

San Antonio Lawyer

The Superpowers
of Robert Dittman



January-February 2019



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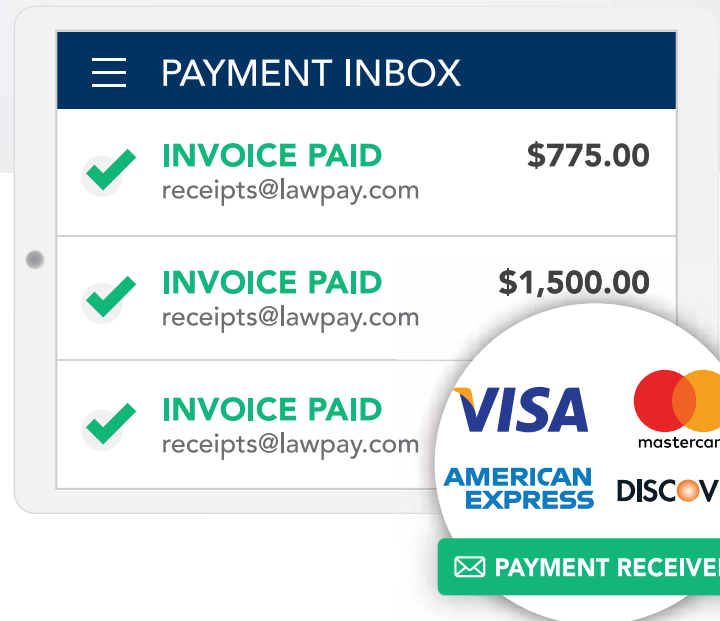


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FEEDBACK

Sara,

I wanted to extend sincere thanks to you and the Editorial Board for including the article about my Texas Bar Foundation award, in the Nov-Dec edition. My family, and I, are very appreciative of the recognition. I have received many remarks about how well written the article was, and the superlative job that Sara Dysart did in the article with the limited substantive material that she had to deal with!

Sara, you and your staff should be congratulated for the continuing commitment to excellent journalism, always reflected in your monthly editions.

Best personal regards, and highest professional esteem, Dan

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THE SUPERPOWERS OF ROBERT DITTMAN

By Steve A. Peirce

Having exhaustively interviewed attorney Robert Dittman and read his fifteen-page resume and several news articles about him, I tried to come up with one anecdote that sort of sums him up, though even this one falls short of describing this remarkable individual. But here it is. Robert is having lunch at an outdoor café with his then-wife and his Seeing Eye dog. A female Mastiff comes from nowhere and attacks Robert's dog. Robert blindly (literally) dives into the fray, grabs the Mastiff in a rollover wrestling

hold, and subdues the beast. When the police arrive and treat the matter as routine, Robert sternly gives them a verbatim recitation of Texas Penal Code Section 42.091, which makes it a crime for an animal owner to permit such animal to attack, injure, or kill an assistance animal. A moment worthy of Daredevil, the blind-lawyer Marvel superhero.

Whether his eyes are opened or closed, Robert sees only flashes of color and light, as if being constantly entertained by a laser light show. On a typical day, he will get up at 5 a.m.



Robert can tell a can of cat food from a can of tuna by using an iPhone app called TapTapSee, where he takes a photo of an item and the app audibly tells him what the item is. He uses his iPhone and Apple watch in the “voiceover mode,” which gives an audible identification for every button that’s pressed (my sympathies if you have ever accidentally engaged this feature). When dressing, he uses ribbons to identify his clothes. “Today I’m wearing a black suit, blue shirt, and my Coast Guard tie,” he tells me, and he’s right. On most days, Robert and Justice get a ride downtown from attorney Jefferson Archer, or from a ride service, Adventure Express. When these are unavailable, Robert and Justice ride the VIA bus, which requires catching two buses for over two hours of commuting each way.

His solo practice office is in the law suite at the Riverview Towers. For a couple of years, he had the help of a volunteer assistant, Katherine Johnston, who documented her experiences in the blog *The Pocket Docket—Tales from the Law Office*, which by the way is a great read. Now, his only assistance is a receptionist he shares with the other tenants in the suite, Justice, and colleagues down the hall who help him from time to time when he needs to borrow someone’s eyes or get some advice. One of those colleagues is attorney Bob Hicks, a former Latin teacher who has served as Robert’s criminal law mentor since Robert arrived at the suite as a newly licensed lawyer in the summer of 2013. Bob has been with Robert for all of his trials. Like the barbershop scene in *Gran Torino*, Bob and Robert are fond of heckling each other in a way that only close friends can get away with. Robert’s civil law mentor is attorney Dennis Drouillard, a former military intelligence officer, also at the Riverview Towers, who has helped Robert since his practice began. Robert and Dennis share the common bonds of the Catholic faith, military experience, and an affinity for the courtroom.

