Article 17.02, Code of Criminal Procedure, on the other hand, specifically provides that cash bail bonds deposited in a court's registry may only be released on order of the court. The court held that because a specific statute will prevail over a general statute if the statutes conflict, Article 17.02 controls over Section 74.301 if the abandoned property in issue is an abandoned cash bail bond.

SHARKEY v. STATE, 994 S.W.2d 417 (Tex. App.--Texarkana 1999, no pet.).

Statutes found in conflict: Section 1, Article 42.01, Code of Criminal Procedure, "Judgment," and Subsection (a), Section 74.094, Government Code, "Hearing Cases."

Holding: Section 1, Article 42.01, Code of Criminal Procedure, provides that "[a] judgment is the written declaration of the court signed by the trial judge . . . ." Section 74.094(a), Government Code, provides that "[a] district or statutory county court judge may hear and determine a matter pending in any

district or statutory county court in the county . . ." and that "[t]he judge may sign a judgment or order in any of the courts . . . ." The court held that Article 42.01 controls and it is necessary that at least one of the judges participating in a criminal trial hear all or part of the case as the trial judge.

POLEDORE v. STATE, 8 S.W.3d 22 (Tex. App.--Houston [14th Dist.] 1999, pet. filed).

Statutes found in conflict: Subsection (b), Section 311.031, Government Code (Code Construction Act), "Saving Provisions," and Section 1.18, Chapter 900, Acts of the 73rd Legislature, Regular Session, 1993.

Chapter 900, the 1993 reenactment of the Penal Code, reclassified offenses similar to the appellant's as state jail felonies from third degree felonies. The sentences the defendant received were for third degree felonies. The issue before the court was whether the former law or the new Penal Code should be applied.

Section 311.031(b) provides that "[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended."

Section 1.18, Chapter 900, limits the applicability of the amended Penal Code to offenses committed on or after September 1, 1994, the effective date of that act; provides that "an offense is committed before the effective date if any element of the offense occurs before September 1, 1994"; and states that "an offense committed before the effective date is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose."

Holding: The court held that because the Court of Criminal Appeals has previously resolved conflicts between Section 311.031(b) and specific enabling legislation regarding changes to the Penal Code, the enabling legislation accompanying the new Penal Code controls, and the defendant was properly sentenced.

McLENDON v. TEXAS DEPARTMENT OF PUBLIC SAFETY, 985 S.W.2d 571 (Tex. App.--Waco 1998, pet. filed).

Statutes found in conflict: Section 7, Article 42.12, Code of Criminal Procedure, and Section 1(4), Article 4413(29ee), V.A.C.S., before repeal and reenactment in 1997 as Section 411.171(4), Government Code.

Holding: Section 7, Article 42.12, Code of Criminal Procedure, provides that when a court has set aside a verdict and dismissed the indictment, the accused is "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty." Because the pertinent provisions of the community supervision law and the concealed handgun licensing statute address a similar subject matter, they are *in pari materia* and must be construed together. The court held that the specific provision, Section 7, Article 42.12, controls over the broad statutory definition of the term "convicted" found in Section 1(4), Article 4413(29ee).

RAMOS v. STATE, 928 S.W.2d 160 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd).

Statutes found in conflict: Section 481.112, Health and Safety Code, which proscribes delivery of a controlled substance by the offer to sell a controlled substance, and Section 482.002, Health and Safety Code, which proscribes the delivery of a simulated controlled substance accompanied by the representation that the simulated controlled substance is actually a controlled substance. The appellant was convicted under Section 481.112 for having offered to sell cocaine, which turned out to be dominoes packaged to look like cocaine.

Holding: The court held that Sections 481.112 and 482.002 are in *pari materia*, that when statutes are in *pari materia*, the state should charge the accused under the more specific statute if it proscribes the particular conduct in which the accused engages, and that under the facts of the case the appellant could not be prosecuted under Section 481.112, but instead had to be prosecuted under Section 482.002, the specific statute.

GONZALEZ v. STATE, 915 S.W.2d 170 (Tex. App.--Amarillo 1996, no pet.).

Statutes found in conflict: The enhancement provisions of Section 12.42(d), Penal Code, relating to any felony conviction, and the requirement of Section 15(a), Article 42.12, Code of Criminal Procedure, related to the suspension of the sentence of a person convicted of a state jail felony, as those sections existed before amendment in 1995.

Holding: The court examined the legislative history of Senate Bill 1067, which created state jail felonies, as well as the subsequent amendments to Section 12.42(d) and Section 15, Article 42.12, and held that Section 12.42(d), Penal Code, does not apply to a person convicted of a state jail felony.

SIMMONS v. STATE, 944 S.W.2d 11 (Tex. App.--Tyler 1996, pet. ref'd); ***PHUONG THAI THAN v. STATE***, 918 S.W.2d 106 (Tex. App.--Fort Worth 1996, no pet.).

Statutes found in conflict: Section 311.031(b), Government Code, the "saving provisions" clause

of the Code Construction Act, and the '"saving provisions' clauses" in Senate Bill 1067, 73rd Legislature, Regular Session, 1993.

Holding: In *SIMMONS*, at the time of the offense for which the appellant was convicted, Section 481.112(b), Health and Safety Code, provided that delivery of less than 28 grams of a controlled substance (crack cocaine) was a first degree felony, punishable by imprisonment for life or for 5 to 99 years and a fine not to exceed $20,000. Effective September 1, 1994, Senate Bill 1067 amended the Health and Safety Code to make delivery of less than one gram of a controlled substance a state jail felony, punishable by a term of 180 days to two years and a fine not to exceed $10,000.

In *PHUONG THAI THAN*, at the time of the offense for which the appellant was convicted and placed on probation, Section 30.04, Penal Code, provided that burglary of a motor vehicle was a third degree felony, punishable by imprisonment for 2 to 10 years and a fine not to exceed $10,000. Effective September 1, 1994, Senate Bill 1067 amended the Penal Code to make burglary of a motor vehicle a Class A misdemeanor, punishable by a fine not to exceed $4,000, confinement for a term not to exceed one year, or both. After September 1, 1994, appellant's probation was revoked and appellant sentenced as a third degree felon. On appeal, appellant claimed that he should have been sentenced as a Class A misdemeanor.

In both *SIMMONS* and *PHUONG THAI THAN*, the court held that in including the specific '"saving provisions' clauses" in Senate Bill 1067, the legislature expressed a clear intention that the law in effect at the time the offense was committed would govern the disposition of cases involving offenses committed before 1994, and furthermore, because Section 311.026(b), Government Code, (Code Construction Act), provides that when two statutes conflict, the specific controls over the general, particularly when the specific provision is the later enactment, that Section 311.031(b), Government Code, does not apply to the 1994 amendments to the Health and Safety Code and to the Penal Code, and the '"saving provisions' clauses" in Senate Bill 1067 prevail.

AVERY v. STATE, 963 S.W.2d 550 (Tex. App.--Houston [1st Dist.] 1997, no writ).

Statutes found in conflict: Section 54.697, Government Code, a special Harris County juvenile law master statute, and Section 201.005, Family Code, the general family law associate judge statute.

Holding: After reviewing both statutes, it is clear that a master or associate judge cannot preside under both the general family law associate judge statute and the Harris County juvenile law master statute. Section 54.697 prevails over Section 201.005 for two reasons: it is a special provision and it was originally enacted later in time. Section 311.026(b), Government Code (Code Construction Act).

IN RE HATHCOX, 981 S.W.2d 422 (Tex. App.--Texarkana 1998, no pet.).

Statutes found in conflict: Section 157.062(d), Family Code, and Rules 2 and 247, Texas Rules of Civil Procedure.

Holding: Section 157.062(d), Family Code, provides that if a motion for enforcement of child support is joined with another claim, "(1) the hearing may not be held before 10 a.m. on the first Monday after the 20th day after the date of service; and (2) the provisions of the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply." Rule 2, Texas Rules of Civil Procedure, provides "[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated." Rule 247 provides that "[e]very suit shall be tried when it is called, unless continued or postponed to a future day or placed at the end of the docket to be called again for trial in its regular order" and that "[n]o cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party."

Section 157.062(d), Family Code, not Rules of Civil Procedure, governs notice and hearing requirements for an amended motion for enforcement of child support, which is joined with another claim. A hearing on the motion may not be held earlier than the first Monday after the 20th day following service.

RENT v. STATE, 949 S.W.2d 418 (Tex. App.--Houston [14th Dist.] 1997), aff'd, 982 S.W.2d 382, (Tex. Crim. App. 1998).