Robert’s office is small and windowless, and one could not tell from initial impression that it belongs to a blind person. Like most lawyers, there are degrees, certificates, and pictures on the wall, a computer, and stacks and stacks of paper. To deal with the paper, Robert either scans it into the computer or has someone read it to him. Once scanned (either as an MS Word document or a searchable .pdf), the document can be listened to audibly through screen reader software. Or he can read the document in braille using his refreshable braille display, which raises and lowers pins electronically to produce in braille what appears on the screen. Or he can print documents in braille using a braille embosser, but each hard copy page of ordinary text equates to several pages of braille. For composing legal documents, he is a touch typist on a QWERTY keyboard, and he will have a colleague or a client proofread it for him, mostly for formatting. In court, he often engages his clients to assist him in putting together trial notebooks and in reading documents to him. Sometimes the judges or even opposing counsel read documents to him.

Most of Robert’s work is representing indigent criminal defendants by court appointment, where he gets a maximum \$180 per case. Some clients react to a blind lawyer by asking for another lawyer (the judges have always refused these requests), while many are humbled by Robert. Having handled hundreds of cases, Robert has as many stories to tell. On one occasion, he was called to the jail to meet his client. The deputy informed him that the inmate had tears on his face. Upon meeting the client, Robert informed him that it was okay for him to cry, and that crying is not a sign of weakness. It turns out that the tears were

I say “get up” rather than “wake up” because some nights he doesn’t sleep at all due to non-24 sleep disorder. This is a common condition of the blind, whose circadian rhythms are off because their bodies can’t tell night from day. Because the medications for this are expensive, he deals with it by drinking energy drinks and napping when he can. When he does sleep, he often dreams in color from his subconscious memories of the days of his early youth, when he could see vague images at close range. Robert has been blinded twice; once at birth and again, more severely, as a teenager.

He lives alone in a house with his cat Midnight and his current Seeing Eye dog, Justice. Justice is a docile black Labrador, whose primary job is obstacle avoidance. He is to follow Robert’s commands except when to do so would endanger them, such as when oncoming vehicles are bearing down. This is known as “intelligent disobedience.” “It is very stressful on a dog to disobey,” says Robert. In fact, “Justice” is the alter ego name of his Seeing Eye dog. “I have withheld his real name because of the distraction that may occur if people address my dog by name. One should not address or distract a Seeing Eye dog,” Robert explains.

So, after Robert’s 5 a.m. arising, Justice is let out in the yard to do his business while Robert hops on the treadmill for a morning run. Then the animals are fed. To Midnight’s dismay,

tear tattoos, with each tear representing a person the inmate had killed. The blind don't judge people on their appearance. "I remember my first criminal appointment case, a DWI," Robert says. "The prosecutor was Tom Velez, who reviewed the videotape with me. He suggested that my client might plea to a lesser offense of obstructing a highway. I will always remember Tom's professionalism. Most of the local prosecutors I have worked with are total professionals like that."

In addition to his criminal defense work, Robert handles family law cases and some basic estate planning. Robert is a volunteer member of the Coast Guard Auxiliary, and as a qualified U.S. Coast Guard Military Legal Assistance Attorney, he serves as an attorney for military personnel and their families. He is also admitted to practice before the U.S. Court of Appeals for the Armed Forces and is accredited by the U.S. Department of Veterans Affairs. In one case, he was able to obtain military benefits for a four-year-old child born out of wedlock whose military father was cremated before any DNA tests could be done.

Robert was born prematurely on a Saturday morning about forty-one years ago at Shepherd Air Force Base in Wichita Falls to parents Debra Dittman and then-Master Sergeant Charles Dittman. At twenty-five weeks' gestation and only 1½ pounds, his chances of survival were slim. A Catholic priest was called in and gave baby Robert last rites. Due to the prematurity of his lungs, in order to save his life, baby Robert was given oxygen therapy. A side effect of the extra oxygen can be Retinopathy of Prematurity, or ROP, which is damage of the retinal blood vessels, scarring, and retinal detachment that can cause blindness. This is what happened to Stevie Wonder, and it happened to baby Robert. At about 10 a.m., the hospital

commander took Robert's dad out to the hospital parking lot and gave him a shot of whiskey. Sergeant Dittman was told that Robert needed to be air-evacuated to Wilford Hall Medical Center in San Antonio, but due to the expense, it could not be authorized unless the baby could survive until noon. Well, after a couple of gut-wrenching hours, baby Robert made it until noon and made the trip to San Antonio, which ultimately became his home town.

In elementary school, Robert's teacher would write letters and numbers in a large magic marker on a piece of paper, which Robert would hold near his face so that he could make out the shapes. He began (reluctantly) to learn braille in the second grade. In second grade, while in the Schertz-Cibolo school district, the principal informed Robert's parents that a blind child should not be in public school, and that Robert should be put in a special school. But a principal at another school in the district, Marion Dolford, said that he would take young Robert at his school, Schertz Elementary. So Robert took regular classes, supplemented by sessions with his teachers Debra Thompson and Linda Halleran, who were certified in training the visually impaired. Years later, on Principal Dolford's family's request, Robert was able to repay the favor, successfully arguing that a new district educational administration campus should be named Marion Dolford Learning Center.

Then young Robert joined the Boy Scouts, and ultimately became the first blind Eagle Scout in Bexar County. "My Eagle Scout project was providing leadership to my troop, which collected 400,000 pounds of food for the San Antonio Food Bank," he says. Through scouting, he learned International Morse Code, and became a licensed amateur or "ham" radio operator, and he is still a ham radio operator today.

For middle school, Robert attended Texas School for the Blind and Visually Impaired, a public boarding school in Austin. He needed immersion training there to perfect his braille, social, and functional skills as a blind person. While there, he bested another boy in a fight ("he was older and less blind than me," adds Robert). The other boy's family complained, and Robert was ordered to serve three months of after-class detention. Not unlike an after-school TV special, then-principal Bill Doherty told him, "I'm going to teach you how to put those hands to good use." So Robert was taught guitar during those detention sessions. Today, he can be found singing and playing traditional Irish songs and original tunes as a member of the Harp & Shamrock Society through his alter ego, Robert Doyle (all legit superheroes must have an alter ego). In addition to guitar, Robert plays bugle and, that most Irish of instruments, the penny whistle. "I learned all the old Irish songs from my grandmother," he says. "I love accents." Then he breaks into a Robin Williams-esque monologue, giving a hilarious mock jury argument in Irish, British, and Russian accents. The guy could do voice-work for *The Simpsons*.

Robert wanted to participate in sports, and wrestling was a good fit. His mother, fearing injury, was not enthused, but acquiesced. Robert did quite well, wrestling both blind and sighted opponents. Small and wiry, he wrestled at a weight of 103 pounds as a high school sophomore. After his sophomore year, while training in Colorado Springs for the 1996 Olympics, he was wrestling a sighted opponent and got thrown off the mat, hitting his head on the hard gym floor. This immediately caused retinal detachment, and in an instant, his vision went from vague images to laser light show. "In a way, things became easier for me after the accident, because I no longer had to try





to use my eyes," he says. After the accident, Robert continued to wrestle and remain active. He has been water skiing. He has skydived at 10,000 feet and has been bungee jumping. If he could only see how scary that looks . . . but hey, Daredevil's tag line is *The Man Without Fear*.

Ever since he was a GI Joe-playing child, Robert has always been fascinated with the military. He was denied admittance into his high school ROTC, only to become admitted to the U.S. Army and U.S. Air Force ROTC in college. He has been a Squadron Communications Officer in the Civil Air Patrol, a U.S. Marine recruiter, and has held several positions in the Coast Guard Auxiliary. In the Coast Guard Auxiliary, he is currently a Vice Commander and Chief of Staff for a division, Legal Assistance Attorney, and a Judge Advocate General assigned to the District 8 active duty legal office.

In 2002, he served on the Coast Guard Cutter *Dallas*, where he had the advantage over his fellow Coasties (who were blindfolded) in an escape drill simulating a smoke-filled ship. In an underwater helicopter egress drill, he excelled in extricating himself from being strapped in an upside-down water-immersed simulated helicopter in total darkness while many of his sighted colleagues were understandably freaking out. He is the only blind person to complete Coast Guard

reserve basic indoctrination training, which is a two-week series of physical and mental challenges for former service members, police, and firemen. And you're probably familiar with the drill where a blindfolded service member has to disassemble and reassemble his weapon. Piece of cake for Robert, thanks to the Marines. Tying knots? Check that, too, thanks to the Scouts.

For over a decade and a half, Robert has tried to join active duty military. However, even though this has not happened, he has served for over twenty-three years as a volunteer, and his assignments have been predominately active-duty military units. "I don't wear sunglasses all the time like some blind folks, but when I do, it's these," he tells me, whipping out his *Top Gun*-style aviators. He even wrote to NASA in an effort to become an astronaut.

After graduation from the University of Texas at San Antonio, Robert worked for the U.S. Department of Defense, the U.S. Department of the Air Force, and the San Antonio Lighthouse. Looking for a career change, he arranged to take the Law School Admissions Test orally (if you remember some of the complex analytical reasoning questions, you can appreciate how difficult that was) and sent his scores to St. Mary's University School of Law. His LSAT score was slightly under the admissions level for St. Mary's, but based on his character, he was selected for the St. Mary's summer school enhancement program, a one-month law school boot camp with a midterm and final exam to see how the law school hopefuls would perform in law school. Out of the fourteen classmates, five were chosen for admittance, including Robert.