Statutes found in conflict: Defendant was convicted of the misdemeanor offense of unwarranted mental health commitment under Section 571.020(a), Health and Safety Code. In 1993 the legislature nonsubstantively codified Section 571.020 and repealed its predecessor statute, Article 5547-19, Vernon's Texas Civil Statutes. Both Article 5547-19 and Section 571.020 provided that the offense of unwarranted mental health commitment was punishable by a fine not to exceed $5,000 or by imprisonment in the county jail not to exceed two years. Also in 1993, the legislature amended Article 5547-19 to change the maximum term of confinement for a violation from two years to one year. The court stated that "[a]s the code and amendment to the statute conflict, the amended statute controls."[1]

[1] The appeals court appears to have reached the correct conclusion, but on an incorrect reading of the Code Construction Act. The court recognized that Section 311.031, Government Code, governs the effect to be given to a code provision and an amended statute: "Section 311.031(c) provides that (1) the repeal of a statute by a code does not affect an amendment, revision or reenactment of the statute by the same legislature that enacted the code and (2) the amendment, revision, or reenactment is preserved and given effect as part of the code provision that revised the statute so amended, revised, or reenacted." Having said this, the court continued: "In addition, section 311.031(d) provides that if any provision of a code conflicts with a statute enacted by the same legislature that enacted the code, the statute controls (emphasis added). . . . Therefore, article 5547-19, as amended, is to be given effect as part of section 571.020

WILSON v. STATE, 944 S.W.2d 444 (Tex. App.--Houston [14th Dist.] 1997), aff'd, 977 S.W.2d 379 (Tex. Crim. App. 1998).

Statutes found in conflict: Section 311.031(b), Government Code, the "saving provisions" clause of the Code Construction Act, which provides that when two statutes conflict the specific controls, and the "'saving provisions' clauses" in Senate Bill 1067, 73rd Legislature, Regular Session, 1993.

Holding: At the time of the offense for which appellant was convicted, Section 481.115(b), Health and Safety Code, provided that possession of less than 28 grams of a controlled substance (cocaine) was a second degree felony punishable by a term of 2 to 20 years' confinement and a fine not to exceed $10,000, and Section 12.42(d), Penal Code, increased the range of punishment to 25 years to life because appellant had two prior felony convictions. Effective September 1, 1994, Senate Bill 1067 amended the Health and Safety Code and the Penal Code to make possession of less than one gram of cocaine a state jail felony punishable by a term of 180 days to two years and a fine not to exceed $10,000.

Held that in including the specific "'saving provisions' clauses" in Senate Bill 1067, the legislature expressed a clear intention that the law in effect at the time the offense was committed would govern the disposition of cases involving offenses committed before 1994, and furthermore, because Section 311.026(b), Government Code (Code Construction Act), provides that when two statutes conflict, the specific controls over the general, particularly when the specific provision is the later enactment, Section 311.031(b), Government Code, does not apply to the 1994 amendments to the Health and Safety Code and the Penal Code, and the "'saving provisions' clauses" in Senate Bill 1067 prevail.

BURD v. ARMISTEAD, 982 S.W.2d 31 (Tex. App.--Houston [1st Dist.] 1998, pet. denied).

Statutes found in conflict: At the time the case was decided and before amendment in 1999, the definition of "*costs*" in Section 34.21(e)(2), Tax Code, and the definition of "*costs*" in Section 34.21(i), Tax Code.

Holding: Because the legislature enacted Section 34.21(e)(2) three days after it enacted Section 34.21(i), the court held that the definition in Section 34.21(e)(2) is the intended definition.

MEDNICK v. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY, 933 S.W.2d 336

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unless there is a conflict in which event article 5547-19 controls." The court's reference to and reliance on Section 311.031(d) was not necessary.

(Tex. App.--Austin 1996, writ denied).

Statutes found in conflict: Section 22(f), Texas Public Accountancy Act (Article 41a, Vernon's Texas Civil Statutes), as that law existed before codification in 1999 as Chapter 901, Occupations Code, which provided that an accountant's motion for rehearing to the Texas State Board of Public Accountancy must be filed within 15 days of the rendition of the order, ruling, or decision complained of, and Section 2001.146(a), Government Code (Administrative Procedure Act), which required that, in order to preserve the right to appeal the board's decision to district court, a party must file a motion for rehearing not later than the 20th day after the date on which the party was notified of the adverse action.

Holding: Because the Public Accountancy Act fully incorporated the Administrative Procedure Act, which provides the minimum standards for judicial review of agency decisions, the court held that the Administrative Procedure Act's 20-day period controlled over the Public Accountancy Act's 15-day period.

SIMMONS v. TEXAS STATE BOARD OF DENTAL EXAMINERS, 925 S.W.2d 652 (Tex. 1996).

Statutes found in conflict: Section 3(a), Dental Practice Act (Article 4548h, Vernon's Texas Civil Statutes), as that law existed before amendment in 1997, which provided that a dentist has 30 days from the date of a license revocation to seek judicial review in district court, and Section 2001.145(a), Government Code (Administrative Procedure Act), which required an aggrieved person to file a timely motion for rehearing before the board of dental examiners before filing an appeal to district court.

Holding: A dentist could not be required to comply with the Administrative Procedure Act by waiting for the board of dental examiners to overrule a motion for hearing because the dentist may not be assured of a timely appeal to district court. A petition for judicial review in district court filed within the 30-day period provided by the Dental Practice Act was sufficient to invoke the jurisdiction of the district court.

SMITH v. TARRANT COUNTY BAIL BOND BOARD, 997 S.W.2d 870 (Tex. App.--Fort Worth 1999, rev. denied).

Statutes found in conflict: Article 2372p-3, Vernon's Texas Civil Statutes, relating to the licensing and regulation of bail bondsmen (nonsubstantively revised in 1999 as Chapter 1704, Occupations Code), and Articles 6252-13c and 6252-13d, Vernon's Texas Civil Statutes, relating respectively to the eligibility of persons with criminal backgrounds for certain occupations, professions, and licenses and to the suspension, revocation, or denial of licenses to persons with criminal backgrounds (in pertinent parts, nonsubstantively revised in 1999 as Subchapters A and B, Chapter 53, Occupations Code).

Holding: It is clear that in regard to occupational licensing, Articles 6252-13c and 6252-13d are general statutes, contrasted with Article 2372p-3, which specifically regulates the business and licensing of bail bondsmen and their agents. The court held that the licensing procedure for bail bondsmen is exclusively governed by Article 2372p-3, the specific statute, and that Articles 6252-13c and 6252-13d, the general statutes, do not apply to that procedure.

III. DECISIONS HOLDING A STATUTE UNCONSTITUTIONAL

SOUTHWEST TRAVIS COUNTY WATER DISTRICT v. CITY OF AUSTIN, 2000 WL 12894 (Tex. App.--Austin 2000).

Holding of unconstitutionality: House Bill No. 3193 (Chapter 844), Acts of the 74th Legislature, Regular Session, 1995, creating the Southwest Travis County Water District, is an unauthorized local law violative of Section 56, Article III, Texas Constitution.

HAWK LEASING COMPANY, INC. v. TEXAS WORKFORCE COMMISSION, 971 S.W.2d 598 (Tex. App.--Dallas 1998, no pet.).

Holding of unconstitutionality: Section 61.063(a)(2), Labor Code, requires an employer seeking judicial review of the Texas Workforce Commission's determination of an employee's wage claim to send the amount of the award to the commission for deposit in an interest-bearing account. The court held that this requirement is constitutional but that Section 61.063(b), Labor Code, which conditions an employer's right to appeal on the employer's compliance with Section 61.063(a)(2) or filing of an affidavit of inability to pay, is unconstitutional as violative of the open courts provision in Section 13, Article I, Texas Constitution.

CITY OF AUSTIN v. CITY OF CEDAR PARK, 953 S.W.2d 424 (Tex. App.--Austin 1997, no writ).

Holding of unconstitutionality: Section 42.024, Local Government Code, which allows an adopting municipality to compel a releasing municipality to transfer part of its extraterritorial jurisdiction, is a local law regulating the affairs of the City of Austin violative of Section 56, Article III, Texas Constitution.

MAPLE RUN AT AUSTIN MUNICIPAL UTILITY DISTRICT v. MONAGHAN, 931 S.W.2d 941 (Tex. 1996).

Holding of unconstitutionality: Section 43.082, Local Government Code, enacted in 1995 and expiring on the last day of 1996, authorizing certain municipal utility districts lying within a municipality's extraterritorial jurisdiction to dissolve and requiring the affected municipality to take ownership of the district's assets and assume its debts, is an invalid local law under Section 56, Article III, Texas Constitution, because the Maple Run at Austin Municipal Utility District is the only district in the state

qualifying for the special treatment under Section 43.082.

COMMISSION FOR LAWYER DISCIPLINE v. BENTON, 980 S.W.2d 425 (Tex. 1998, cert. denied 119 S.Ct. 2021).

Holding of unconstitutionality: Rule 3.06(d), Texas Disciplinary Rules of Professional Conduct, provides that "[a]fter discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."

The court held that "embarrass" is fatally vague, that it runs afoul of the notice aspect of the vagueness doctrine because "men of common intelligence must necessarily guess" at what speech might embarrass a juror, and that it likewise implicates the doctrine's concern with arbitrary enforcement, being so "standardless" that the Commission for Lawyer Discipline can only look to its own "personal predilections" to determine whether an attorney's speech is embarrassing.

HIXSON v. STATE, 1 S.W.3d 160 (Tex. App.--Corpus Christi 1999, no pet.); ***FRENZEL v. STATE***, 963 S.W.2d 911 (Tex. App.--Waco 1998, pet. ref'd); ***EX PARTE BARNES***, 959 S.W.2d 313 (Tex. App.--Fort Worth 1997, pet. dism'd as improvidently granted); ***STATE v. CONDRAN***, 951 S.W.2d 178 (Tex. App.--Dallas 1997, pet. dism'd as improvidently granted).

Holding of unconstitutionality: The court held that Article 28.061, Code of Criminal Procedure, as that statute existed before amendment in 1997, to the extent the statute barred a criminal prosecution based on an untimely indictment, unnecessarily shifted the focus from releasing the accused to infringing on the state's ability to obtain an indictment within a certain time frame and was unconstitutional as violative of the separation of powers clause in Section 1, Article II, Texas Constitution.

JIMERSON v. STATE, 957 S.W.2d 875 (Tex. App.--Texarkana 1997, no pet.).

Holding of unconstitutionality: Section 15(h)(2), Article 42.12, Code of Criminal Procedure, which grants discretion to a trial judge to grant a defendant credit for time served between arrest and guilty plea, is unconstitutional as violative of the due process clause in Section 19, Article I, Texas Constitution.

LONG v. STATE, 931 S.W.2d 285 (Tex. Crim. App. 1996).

Holding of unconstitutionality: Section 42.07(a)(7), Penal Code, the "*stalking*" provision of the 1993 harassment statute, is unconstitutionally vague under the First Amendment to the United States

Constitution.

EX PARTE BATES, 978 S.W.2d 575 (Tex. Crim. App. 1998, no pet.).

Holding of unconstitutionality: Section 15(h)(2), Article 42.12, Code of Criminal Procedure, provides that "[a] judge may credit against any time a defendant is required to serve in a state jail felony facility time served by the defendant in county jail from the time of the defendant's arrest and confinement until sentencing by the trial court."

The court held that the statute, to the extent that it provides a trial court with discretion to grant credit against time served, violates Section 19, Article I, Texas Constitution, in that it denies credit for periods of confinement pursuant to a motion to a revocation of community supervision. The availability of discretion to decide whether an individual should receive credit for time spent in jail before a revocation hearing constitutes a punitive policy that may chill the defendant's decision to exercise the defendant's constitutional right to a pre-revocation hearing.

TEXAS BOLL WEEVIL ERADICATION FOUNDATION, INC. v. LEWELLEN, TEXAS BOLL WEEVIL ERADICATION FOUNDATION, INC. v. ABBOTT, 952 S.W.2d 454 (Tex. 1997).

Holding of unconstitutionality: Subchapter D, Chapter 74, Agriculture Code, which governs a state program for boll weevil eradication, was held to represent an overly broad delegation of legislative authority to a private entity and to be unconstitutional as violative of Section 1, Article II, Texas Constitution.

CENTRAL APPRAISAL DISTRICT OF ROCKWALL COUNTY v. LALL; DALLAS CENTRAL APPRAISAL DISTRICT v. W. V. GRANT EVANGELISTIC ASSOCIATION, INC., 924 S.W.2d 686 (Tex. 1996).

Holding of unconstitutionality: At the time of the case and before amendment in 1997, the second prong of Section 42.08(b)(1), Tax Code, which provided that a taxpayer forfeits the right to judicial review of an appraisal review board's determination of the taxable value of property if the taxpayer does not timely pay an amount of ad valorem taxes for the year under appeal equal to the ad valorem taxes imposed against the property in the preceding year, was held facially unconstitutional as violative of the open courts provision in Section 13, Article I, Texas Constitution.

HAYS COUNTY APPRAISAL DISTRICT v. MAYO KIRBY SPRINGS, INC., 903 S.W.2d

394 (Tex. App.--Austin 1995, no writ).

Holding of unconstitutionality: Section 42.225, Tax Code, as that statute existed at the time of trial and before amendment in 1993, was held unconstitutional in purporting to authorize binding arbitration on a property owner's motion and over objection by the interested appraisal district because: (1) it impermissibly delegated judicial power and process to a person (the arbitrator) outside the judicial system, contrary to Section 1, Article V, Texas Constitution, which vests the judicial power of the state in the courts; (2) it violated the separation of powers principle of Section 1, Article II, Texas Constitution; (3) it frustrated the appraisal districts' and courts' constitutional duty and function to assure equality and uniformity in ad valorem taxation under Section 1, Article VIII, Texas Constitution; and (4) it purported to authorize secret proceedings in the public function of taxation in violation of the "open courts" provision of Section 13, Article I, Texas Constitution.

IV. DECISIONS EXPRESSLY FINDING A STATUTE TO BE AMBIGUOUS

CAMPBELL v. WALKER, 2000 WL 19143 (Tex. App.--Houston [14th Dist.] 2000).

Finding of ambiguity: Under Section F, Article 5.14, Texas Business Corporation Act, as that statute existed at the time of the action, if a shareholder of a corporation brought an action against the corporation without "*reasonable cause*," the court could award expenses to the defendant corporation. The statute is ambiguous because it does not specify whether the existence of reasonable cause must be determined by the trial court or by the jury.

Resolution of ambiguity: Applying the rules of statutory construction in Section 311.023, Government Code, the court held that the trial court must decide if the shareholder filed the suit without reasonable cause.

NABISCO, INC. v. RYLANDER, 992 S.W.2d 678 (Tex. App.--Austin 1999, pet. denied).

Finding of ambiguity: Section 171.104(1), Tax Code, relating to franchise tax deductions attributable to sales of food exempted from sales and use tax, is ambiguous because that section does not specify the *timing* of the sale.

Resolution of ambiguity: The comptroller's construction of the statute, that Section 171.104 tax exemption is restricted to interstate sales in which the sales are made at the same time as the shipment and not to intrastate sales in which the sales are made after shipment, was upheld as reasonable and correct.

CITY OF PLANO v. PUBLIC UTILITY COMMISSION, 953 S.W.2d 416 (Tex. App.--Austin 1997, no writ).

Finding of ambiguity: Section 3.2555(a), Public Utility Regulatory Act of 1995 (Article 1446c-0, Vernon's Texas Civil Statutes), relating to a telephone utility applicant for a certificate of operating authority or a service provider certificate of operating authority, is ambiguous.

Resolution of ambiguity: The Public Utility Commission's interpretation of the statute, that the applicant is not required to first obtain, or at least apply for, a franchise from the municipality in which it intends to provide service before the Public Utility Commission may issue the certificate, was upheld as

consistent with the purposes of the act and the legislature's intent in enacting the act.

CAMPBELL v. MacGREGOR MEDICAL ASSOCIATION, 966 S.W.2d 538 (Tex. App.--Houston [1st Dist.] 1997, writ granted); *aff'd in pertinent part*, 985 S.W.2d 38 (Tex. 1998).

Finding of ambiguity: Although the limitation provisions in Section 10.01, Texas Medical Liability and Insurance Improvement Act (Article 4590i, Vernon's Texas Civil Statutes), clearly state that a liability claim may not be commenced against "*a health care provider or physician*" more than two years after the occurrence of the breach of duty or tort, to exclude professional associations from the application of the limitations period would "*thwart express legislative intent*."

Resolution of ambiguity: Notwithstanding the plain language of the specific provision of the statute, the court held that there was strong evidence, including other provisions of Article 4590i, that the legislature intended a broader meaning to the statute and intended to include professional associations providing health care as physicians within the meaning of "*health care provider*" and the statute was construed accordingly.

GLASSCOCK UNDERGROUND WATER CONSERVATION DISTRICT v. PRUIT, 915 S.W.2d 577 (Tex. App.--El Paso 1996, no writ).

Finding of ambiguity: Senate Bill No. 1634 (Chapter 653), Acts of the 71st Legislature, Regular Session, 1989, created the Santa Rita Underground Water Conservation District. The parties agree that language in the bill relating to the inclusion of territory in the Santa Rita Underground Water Conservation District is ambiguous.

Resolution of ambiguity: The resolution of the controversy turns on the interpretation of the legislative intent behind certain annexation provisions in the bill and Sections 51.714 and 52.521, Water Code, and it is reasonable to infer from the legislative history that the legislature compromised by initially allowing certain landowners to choose the appropriate district for their particular land use. The law is construed accordingly.

IN RE MISSOURI PACIFIC RAILROAD COMPANY, 998 S.W.2d 212 (Tex. 1999).

Finding of ambiguity: The reference in Subsection (b), Section 15.018, Civil Practice and Remedies Code, "[Venue in suit brought under] Federal Employers' Liability Act and Jones Act," to the defendant's "principal office" in this state could support more than one reasonable interpretation and therefore is ambiguous.

Resolution of ambiguity: The court held that the legislative history supports the conclusion that: "(1) a company may have more than one principal office, (2) the 'decision makers' who conduct the 'daily affairs' of the company are officials who run the company day to day, (3) a mere agent or representative is not a 'decision maker' nor is a principal office one where only decisions typical of an agency or representative are made, and (4) a principal office is not an office clearly subordinate to and controlled by another Texas office."