"St. Mary's was good to me," he says. The school purchased a braille display, a braille embosser, and screen reading software for him. An agreement was reached with the book publishers to obtain his books in MS Word so that he could listen to the books using the screen reading software. In class, he took notes on a keyboard and was given his final exam questions on a listenable MS Word document. "By the grace of God and St. Mary's, I was able to go to law school, and I can't be thankful enough for that," says Robert. At Robert's law school graduation, his then-Seeing Eye dog, Snickers, was given special recognition, since Snickers attended all those classes with Robert.

How does a blind person prepare for the bar exam? Robert got DVD copies of the preparation course materials and listened to them every day. His friend, attorney Melissa Lesniak, who had passed the previous July exam, helped him study. Robert says "I owe Melissa my thanks; in our profession, we should take care of each other, and Melissa took care of me. For three days, we did 200 multi-state and 25 essay questions together." Robert petitioned for and was granted extra exam time in order to conduct the exam orally. Robert recalls, "My bar exam was four twelve-hour days. We were put in a separate room where you could not leave. It was me, an attorney who volunteered to read the questions to me, a court reporter to take down my answers, and a proctor from the board of law examiners. I would listen to the questions, compose the answer in my mind, and stand up and recite the answer. I stood up because it kept me awake, and my professors always told me that lawyers should think on their feet." A few weeks later, just before the pass list was published, Robert received a personal phone call from Kristin Bassinger of the Board of Law Examiners telling him that he had a passing score. A few weeks later, he opened up his solo practice.

So what are Robert Dittman's superpowers? A photographic memory by someone who can't see photographs. By necessity he has to remember how to find his way home, to the office, to the courthouse, the jail, around parameters of a room, and a myriad of other places. He must memorize evidence, statutes, and legal concepts on the fly. He recites for me the admonishments for a plea that he tells his criminal defendant clients, then, just for fun, has me google statutes and he tells me what they say. A superior imagination? He must conceptualize things in his mind that he has never seen, where others can simply visualize them. A little indestructibility? When you have to feel your way around, there are the constant little injuries from bumping into things and getting fingers pinched and burned. Humanity? "Laughing is better than crying, and I do both frequently," he says. "One of my favorite gags is asking someone if they can help me find my car keys." A healthy level of extroversion? Wherever he goes, Robert has to speak into the void to people he can't see. He has to ask strangers for directions and assistance from time to time. Imagine being blind and getting to the airport and catching a plane (Robert has independently and frequently traveled internationally). Shrinking violets need not apply. Appreciation and gratitude? This one is quite impressive. Robert can name all of his teachers from school. He has either on speed-dial or in his head the phone numbers of his visually impaired teachers, his Coast Guard supervisors, Justice's trainer, his eye doctor, and others who have helped him along the way. He calls several of them so that they can tell me a story for this article, like an episode of the old TV show *This is Your Life*. Persistence and gumption? He's lost count of the eye surgeries he's had

(he thinks about twenty) and after each one, he's still blind. Despite these setbacks, he soldiers on. His whole life, he has been told he can't do things, and he does them anyway. Robert tells me, "My greatest asset is enthusiasm and motivation. I want to convince people that I have something meaningful to contribute." And that's pretty doggone super.

Post-Script

In addition to his lawyer work, Robert is also a motivational speaker. In 2018, Robert was knighted and rose to the rank of 4th Degree, Order of the Knights of Columbus, Holy Roman Catholic Church. He can be reached at robert@robertdittmanlaw.com and 210 299-7658, and would love to hear from you. In addition to all of the people mentioned in this article, Robert would like to express his thanks to receptionist Alex Garcia and manager Cynthia Salazar-Kelley at the Riverview Towers, to the many professors and staff at St. Mary's School of Law, to the service members of the U.S. Armed Forces, and to all the professional colleagues he's known over the years in the Texas Bar. Seeing Eye is a registered trademark of The Seeing Eye, Inc. Dogs trained by other organizations are called guide dogs. Marvel superhero Daredevil's alter ego, Matt Murdock, is also a Catholic Irish-American blind lawyer. ❖



Steve A. Peirce practices business bankruptcy law in the San Antonio office of Norton Rose Fulbright. He can be reached at steve.peirce@nortonrosefulbright.com and 210 270-7179.



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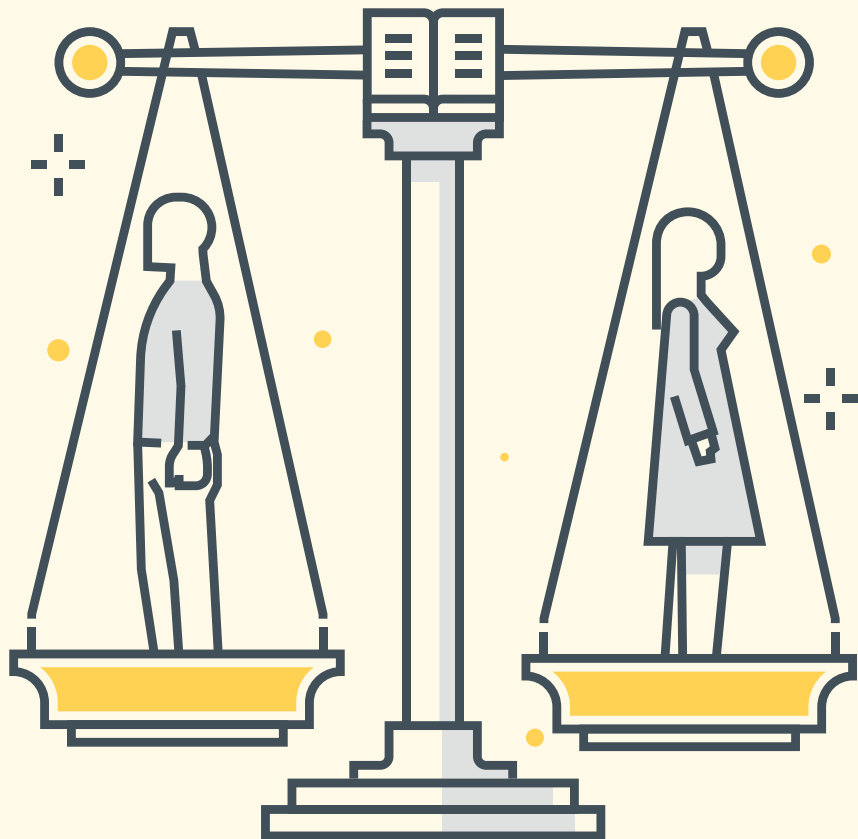


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A History of Divorce

By Harry L. Munsinger, J.D., Ph.D.



Divorce has existed since humans began forming pair bonds and raising children together. Among hunter-gatherer tribes, divorce was probably informal compared with modern practices, but we have no solid evidence about how they terminated long-term sexual relationships. Divorce among farming, ranching, and industrialized societies was more formal, but the rules, rituals, grounds, and ease of getting a divorce have varied enormously throughout history.

Divorce in Ancient China

Traditional Chinese culture discouraged divorce, and even today under Communist rule couples need permission from their employers or neighborhood committees before they may dissolve their marriage. Divorce in ancient China could be by agreement or state-mandated annulment, or a husband could divorce his wife for cause. The only formal requirement for a consensual divorce was for the husband to write a note to his wife stating that he wanted a divorce. Chinese marriages were annulled by the state when a wife committed a serious crime against her husband or his family. Finally, a husband could divorce his wife for lack of filial

piety, failing to bear a son, adultery, gossiping, contracting a disease, or committing theft.

Under Communist rule, divorce was made easier, and women were permitted to divorce their husbands for cause. Divorce has increased recently, causing concern within the Chinese Communist government. To lower the divorce rate, marital counselors are being trained to “fix” broken Chinese marriages. A Chinese man cannot divorce his wife if she is pregnant or within a year after she gives birth to a child. However, a Chinese woman can get a divorce while pregnant if she wishes. The current divorce rate of about 13% is higher in large cities than in rural areas. Men usually receive custody of the children, and divorced women have trouble finding a job. Spying on a spouse is condoned in China, and many divorces are triggered by such investigation.

Code of Hammurabi

Western records of divorce begin with the Code of Hammurabi around 1764 BCE. Men could divorce at will. The major cause of divorce was infertility, but in such cases, the husband was required to return the wife’s dowry. Divorce was most often initiated by a husband, but wives were allowed to divorce because

of abuse or neglect. In such cases, the woman had to prove conclusively that her husband had abused or neglected her before she could get a divorce.

Women had the right to divorce their husbands for desertion, neglect, and incompatibility—not unlike modern divorce laws. The Code allowed a woman who quarreled with her husband to say, “You are not congenial with me”; present evidence to a tribunal; and receive a divorce. If she was guiltless, the wife could take her dowry and return to her father’s house. If she was not blameless, the consequences could be severe. A woman who committed adultery was drowned along with her lover.

Despite relatively liberal-seeming divorce laws, couples generally stayed married for life—even if their marriage was unhappy—because of the stigma associated with divorce. A woman who wanted to avoid a public divorce deserted her home, husband, and children.

Divorce in Ancient Israel

Ancient Hebrew law, as described in the Bible, is vague about the details of Jewish divorce. Adultery carried a penalty of death for both participants. Because children were important, if a wife was barren, her husband was encouraged to take a second wife.