TEXAS WATER COMMISSION v. BRUSHY CREEK MUNICIPAL UTILITY DISTRICT, 917 S.W.2d 19 (Tex. 1996).

Finding of ambiguity: The court of appeals held that "[*a*]*t minimum*, the provisions of section 12.013, [Water Code,] on the one hand, and sections 11.036 and 11.041, [Water Code,] on the other hand, create an ambiguity as to what exactly are the conditions under which the Commission may fix the rates at which water is supplied under contract in cases like the present." *BRUSHY CREEK MUNICIPAL UTILITY DISTRICT v. TEXAS WATER COMMISSION*, 887 S.W.2d 68, 73 (Tex. App.--Austin 1994).

Resolution of ambiguity: The court of appeals resolved the ambiguity rather simply by an examination of the historical evolution of the statutes in question. 887 S.W.2d 68, 73. The court of appeals held that the water commission lacked authority to establish rates in the case because the statute conferred jurisdiction on the commission to set rates only at the request of a water purchaser and that the commission's rate-making authority was limited to cases in which the seller appropriates state water, but the party seeking to invoke the commission's jurisdiction was a water supplier.

The supreme court reversed the judgment of the court of appeals. The supreme court applied certain principles of statutory construction: that the court's ultimate purpose is to effect the legislature's intent, that the legislature's later interpretation of an ambiguous statute is highly persuasive, and that the construction of a statute by an agency charged with its execution is entitled to serious consideration. The supreme court concluded that the legislature did not intend the limitations on the scope of the water commission's wholesale rate-making authority inferred by the court of appeals, and that the interpretation of the agency that affirmatively interpreted the law to allow petitions by water suppliers was not inconsistent with the legislature's intent. In addition, the supreme court stated that the legislative history of Section 12.013(d), Water Code, coupled with the lack of any limiting language in Section 12.013(a), led the court to conclude that the water commission's rate-making authority under Section 12.013(a) is not limited to instances in which the water supplier appropriates state water.

EX PARTE WHITESIDE, 1999 WL 391552 (Tex. Crim. App. 1999).

Finding of ambiguity: The language in Section 4, Article 11.07, Code of Criminal Procedure, "[Habeas Corpus] Procedure After Conviction Without Death Penalty," relating to a subsequent application to a "*challenge to the conviction*" can be interpreted two ways.

Resolution of ambiguity: Considering the legislative history, the statute was construed to mean that a "*challenge to the conviction*" does not include a challenge to a parole revocation determination.

BROWN v. STATE, 943 S.W.2d 35 (Tex. Crim. App. 1997).

Finding of ambiguity: Section 5(a), Article 42.12, Code of Criminal Procedure, as that statute existed before amendment, which requires the trial court give certain information to a defendant, is ambiguous because it does not specify when the information must be provided or explain the effect of a trial court's failure to give the information.

Resolution of ambiguity: From the ambiguous legislative history, the court held that the legislature intended the information to be provided before the defendant is placed on probation but that a defendant is entitled to relief only if the defendant can show harm by the failure of the court to provide the information in a timely manner.

LANE v. STATE, 933 S.W.2d 504 (Tex. Crim. App. 1996).

Finding of ambiguity: The requirement in Section 3(a)(5), Article 38.22, Code of Criminal Procedure, that an oral statement made by a defendant is not admissible unless the defendant's attorney is "*provided with*" an accurate copy of all recordings of the defendant is ambiguous because it is capable of two meanings, i.e., that counsel merely be given access to a copy of a recording or that actual delivery of the recording is required.

Resolution of ambiguity: The legislative history is not conclusive but, given the object sought by the statute and the consequences of the differing construction, the court held that "*provide*" means to "*make available or furnish*." Accordingly, when the tapes were introduced into evidence and therefore available to the defendant in the clerk's office, the state had "provided" the tape.

TIGNER v. STATE, 928 S.W.2d 540, (Tex. Crim. App. 1996).

Finding of ambiguity: Section 3(a), Article 38.22, Code of Criminal Procedure, requires that a complete and accurate recording of a defendant's confession be provided to defense counsel more than

20 days before the commencement of "*the proceeding*." The meaning of "*proceeding*" is ambiguous because a literal reading of the term does not denote which step or steps constitute "*the proceeding*" for the purpose of the statute.

Resolution of ambiguity: The legislative history, including statements in the record from the senator who proposed the 20-day rule on the floor of the senate, indicates the legislature's intent that the court strictly advance its purpose to declare inadmissible a custodial statement not provided to defense counsel with ample time to effectively challenge its admissibility. Only by interpreting "*proceeding*" to include voir dire is the legislative purpose advanced.

STATE v. EDMOND, 933 S.W.2d 120 (Tex. Crim. App. 1996).

Finding of ambiguity: Section 39.02(a)(1), Penal Code, ("*Official Oppression*") is susceptible to more than one rational interpretation and is ambiguous because it is impossible to discern its meaning, based upon the text itself.

Resolution of ambiguity: Because it is presumed that the legislature intended to enact a constitutional statute and that intent provides a slight indication of the legislature's resolution that "*knowledge of illegality*" modifies "*mistreatment*" under the statute, the court held that a defendant charged under Section 39.02(a)(1) must mistreat another and must also know that the conduct is criminal or tortious. In addition, it is not necessary that the indictment allege that the defendant's conduct was actually unlawful.

PERKINS v. GROFF, 936 S.W.2d 661 (Tex. App.--Dallas 1996, writ denied).

Finding of ambiguity: The reference to the word "hearing" in Section 74.053, Government Code, which allows a party to object to the assignment of a trial judge before the first "hearing" or trial, is ambiguous.

Resolution of ambiguity: The court held that the statute contemplates a presentation of argument accompanied by judicial examination and a ruling; that a "*hearing*" need not take place in a courtroom while the assigned judge sits on the bench in the presence of counsel; and that this construction is the just and reasonable result intended by the legislature when it enacted the statute.

BINGHAM v. STATE, 915 S.W.2d 9 (Tex. Crim. App. 1994); 913 S.W.2d 208 (Tex. Crim. App. 1995).

Finding of ambiguity: In original submission, a plurality of the court concluded that Article 38.14, Code of Criminal Procedure, providing that a conviction cannot be had upon the "*testimony*" of an accomplice, may be read as including at least some out-of-court statements not made under oath, in addition to evidence given in court or under oath.

Resolution of ambiguity: On the state's motion for rehearing, the court held that the legislative intent in enacting Article 38.14, providing that a conviction cannot be had upon the testimony of an accomplice witness unless corroborated by other evidence, can be effectuated by reading that statute to embrace only the in-court "*testimony*" of an accomplice, thus resolving any ambiguity that may be present in the statute's use of the word "*testimony*."

FAIN v. STATE, 986 S.W.2d 666 (Tex. App.--Austin 1998, pet. ref'd).

Finding of ambiguity: In footnote 9 to its opinion, the court stated that Article 31.09(a), Code of Criminal Procedure, which prescribes a manner of changing venue that permits a district court, with the agreement of the prosecutor and the defendant, to accomplish a change of venue while maintaining the cause on its own docket and preside over the trial in the courthouse of the county to which venue has been changed, "is somewhat ambiguous."

Resolution of ambiguity: In dictum, because Article 31.09 became effective nine months after the parties agreed to try the case in another county without a formal change of venue, the court held that it did not believe that Article 31.09 requires a formal change of venue to docket the cause in the new court before the benefit of not forwarding the cause to the docket of the new court is available. Such a construction would render the new procedure meaningless.

MARTIN v. DEPARTMENT OF PUBLIC SAFETY, 964 S.W.2d 772 (Tex. App.--Austin 1998, no pet.).

Finding of ambiguity: Section 724.015(3), Transportation Code, provides that before requesting a person to submit to the taking of a blood or breath specimen for intoxication testing purposes, the arresting officer shall warn the person that if an analysis of the specimen shows the person *had* an alcohol concentration of 0.10 or more, the person's driver's license will be automatically suspended. The court held that the legislature's use of the word "had" as opposed to "have" in Section 724.015(3) is "somewhat ambiguous." In isolation, the statutory warning does not make it clear whether the suspension will be imposed as a consequence of the licensee's state of intoxication at the time he or she was driving or at the time he or she takes the breath test.

Resolution of ambiguity: The court held that the statutory warnings cannot possibly be intended to reference a licensee's state of intoxication while driving because an after-the-fact breath test can never reveal the licensee's exact alcohol concentration at the time of the offense, since some delay between arrest and testing is inevitable.

HENDERSON v. STATE, 962 S.W.2d 544 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 978, 119 S. Ct. 437 (1998).

Finding of ambiguity: Article 38.23, Code of Criminal Procedure, which provides in relevant part that "[n]o evidence . . . obtained in violation of any provisions of the . . . laws of the State of Texas . . . shall be admitted in evidence against the accused on the trial of any criminal case" is ambiguous as to whether it applies to violations of the attorney-client privilege rule and whether a violation of the attorney-client privilege is necessarily a violation of the law.

Resolution of ambiguity: The court held that the obvious resolution is that the privilege must yield to some extent; i.e., to the extent necessary to satisfy the policy interest in question. A third party need show only a reasonable possibility of the occurrence of a continuing or future crime likely to result in serious bodily injury or death to compel disclosure of the privileged information. If the privilege was legitimately required to yield, then no law violation exists, and the fruits of the privileged communication are not barred from evidence by Article 38.23.

EX PARTE JONES, 957 S.W.2d 849 (Tex. Crim. App. 1997).

Finding of ambiguity: Section 3g(a)(2), Article 42.12, Code of Criminal Procedure, provides that the provisions of Section 3 do not apply to a defendant if it is shown that a deadly weapon "was used or exhibited during the commission of 'a' felony offense or during immediate flight therefrom." The court stated that in its view there are two ways to read the statute. First, the statute can be read (as did the trial court) that the word "a" in the phrase "a felony" is used to mean the use of a deadly weapon in "any" felony is sufficient for the statute to apply. The other way is to read the word "a" as part of the phrase "a felony," used to distinguish the case at trial from misdemeanor offenses and that the felony offense referred to is the same as that being tried.

Resolution of ambiguity: After reviewing the legislative history of the bill that added the ambiguous provision and determining that the legislators' statements show that the legislature focused on the punishment for the offense for which the defendant is being tried and the use or exhibition of a deadly

weapon during the commission of that offense, the court held that Section 3g(a)(2), Article 42.12, requires the use of a deadly weapon to be made during the transaction from which a conviction for a felony offense is obtained.

EX PARTE TORRES, 943 S.W.2d 469 (Tex. Crim. App. 1997).

Finding of ambiguity: The phrase "final disposition" in Section 4(a), Article 11.07, Code of Criminal Procedure, relating to a subsequent application for a writ of habeas corpus, can have various meanings, ranging from situations in which a mere dismissal without prejudice will suffice to situations that require an adjudication on the merits.

Resolution of ambiguity: After reviewing the legislative history of the bill that added Section 4(a) to Article 11.07, the court held that a "final disposition" of an initial writ of habeas corpus must entail a disposition relating to the merits of all the claims raised; i.e., a decision that decides the merits or makes a determination that the merits of the applicant's claims can never be decided.

CUELLAR v. STATE, 957 S.W.2d 134 (Tex. App.--Corpus Christi 1997, pet. ref'd).

Finding of ambiguity: Section 49.08, Penal Code, "Intoxication Manslaughter," includes as an element that the defendant causes the death of "another." Section 1.07, Penal Code, defines "another" to mean a "person," "person" to include an "individual," and "individual" to mean "a human being who has been born and is alive." However, the phrase "has been born and is alive" does not specify at what point in time the individual needs to have been born and been alive.

Resolution of ambiguity: The court held that, in applying the statutory definition "has been born and is alive" to the facts of the case, a child who is born and alive for a period of time before dying as a result of prenatal injuries is an "individual" under Section 1.07, Penal Code, and a "person" under Section 49.08, Penal Code.

LOVING v. STATE, 947 S.W.2d 615 (Tex. App.--Austin 1997, no writ).

Finding of ambiguity: In footnote 2 to its opinion, the court stated that the part of Article 36.16, Code of Criminal Procedure, "Final Charge," that provides that "[a]fter the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion permit the introduction of other testimony, and in the event of such further charge, the defendant or his counsel shall have the right to present objections in the same

manner as prescribed in Article 36.15" is "unclear and ambiguous. E.g., the State argues that this provision gives the trial court discretion to give an *Allen* charge without the jury's request, while the appellant argues that it is necessary for the jury to request an *Allen* charge before it should be given."

Resolution of ambiguity: The court held that the trial court did not err in giving the *Allen* charge before the jury indicated it was unable to reach a verdict and deadlocked. In the concluding sentence of footnote 2, the court noted that "the Court of Criminal Appeals, without regard for article 36.16, has long approved the submission of *Allen* charges."

STATE v. ROBERTS, 940 S.W.2d 655 (Tex. Crim. App. 1996).

Finding of ambiguity: Article 44.01, Code of Criminal Procedure, enumerates the circumstances under which the state is entitled to appeal an order of a court in a criminal case. Subsection (a)(5) provides that the state is entitled to appeal an order that "grants *a motion to suppress evidence*, a confession, or an admission." The court concluded that the phrase "*motion to suppress evidence*" is ambiguous.

Resolution of ambiguity: Applying the legislature's directive in Section 311.023, Government Code (Code Construction Act), that in construing a statute a court should attempt to ascertain the consequences of a particular construction, the court held that the phrase "*motion to suppress evidence*" in Article 44.01(a)(5) is limited to motions that seek to suppress evidence on the basis that the evidence was illegally obtained.

RAMOS v. STATE, 934 S.W.2d 358 (Tex. Crim. App.), cert. denied, 520 U.S. 1198, 117 S. Ct. 1556 (1996).

Finding of ambiguity: Article 18.02, Code of Criminal Procedure, relates to the categories of items for which a search warrant may be issued. Subsection (11) of Article 18.02 includes "person." The question before the court was whether the body of a dead person qualifies as a "person" under Subsection (11). The court stated that the word "person" in Article 18.02 does not appear to have a clear and unambiguous meaning.

Resolution of ambiguity: Applying the legislature's directive in Section 311.023, Government Code (Code Construction Act), that in construing a statute a court should attempt to ascertain the object sought by the statute and the consequences of a particular construction, the court held that the term "person" in Article 18.02(11) refers to both a living person and a dead person.

PORTER v. STATE, 996 S.W.2d 317 (Tex. App.--Austin 1999, no pet.).

Finding of ambiguity: Section 43.26, Penal Code, Possession or Promotion of Child Pornography, as that statute existed before amendment, insofar as it proscribes possession of "*material containing a film image*," is ambiguous. From the legislative history, the statute does not appear to have been intended by the legislature to apply to computer data files and a viewer program on a computer hard drive.

IN RE J.C.H., 1999 WL 1244424 (Tex. App.--San Antonio 1999, no pet.).

Finding of ambiguity: Subsection (b), Section 56.01, Family Code, "Right to Appeal," permits the appeal of an order of adjudication of delinquency notwithstanding that the adjudication order was signed more than 30 days before the date of the notice of appeal. The court found the language ambiguous "because, if read literally, it could be construed to permit an indefinite right of appeal on the guilt/innocence stage whenever it occurred even though the disposition had long since caused the rendition of a final judgment."

Resolution of ambiguity: The court stated that it did not believe that the legislature intended to generate the ambiguous result with its chosen language. Rather, the more logical construction is to allow issues relating to adjudication to be appealed within the time provided for timely appeal of the disposition order, the equivalent to the signing of a judgment.

BAPTIST VIE LE v. STATE, 993 S.W.2d 650 (Tex. Crim. App. 1999).

Finding of ambiguity: Subsection (a), Section 52.02, Family Code, "Release or Delivery [of child taken into custody] to Court," provides that a person who arrests a child "without first taking the child to any place other than a juvenile processing office designated under Section 52.025" may take certain actions in connection with the child. Subsections (a) and (b), Section 52.025, Family Code, "Designation of Juvenile Processing Office," provide that the juvenile court may designate an office or room as "the juvenile processing office" and that a child may be detained in a juvenile processing office only for certain purposes. The court found some ambiguity in the phrase "designated juvenile processing office" that the text of Section 52.02 and Section 52.025 do not completely resolve.

Resolution of ambiguity: Based on the legislative history of Section 52.025, in particular the explanation of the senate sponsor of the bill that enacted Section 52.025, the court held that a single office

cannot simultaneously qualify as both a juvenile processing center under Section 52.025 and an office or official designated by the juvenile court under Section 52.02(a).

IN THE MATTER OF D.I.B., 963 S.W.2d 862 (Tex. App.--San Antonio 1998), *aff'd*, 988 S.W.2d 753 Tex. 1999).

Finding of ambiguity: Section 3g, Article 42.12, Code of Criminal Procedure, limits the circumstances in which a trial judge can grant community supervision in an adult proceeding and in general does not permit the trial judge to grant community supervision for offenses listed in that section. As to whether Section 3g applies to juvenile proceedings, the court stated that "[t]his confusion is understandable in light of the absence of either statutory law or case law explicitly indicating whether the limitations of Section 3g apply to juvenile proceedings. This ambiguity illustrates the confusion that sometimes results from adjudicating juvenile delinquency for criminal offenses as civil proceedings."

Resolution of ambiguity: "[A]mbiguities can be clarified by relying on the overall purposes of juvenile law as specified in the Family Code," including Section 54.04(d)(l), which provides that "the court or jury may . . . place the child on probation on such reasonable and lawful terms as the court may determine," and Section 54.04(l), which provides that a "court or jury may place a child on probation . . . for any period . . . ." The court held that because the legislature could have stated its intent that Section 3g apply to juvenile proceedings in 1993 when it amended Section 3g and several Family Code provisions relating to probation for juvenile offenders, but did not, the amendments "indicate that section 3g does not apply to adjudications of juvenile delinquency."