Widows often married their husband's brother, and widowers married their dead wife's sister. The husband was master of his home, but the wife had a right to financial support during the marriage. To be certain of paternity, sexual access to Jewish women was strictly controlled in ancient Israel because husbands wanted to believe the sons who would inherit their wealth were genetically related to them. Divorced men and women could remarry in ancient Israel, and Jewish women were protected by a marriage contract that specified her property rights upon divorce or death of her husband. Under Talmudic law, a Jewish woman could divorce her husband if he was impotent, if he falsely accused her of adultery, if he had a disease, or if he deserted her.

Ancient Greek Divorce

Divorce in ancient Greece was easy for men—they simply sent an unwanted wife back to her father's house. A husband could easily divorce his wife for adultery or the inability to bear children. Women also had the right to dissolve their unions, but a Greek wife or her father had to initiate a formal proceeding and bring evidence before a court to obtain a divorce. Although it is commonly assumed that divorce was frequent in ancient Greece, that does not seem to have been the case. Men divorced their wives primarily to make more advantageous marriages. Adultery was grounds for divorce in ancient Greece, although a Greek man thought twice about divorcing his wife if she brought a large dowry to the marriage because he was obligated to return her dowry or pay 18% interest on the funds, if he divorced her.

Divorce in Ancient Rome

The earliest recorded case of divorce in ancient Rome involved a patrician who divorced his wife because she was barren. Roman law also allowed men to divorce their wives for drinking wine, going to a public place of entertainment without consent, and other acts of moral perversity. A Roman husband had no duty to support his wife after a divorce for cause. Later, when women gained the right to own property, they could sue for divorce, as well. Marriages between Roman citizens were a private partnership formed by mutual consent, so when affection waned, the couple

could divorce by giving the spouse notice or declaring before witnesses that they wanted a divorce. Roman law did not require a judicial inquiry into the causes of divorce.

Children belonged to the father, and there was no community property in Rome. The only asset to argue about was the wife's dowry, which generally had to be returned to her family if the husband initiated the divorce. A woman who brought a large dowry into a marriage had considerable power because her husband might face financial difficulties if he initiated the divorce and had to return her dowry. If the wife initiated the divorce, the husband was allowed to keep $\frac{1}{3}$ of her dowry for each child, up to three. If the wife committed adultery, the husband could retain another $\frac{1}{3}$ of her dowry in addition to the fraction for each child. Husbands could deny their divorced wives access to the children. Some Roman women won custody of their children because the father was declared "wicked." No matter where the children lived, both Roman parents were financially responsible for their support.

The Justinian Code, passed in 449 BCE, allowed women to divorce if they proved their husband had plotted to murder them, whipped them, or brought prostitutes into their home. Around 420 BCE, divorce laws in Rome were made more restrictive, and a wife had to prove her husband was guilty of vice or forfeit her entire dowry to obtain a divorce.

How the wife's dowry was divided and who could have access to the children could be contentious issues in a Roman divorce. Under Emperor Augustus, a husband was required to divorce his wife if she committed adultery, and she had to forfeit $\frac{1}{2}$ her dowry and $\frac{1}{3}$ of any other property she owned if found guilty.

By around 300 BCE, Roman citizens were becoming concerned about the high incidence of divorce and its impact on children. In the reign of Constantine, divorce could only be obtained by a wife if she could prove her husband was murderous, a preparer of poisons, or a disturber of tombs. Otherwise, if a wife asked for a divorce, she lost her dowry and was exiled to an island for life. A husband could only divorce his wife if he proved she was an adulteress or a preparer of poisons, and he was required to return her dowry as part of the divorce. If the husband remarried, the wife could invade his home and take

the new wife's dowry. If both parties agreed to the divorce, the new laws had no effect on their divorce.

Marriages could be declared void under Roman law if contracted under mistaken beliefs, such as when the wife turned out to be a slave rather than a free woman. In these cases, the innocent party was entitled to retain custody of the children. The husband was entitled to keep the children in almost all cases, even if he was the guilty party. Later, during the era of Christianity, a Roman woman wishing to divorce her husband without good cause was obligated to enter a monastery, and her property was divided among the Church and her children. These divorce laws enriched the Church and brought many new members into monasteries, but the more restrictive divorce laws created so much discord among Roman citizens that Justinian's successor repealed them and reinstated divorce by mutual consent. If a spouse became insane, the partner could submit an application to the Emperor for a divorce on the grounds that the marriage has ceased to exist because, if the insanity had occurred prior to marriage, the union would have been void.