SCOTT v. YOUNTS, 926 S.W.2d 415 (Tex. App.--Corpus Christi 1996, writ denied).

Finding of ambiguity: Section 14.055(c), Family Code [recodified in 1995 as Section 154.126, Family Code], instructs courts to consider various factors when ordering child support to be paid by certain obligors whose monthly net resources exceed $6,000. After applying the child support guidelines for the first $6,000 of net resources, the court may order additional amounts of support based on the net incomes of the parties and the proven *needs of the child*. "The 'needs of the child' . . . is an ambiguous term which has never been defined by the [Family] Code."

Resolution of ambiguity: No resolution per se. The court of appeals concluded that the "needs of the child" are to be determined by courts in their discretion on a case-by-case basis.

MIAMI INDEPENDENT SCHOOL DISTRICT v. MOSES, 989 S.W.2d 871 (Tex.

App.--Austin 1999, no writ).

Finding of ambiguity: Section 39.112, Education Code, is ambiguous. Subsection (a) exempts a school district that is rated "exemplary" from "*requirements and prohibitions imposed under this code*." Merely reading the text of the statute does not reveal the scope of the quoted language.

Resolution of ambiguity: The Texas Education Agency's construction of statute, that Section 39.112 refers only to *educational* "requirements and prohibitions" and does not include the wealth equalization provisions under the school finance system, was upheld as reasonable and logical.

COALITION OF TEXANS WITH DISABILITIES v. SMITH, 1999 WL 816734 (Tex. App.--Austin 1999, pet. filed).

Finding of ambiguity: Section 2(g), Architectural Barriers Act (Article 9102, Vernon's Texas Civil Statutes), providing that "[t]he standards adopted under this article do not apply to a place used primarily for religious rituals within either a building or facility of a religious organization," is ambiguous because both "*place*" and "*ritual*" are subject to at least two reasonable interpretations.

Resolution of ambiguity: The Court concluded that the legislature did not intend the statute to exempt entire religious buildings or facilities, as well as all attached buildings, from the Architectural Barriers Act. Construction of Section 2(g) by the Texas Department of Licensing and Regulation, that religious buildings and facilities are simply not subject to the requirements of the act, is inconsistent with the intent shown by the legislative history of Section 2(g) and is unreasonable.

BIRNBAUM v. ALLIANCE OF AMERICAN INSURERS, 994 S.W.2d 766 (Tex. App.--Austin 1999, rev. denied).

Finding of ambiguity: Section 552.112, Government Code, "Exception: Certain Information Relating to Regulation of Financial Institutions or Securities," provides an exception to disclosure under the open records law to "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." The court held that the meaning of the term "financial institution," as used in Section 552.112, is uncertain as to whether it was intended to include insurance companies.

Resolution of ambiguity: The court held that with nothing definite before it regarding the

legislature's intention, and having looked for guidance in the analogous federal Freedom of Information Act provision, insurance companies are not "financial institutions" within the meaning of Section 552.112.

UNIVERSITY OF TEXAS MEDICAL BRANCH v. HOHMAN, 6 S.W.3d 767 (Tex. App.--Hous. [1st Dist.] 1999, pet. filed).

Finding of ambiguity: Before repeal and nonsubstantive codification in 1999 as Section 301.413, Occupations Code, "Retaliatory Action," Section 11, Nurse Reporting Act, Article 4525a, Vernon's Texas Civil Statutes, provided that "[a] person has a cause of action against an . . . agency . . . or other person that suspends or terminates the employment of the person or otherwise disciplines or discriminates against the person for reporting under [the Act]." The court held that the term "agency" is used ambiguously in Section 11, in that it could refer to "state agencies," "home health agencies," or both.

Resolution of ambiguity: There was no resolution of ambiguity. The issue before the court was whether the legislature had by clear and unambiguous language waived sovereign immunity for claims of retaliation under the Nurse Reporting Act. Having found Section 11 ambiguous, the court concluded that there was no clear and unambiguous waiver of sovereign immunity.

McMILLAN v. TEXAS NATURAL RESOURCES CONSERVATION COMMISSION, 983 S.W.2d 359 (Tex. App.--Austin 1998, pet. denied).

Finding of ambiguity: Section 49.231, Water Code, and a commission rule authorize the imposition of standby fees on "undeveloped property." The statute defines "undeveloped property" solely in terms of whether facilities and services are "available" to serve the property, but neither the statute nor the rule defines "available." The court held that the word "available" is not, in context, susceptible of only one interpretation, that it is uncertain what the legislature intended the word to mean in the complex circumstances in which the word is used, that the word is therefore open to construction by the commission that must administer the statutory scheme, and that the commission's resulting interpretation that "available" is synonymous with capacity currently available, albeit on a first-come, first-served basis, is entitled to serious consideration and weight as to be meaning property to be assigned to the word "available" in context.

Resolution of ambiguity: The court concluded that the Texas Natural Resource Conservation Commission's interpretation of the statute to allow assessment of standby fees for a particular tract if there is adequate capacity actually available for immediate use on the tract, even if there is not sufficient capacity for projected utility demand after full district development, is sustained as neither plainly erroneous nor inconsistent with the relevant provisions of the statute and the rule.

TEXAS UTILITIES ELECTRIC COMPANY v. SHARP, 962 S.W.2d 723 (Tex. App.--Austin 1998, pet. denied).

Finding of ambiguity: "Confusion about the proper interpretation of [Section 171.109, Tax Code, (relating to a corporation's franchise tax liability)], arises for two reasons: First, section 171.109(b) requires corporations to compute 'debt' according to GAAP [generally accepted accounting principles], while GAAP technically speaks in terms of 'liabilities' rather than 'debt.' Second, section 171.109(b) contains a proviso at the beginning, but the proviso does not enumerate the exceptions to which it refers or how extensive those exceptions are."

Resolution of ambiguity: The court stated that, as a general rule, substantial weight should be given to an administrative agency's contemporaneous interpretation of an ambiguous statute, so long as the interpretation is reasonable, especially when the agency has special expertise in the area. The court also looked at the history behind the legislature's enactment of Section 171.109. The court concluded that the computation of deductible "debt" for franchise tax purposes requires, first, that the "debt" be a liability under GAAP and, second, that it satisfy the restricted definition of "debt" in Section 171.109(a)(3).

SIMPLEX ELECTRIC CORP. v. HOLCOMB, 949 S.W.2d 446 (Tex. App.--Austin 1997, writ denied).

Finding of ambiguity: The two relevant statutes were Sections 409.011 and 409.021, Labor Code. At issue was the Texas Workers' Compensation Commission's decision that a carrier's inadvertent failure to contest compensability by the 60-day deadline imposed by Section 409.021 does not give rise to the employer's right to contest compensability. The appeals panel decision stated that to allow an employer to challenge compensability after its carrier had inadvertently missed the 60-day deadline would sanction an easy circumvention by the carrier of its obligation under Section 409.021 to initiate benefits or to timely contest compensability.

Resolution of ambiguity: The court stated that the construction of a statute by an agency charged with its execution is entitled to serious consideration as long as the construction is reasonable and does not contradict the plain language of the statute, that the appeals panel's interpretation does not contradict the statutory language, and that an inadvertent failure to act within the 60-day deadline is not an acceptance under Section 409.021.

LE v. FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY, 936 S.W.2d 317

(Tex. App.--Houston [1st Dist.] 1996, writ denied).

Finding of ambiguity: Article 5.06-3(b), Insurance Code, defines "personal injury protection" (PIP) as provisions in a motor vehicle liability policy that provide for certain payments to persons for all reasonable expenses *arising from the accident*. The statute does not, however, define "the accident," and the issue before the court was "whether the legislature intended PIP in an auto liability insurance policy to cover injuries from any accident that happens to occur in a car or only those injuries that result from automobile accidents." The court of appeals cited an earlier opinion, *REED v. DEPARTMENT OF LICENSING & REGULATION*, 820 S.W.2d 1 (Tex. App.--Austin 1991, no writ), in which the court stated that "[w]hen the meaning of a statutory provision is unclear, in doubt, or ambiguous, the interpretation placed upon the provision by the agency is entitled to weight."

Resolution of ambiguity: The court noted with approval that the State Board of Insurance, pursuant to its statutory duty to prescribe policy forms, had interpreted "the accident" to mean only "a motor vehicle accident" and held that "[w]ithin the context of automobile liability insurance, the legislature intended all types of coverage, including liability, uninsured motorist and personal injury protection, to be limited to motor vehicle accident situations. Therefore, when article 5.06-3(b) refers to 'the accident,' it means the motor vehicle accident for which the legislature created automobile liability insurance."

V. DECISIONS EXPRESSLY SUGGESTING LEGISLATIVE ACTION

STRAITWAY TRANSPORT, INC. v. MUNDORF, 6 S.W.3d 734 (Tex. App.--Corpus Christi 1999, Rule 53.7(f) motion filed).

Issues: In pertinent part, whether, in a suit brought by the driver of a truck against the owner and keeper of calves that the truck struck while on Interstate Highway 37, the jury was properly given a standard negligence instruction that allowed for liability if the calves' owner had not exercised reasonable care in allowing the calves to wander on the roadway and whether the court should extend the law to create a special standard of care for landowners who graze cattle adjacent to highways.

Holding: The jury was properly given the standard negligence instruction. The court declined to extend the law to create a special duty.

Suggestion for legislative action:

> This accident occurred on Interstate 37, a 135 mile stretch of controlled access highway between San Antonio and Corpus Christi, Texas, that does not pass through or near any urban area until near its ends. Often, particularly at night, traffic is slight and the 65 mile per hour speed limit is observed as a minimum only, and the speed of traffic is usually greatly in excess of that legal maximum. With limited nighttime vision and traveling at high speed, a motorist is in mortal peril if he suddenly encounters cattle in his path. For the safety of the traveling public, livestock should be kept off all highways, especially those that have high speed traffic, such as interstate highways.
>
> The keepers of the livestock have control of the potential for cattle to be roaming loose near highways. Given the hazard to the traveling public and the ability of only the keepers to control the animals, perhaps the standard of ordinary care is too lax under modern circumstances.
>
> The proper forum for change is the legislature. It has enacted Agriculture Code section 143.102 that prohibits livestock owners from "knowingly" permitting their stock to roam on the highway. TEX. AGRIC. CODE ANN. § 143.102 (Vernon 1982). The Texas supreme court in *Beck v. Sheppard*, 566 S.W.2d 569, 572-73 (Tex. 1978) declined to change the standard to presume negligence of a horse owner under statute and analyzed the standard of care under a "common-law" duty for the owner to act with due care to keep horse from escaping onto the highway. Judgments have been upheld in many cases for plaintiffs who have been injured by livestock on highways, when the standard is

ordinary care. [Citations omitted.]

Any change in the standard of care for the keepers of livestock is a legislative decision, and not for an intermediate appellate court.

WHITE v. EASTLAND COUNTY, 1999 WL 1018235 (Tex. App.--Eastland 1999, no pet.).

Issues: Whether a county has a legal duty under Section 157.901, Local Government Code, to provide a former sheriff with legal counsel and pay for a legal defense against criminal charges for removing a private fence blocking access to a county road, done at the direction of the commissioners court of the county, and whether the county's decision not to provide legal counsel or pay for a defense was protected by sovereign immunity.

Holding: The requirement in Section 157.901 to provide counsel for county officials and employees does not impose a duty on the county to provide counsel to defend against criminal charges. The county's decision not to provide counsel was discretionary. Therefore, the county enjoyed sovereign immunity from the former sheriff's suit.

Suggestion for legislative action:

The policy issues are best considered by our legislature. The Texas legislature has addressed the problem of frivolous lawsuits against county employees and their cost of counsel in Section 157.901. Although there may be more safeguards against criminal actions being filed than civil lawsuits, the legislature may wish to consider when or if county officials and employees should be entitled to reimbursement for legal fees spent in defending against criminal charges arising out of actions clearly done in the scope of their duties.

EX PARTE LAWSON, 966 S.W.2d 532 (Tex. App.--San Antonio 1996, pet. ref'd).

Issue: Article 32.01, Code of Criminal Procedure, as that statute existed at the time and before amendment in 1997, provided that the prosecution of a defendant be dismissed unless an indictment or information is presented against the defendant at the next term of court, unless good cause was shown for the delay. Questions before court were: whether fact that grand jury for term during which the defendant was arrested had already been discharged at the time of the defendant's arrest established good cause for the state's failure to indict the defendant during the next term; and whether writ of habeas corpus seeking relief for late indictment was made moot by return of indictment against defendant before the writ was granted or any grounds for relief determined.

Holding: Dismissal of grand jury did not excuse compliance with Article 32.01, but the state was entitled to be heard as to whether other good cause existed for delay. Writ of habeas corpus was not made moot by return of indictment.

Suggestion for legislative action: In a footnote, the court stated:

> As a result, the operation of article 28.061["*Discharge for Delay*"] imposes a less reasonable sanction for article 32.01 dismissals in some districts than in others and we invite the Legislature to reconsider this matter.

IN THE MATTER OF M.A., 935 S.W.2d 891 (Tex. App.--San Antonio 1996, no pet.).

Issue: Whether Section 19.03(a)(8), Penal Code, "Capital Murder [of individual under six years of age]," requires knowledge of the victim's age as a necessary element of the offense.

Holding: The knowledge of the age of the murdered child is not a required element of an offense under Section 19.03(a)(8), Penal Code. *McCollister v. State*, 933 S.W.2d 170, 172 (Tex. App.--Eastland 1996, no pet.).

Suggestion for legislative action: Footnote 1 to the opinion reads as follows:

> We note that after reviewing the legislative history, it is clear that 19.03(a)(8) was enacted in response to an outcry over deaths of children under the age of six at the hands of their caregivers. Although there is brief mention of whether the prosecution would be required to show that the accused had knowledge of the victim's age, no definitive stance was taken on that issue. Hearings on Tex. S.B. 13 Before Senate Criminal Jurisprudence Committee, 73rd Leg. R.S. (Mar. 9, 1993) (Statement of Senator Buster Brown). We recognize that the Legislature may not have considered this type of fact scenario when enacting the statute, but we are not at liberty to insert additional elements into the plain language based on our interpretation of the legislative history. . . . We certainly invite the Texas Legislature to clarify the statute if they did not intend for Section 19.03(a)(8) to apply to the fact scenario in this case.

LITTLETON v. PRANGE, 9 S.W.3d 223 (Tex. App.--San Antonio 1999, rev. denied).

Issue: Whether a transsexual person who was born a male and was surgically altered to have the physical characteristics of a woman has standing under the wrongful death and survival statutes to sue as the surviving "spouse" of a man the person ceremonially married in Kentucky.

Holding: Texas (and Kentucky, for that matter), like most states, does not permit marriages between persons of the same sex. As a matter of law, the plaintiff is a male. As a male the plaintiff cannot be married to another male. Plaintiff's marriage was invalid and the plaintiff cannot bring a cause of action as the surviving spouse of the deceased.

Suggestion for legislative action:

> In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case, where the claim being asserted is statutorily-based. The statute defines who may bring the cause of action: a surviving spouse, and if the legislature intends to recognize transsexuals as surviving spouses, the statute needs to address the guidelines by which such recognition is governed. When or whether the legislature will choose to address this issue is not within the judiciary's control.

IN RE SIMONEK, 3 S.W.3d 285 (Tex. App.--Waco 1999, no pet.).

Issue: Whether it is mandatory or discretionary under Section 155.201(b), Family Code, for the court in which a suit affecting the parent-child relationship is filed to transfer the proceeding to another county where the child has resided for six months or longer and whether the court in which the suit was filed and which has adjudged a party to be in contempt should be allowed to assess the party's punishment after the transfer.

Holding: Under Section 155.201(b), Family Code, the transfer of the suit is mandatory. Under Section 155.005(a), Family Code, once the suit is transferred, the transferring court retains jurisdiction to render only temporary orders. The transferring court is without any other authority and may not impose punishment against the contemnor.

Suggestion for legislative action:

> We believe that a court which has adjudged a party in contempt should be allowed to assess the punishment for that contempt. We urge the legislature to consider allowing a court with continuing, exclusive jurisdiction to retain jurisdiction over the contempt proceedings where the court has already determined that its orders have been violated.
>
> . . .Because this issue of the punishment for an already-determined contempt can no longer be said to be a suit that affects the parent-child relationship, but rather relates only to Simonek's continuing violations of court orders and disregard for the judicial

system, we believe that a proceeding in this status should be excluded from the mandatory transfer requirements of the Family Code.

TEXAS SPECIALTY UNDERWRITERS, INC. v. TANNER, 997 S.W.2d 645 (Tex. App.--Dallas 1999, rev. denied).

Issue: Whether under the nonrenewal notice provision in Section 5, Article 21.49-2B, Insurance Code, a homeowner's policy automatically renews on its expiration when the insured receives a timely offer to renew the policy but fails to respond to the offer before the policy's expiration date or otherwise fails to indicate a desire to renew the policy before expiration.

Holding: Absent clear language evidencing such an intent, the court will not read Section 5, Article 21.49-2B, Insurance Code, to require an insurer to mail a notice of nonrenewal before the expiration date after it has already offered to renew the policy.

Suggestion for legislative action:

> We note that much of the confusion surrounding the applicability of section 5 to this case results from the legislature's silence regarding renewal offers. . . . Many states have avoided this confusion by enacting specific guidelines and procedures that an insurer must follow when it decides to renew an insurance policy. . . . We do not reach the issues presented when an insurer fails to send an insured an offer to renew or sends the renewal offer too close to the expiration date of the current policy for the insured to respond before the policy expires. . . . However, they are just a few examples of the unanswered questions that renewal offers present and that might be addressed by the legislature.