During later centuries of the Christian Roman Empire, there was intense competition between Emperors and the Pope over the right to control marriage and divorce. Roman Emperors sided with their citizens and upheld the right to divorce by mutual consent, but Church authorities wanted to restrict the rights of Romans to divorce. Roman courts looked at fault when granting a divorce. If a spouse was guilty of perverse morals, the courts would require him or her to forfeit property to the innocent spouse. Roman courts also exercised jurisdiction over the children in contested divorces, deciding where they should live and requiring both parties to contribute to their support. If the parties were equally guilty of moral perversity, the courts left them in possession of their own property and granted a divorce.

Roman Catholic Divorce

Christian authorities criticized Roman divorce customs when the Catholic Church became the official religion of Rome. Christian leaders argued that divorce was immoral. Catholic scholars believed celibacy was a superior spiritual state to marriage, and that it was better to be married than

commit the sin of fornication. According to Catholic teachings, women and sex were the source of original sin. Some early church authorities wrote that fornication was grounds for divorce, although they could not agree on exactly what constituted fornication. Some Catholic scholars believed a husband had the right to divorce his wife for adultery, but that she had no right to the same remedy. Early Christian doctrines had a strong influence on divorce laws throughout Europe. In the fourth century, St. Augustine and others proposed abolishing divorce, but centuries passed before this happened. Charlemagne introduced strict marriage and divorce laws throughout the Holy Roman Empire during the ninth century, in return for Papal blessing of his divine right to rule.

Once Constantine converted to Christianity in the fourth century, Roman Emperors began to borrow from church doctrine in forming their secular laws about marriage and divorce, and the church gained more control over marriage and divorce. Early Christian Emperors began restricting the rights of women to obtain a divorce and limiting the grounds of divorce to serious crimes. For several centuries after Rome adopted the Catholic religion, divorce by mutual consent was allowed. Under Justinian Law, a woman could divorce her Roman husband if he committed adultery in the same town in which they lived, or if he committed murder, fraud, sacrilege, or treason. However, a Roman woman had no right to divorce her husband if he was abusive. If a husband abandoned a wife, she was required to wait ten years before she could divorce him.

Catholic authorities required a celibate priesthood because they believed celibacy to be a superior spiritual state. They also believed that celibacy and virginity were ideal states for all believers, that sex was sinful, and that the only acceptable avenue for sexuality was to produce children within a marriage. St. Augustine believed an innocent spouse who divorced his or her spouse for adultery should be allowed to remarry because the adulterer could be considered civilly dead since, according to Biblical teaching, adulterers should be stoned to death.

For centuries, Catholic doctrine was flexible about penitential discipline toward matrimonial offenses, especially adultery. For example, if a married man

Annulment was a judicial declaration that the marriage never existed, while divorce dissolved a valid marriage.

had sex with a virgin, his penance was one year on bread and water and sexual abstinence for eighteen months. Some penances seemed similar to outright divorce. For example, Pope Clement I (35 CE–99 CE) noted that a legal marriage could be dissolved if the parties agreed not to remarry. However, he prescribed excommunication for any man who divorced his wife and remarried. There were differences in how Catholic doctrine was enforced between the Eastern and Western Roman Empires. Citizens of Eastern Rome and the Germanic states were allowed to divorce on grounds of adultery or mutual consent, or even unilaterally on occasion.

The Council of Trent firmly established the doctrine of indissolubility of marriage in the 1560s, after generations of debate and uncertainty. Part of the uncertainty about whether divorce was allowed derived from the different types of dissolutions available under canon law. The three types were complete dissolution of the marriage, annulment, and judicial separation. Whether a divorced Catholic could remarry was subject to varying restrictions over the centuries. For example, many legal codes forbade the remarriage of a woman for nine months after her divorce, to determine the paternity of any child she produced during that interval. Another restriction passed in a few countries was a permanent bar to remarriage of a spouse guilty of adultery.

Annulment was a judicial declaration that the marriage never existed, while divorce dissolved a valid marriage. A prominent example of annulment was the dissolution of King Henry VIII's marriage to his first wife, Catherine of Aragon. Henry was granted an annulment under an arcane interpretation of canon law because the Church found matrimonial impediments to the validity of his marriage. Consanguinity (genetic relationship) or affinity (marital relationship) were ways to prove an impediment and gain an annulment. Another impediment was spiritual impediment, where one of the spouses was the godparent of the other. Girls could not legally marry before twelve years of

age or boys before fourteen years of age, so marrying too early was grounds for annulment. If a male was impotent, that was a bar to a valid marriage. Consent was necessary for a valid marriage. Consequently, insanity and the resulting inability to give informed consent was an impediment. Finally, if the marriage had not been consummated, it could be annulled.

Judicial separation was based on a fault or offense by one spouse against the other. Judicial separation did not dissolve or invalidate a Catholic marriage, but the separated individuals were not obligated to live together, as they must under canon law. Even though they lived in separate houses and maintained separate economic accounts, they were expected to be sexually faithful so long as either spouse lived. Separated individuals could not remarry until their spouse died. Unauthorized separations were considered a sin under canon law. Another way to end a marriage within the Catholic Church was to take a vow of chastity, which effectively dissolved the marriage.