A & T CONSULTANTS, INC. v. SHARP, 904 S.W.2d 668 (Tex. 1995).

Issues: Whether a proceeding against the comptroller of public accounts brought under the open records law, Chapter 552, Government Code, as Section 552.321 of that code existed before amendment in 1999, seeking disclosure of certain information must be brought as an original proceeding in the Supreme Court or as an action for mandamus in a district court. Whether information sought from the comptroller was exempted from required disclosure under the open records law.

Holding: An action for mandamus against the comptroller under the open records law must be brought in the Supreme Court under Section 22.002(c), Government Code. Some, but not all, of the information sought is excepted from required disclosure.

Suggestion for legislative action: Part IV of the opinion includes the following:

> Although we were able to resolve the issues raised in this proceeding, we encourage the legislature to take another look at the civil enforcement provision of TORA. See TEX. GOV'T CODE § 552.321. . . .
>
> . . . We invite the legislature to consider whether mandamus is the appropriate remedy against a government officer or agency, or whether a court order and/or judgment declaring the requested records to be public information would be adequate. We further suggest that the legislature exercise its constitutional authority to specify which courts are to have jurisdiction over remedial actions to enforce TORA. See TEX. CONST. art. V, §§ 3, 8.

ESCOBAR v. SUTHERLAND, 917 S.W.2d 399 (Tex. App.--El Paso 1996, no writ).

Issue: Whether the Election Code authorizes a county chairman to resolve factual disputes from sources other than public record or otherwise adjudicate compliance of a candidate's application after the 10-day period in which he or she must review and submit the list of candidates.

Holding: Applying the plain language of the code and giving terms used their ordinary meanings, the court concluded that the chairman loses both the individual responsibility and the individual authority to accept or reject a candidate for a position on the ballot once he or she delivers his or her list of candidates to the appropriate authority.

Suggestion for legislative action: Footnote 3 to the opinion reads as follows:

> We note that current statutes describe the public official in the instant case as the county party "chairman." However, we further note that the Texas Supreme Court Gender Bias Reform Implementation Committee has recommended that the Legislature insure the proper use of gender-neutral language in our statutes. We trust that the Texas Legislature will further those goals and recommendations in its next session. Order appointing Gender Bias Reform Implementation Committee, Misc. Docket No. 94-9175 (Oct. 18, 1994),GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT, Recs. 35 and 36, at 11 (1994).

[NOTE: In the subsequent legislative session, the legislature enacted House Bill No. 1603, Chapter 864, Acts of the 75th Legislature, Regular Session, 1997, "An Act relating to changing terminology involving gender in the Election Code to gender-neutral terminology."]

Findings

Findings[2]

(1) The Committee finds that the Texas Legislative Council, within existing resources, is able to and should perform an ongoing review of appellate decisions in which courts have:[3]

a) Clearly failed to implement legislative purposes;

b) Found two or more statutes to be in conflict;

c) Held a statute to be unconstitutional;

d) Expressly found a statute to be ambiguous;

e) Expressly suggested legislative action; or

f) Changed common law doctrines.

A report summarizing the review should be prepared by Legislative Council prior to each regular legislative session and distributed to the chair of each standing substantive committees of the House and the Senate, as well as the presiding office of each chamber. The report should only inform the committees and leadership of any appellate decisions as described above, without specific recommendations for statutory change.

(2) With regard to the cases identified during the Committee's interim study, the Committee recommends the following:

a) Bring ***Evans v. C. Woods, Inc.***, 1999 WL 787399 (Tex. App.--Tyler 1999, no writ) to the attention of the Committee on Civil Practices to consider potential legislation that would apply time frames to the granting of appealable interlocutory summary judgments to prevent last-minute postponement of trials. (on a motion by Rep. Solomons).

b) Bring ***Fleming Foods of Texas, Inc., v. Rylander***, 6 S.W.3d 278 (Tex. 1999) to the attention of the House Committee on Ways and Means with the respect to the question of tax refunds and to the House Committee on State Affairs with respect to re-codification language and effect. Both Committee's should be urged to determine if and how the decision can be addressed and whether legislative action is needed (on a motion by Rep.

[2] Refer to tapes of the Select Committee on Judicial Interpretations of Law hearing August 24, 1999, provided by House Audio/Video Dept.

[3] *See* Appendix A.

Solomons).

c) Bring ***Lederman v. Rowe***, 3 S.W.3d 254 (Tex. App.--Waco 1999, no pet.); ***Gaskill v. Sneaky Enterprises, Inc.***, 997 S.W.2d 296 (Tex. App.--Fort Worth 1999, rev. denied); ***Davis v. Covert***, 983 S.W.2d 301 (Tex. App.--Houston [1st Dist.] 1998, rev. dism'd w.o.j.) to the attention of the Committee on Civil Practices to determine the potential for legislation granting the Court of Appeals jurisdiction to hear an appeal from a county court trial de novo of a case appealed from small claims court. This may be particularly appropriate for small claims cases from populous counties in which justice court have relatively high jurisdictional limits. (on a motion by Rep. Bosse).

d) Bring ***Campbell v. Walker***, 2000 WL 19143 (Tex. App.--Houston [14th Dist.] 2000) to the attention of the Committee on Business and Industry and the Committee on Civil Practices to review the potential for legislation defining whether the existence of "reasonable cause" should be determined by the trial court or by the jury in cases under Section F, Article 5.14, Texas Business Corporation Act, (on a motion by Rep. Solomons).

e) Bring ***Joyner v. State***, 921 S.W.2d 234 (Tex. Crim. App. 1996); ***Ray v. State***, 919 S.W.2d 125 (Tex. Crim. App. 1996) to the attention of the Committee on Criminal Jurisprudence to review whether existing law sufficiently addresses the requirements of admonishment to a criminal defendant regarding the consequences of a violation of a condition of deferred adjudication probation, as specifically required by § 5(a), Article 42.12, Code of Criminal Procedure. (on a motion by Rep. Dunnam).

f) Bring ***Lane v. State***, 933 S.W.2d 504 (Tex. Crim. App. 1996) to the attention of the Committee on Criminal Jurisprudence to review the potential for legislation answering the question of whether a taped oral statement made by a defendant should be presented to the defendant's attorney or whether mere access to the tape is sufficient (on a motion by Rep. Dunnam).

g) Bring ***Coalition Of Texans With Disabilities v. Smith***, 1999 WL 816734 (Tex. App.-- Austin 1999, pet. filed) to the attention of the Committee on State Affairs to review the potential for legislation regarding what constitutes a "reasonable waiver" for religious institutions, under § 2(g), Architectural Barriers Act (Article 9102, Vernon's Texas Civil Statutes) (on a motion by Rep. Gray).

h) Bring ***Birnbaum v. Alliance Of American Insurers***, 994 S.W.2d 766 (Tex. App.--Austin 1999, rev. denied) to the attention of the Committee on Insurance to review

the potential for legislation regarding § 552.112, Government Code, "Exception: Certain Information Relating to Regulation of Financial Institutions or Securities" and whether an insurance company has the right to claim such an exemption from disclosure of certain documents (on a motion by Rep. Gray).

i) Bring ***Texas Specialty Underwriters, Inc. v. Tanner***, 997 S.W.2d 645 (Tex. App.--Dallas 1999, rev. denied) to the attention of the Committee on Insurance to review the potential for legislation to specify the circumstances under which guidelines and procedures universally constitute a renewal or non-renewal of an insurance policy under § 5, Article 21.49-2B, Insurance Code (on a motion by Rep. Gray).

j) Bring ***University Of Texas Medical Branch v. Hohman***, 6 S.W.3d 767 (Tex. App.--Hous. [1st Dist.] 1999, pet. filed) to the attention of the Committee on Civil Practices and the Committee on Public Health to review the need for legislation to clarify of term "agency" as stated in § 301.413, Occupations Code, "Retaliatory Action," and to determine whether a waiver of sovereign immunity was intended (on a motion by Rep. Gray).

k) Bring ***In Re Simonek***, 3 S.W.3d 285 (Tex. App.--Waco 1999, no pet.) to the attention of the Committee on Juvenile Justice and Family Issues to review the need for legislation clarifying whether a transfer in a suit affecting the parent-child relationship under § 155.201(b), Family Code is mandatory when the child has resided in another county for more than six months and whether the court in which the suit was originally filed and which has adjudged a party to be in contempt should be allowed to assess the party's punishment after the transfer (on a motion by Rep. Goodman).

l) Bring ***Scott v. Younts***, 926 S.W.2d 415 (Tex. App.--Corpus Christi 1996, writ denied) to the attention of the Committee on Juvenile Justice and Family Issues to review the need for legislation clarifying what constitutes the "needs of the child" under § 14.055(c), Family Code [recodified in 1995 as Section 154.126, Family Code] when courts order support by certain obligors whose monthly net resources exceed $6,000 (on a motion by Rep. Goodman).

Appendix A