Strictures against divorce could be avoided by purchasing dispensations from the Church. The sale of dispensations became a very lucrative practice among the clergy and a source of revenue for the Church, which could not levy taxes directly. In the struggle between secular rights and Church dogma, the people had little or no voice.

Divorce in the Middle Ages

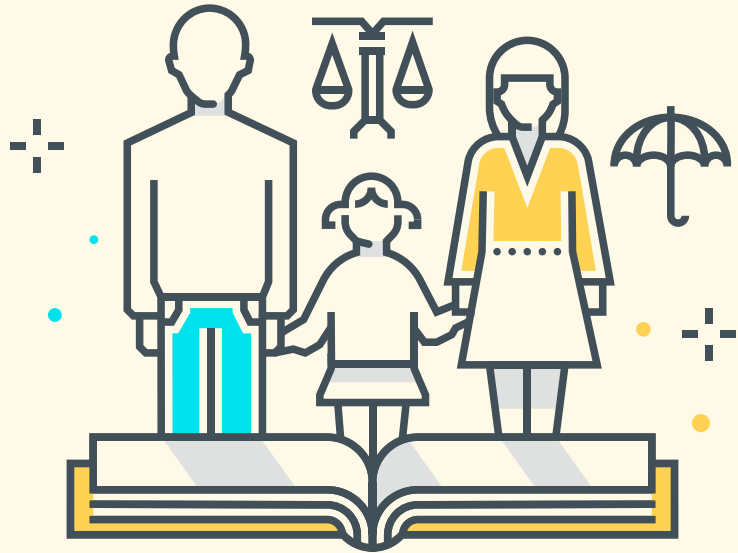
During the eleventh century, Pope Gregory VII excommunicated all Eastern Orthodox Christians because he was competing with the head of the Eastern Catholic Church for Papal power. The Eastern Orthodox Church never adopted the view that celibacy is the preferred way of life for Christians, so Eastern Priests were allowed to marry and divorce. Eastern Orthodox divorces required a judicial trial, and courts allowed divorce on grounds of impotence, attempted murder of a spouse, long absence, abortion, taking monastic vows, treason and other crimes, adultery, and religious differences between the spouses.

As the authority of Western Roman Emperors declined, strong Popes extended their authority over much of secular life. Emperors such as Charlemagne and William the Conqueror willingly ceded authority over marriage and divorce to the Pope in return for his blessings of their divine right to rule. The Church gained broad control over the daily lives of Catholics and Bishops gained the power of excommunication to enforce their rulings. Monks sworn to celibacy made rulings about people's sexual problems and often found this power quite profitable. Even though Catholic marriages were indissoluble, the clergy developed ways to dissolve marriages by judicial separation or annulment. Once the spouses were separated, the Church paid little attention to what they did. If they remarried or lived in adultery, that was considered a minor sin that could be handled by penance. The discretion of Bishops and the Pope over marriages and divorce was practically unlimited, and the Pope or Bishops often contrived to allow rich and powerful members to divorce and remarry within the Church. During the Inquisition, a husband or wife could obtain a divorce by accusing his or her spouse of heresy. Since the accused were almost always put to death, this effectively gave the accusing spouse a divorce.

The Reformation

The Protestant Reformation was a reaction to the financial excesses of the Catholic Church. Martin Luther objected to the corrupt dispensations and indulgences that Bishops and the Pope offered wealthy families to avoid restrictions on divorce and remarriage. Luther argued that divorce should be available on limited grounds. Within a few years, Protestant countries such as North Germany, Switzerland, Holland, England, Scotland, and the Scandinavian countries rejected canon law and began to allow divorce on limited grounds.

Reformers proposed that marriage is a social contract, that divorce should be available on grounds of adultery and desertion, and that a judicial trial was not necessary to dissolve a marriage. A typical case of desertion involved a couple who were married in a Catholic country. When the husband became a Protestant, he fled to Holland, fearing the Inquisition. His wife remained faithful to her Catholic religion and



refused to move because she feared their children would be raised as Protestants. The wife received a separation on grounds of heresy, and the husband applied to the Supreme Court of Holland for a divorce on grounds of desertion. The Dutch court granted his divorce, allowed him to remarry, and ordered his ex-wife to restore his property.

Even though marriage was secular and divorce was available in many Protestant countries, lawyers trained in canon law justified divorce on theological grounds. Any deviation from Scripture was condemned as heretical. Even when divorce became more readily available, it was associated with public disgrace. Reformers rejected the idea that marriage was indissoluble, but they allowed the couple no voice in the matter. The divorce trial became a prosecution of one spouse by the other, much like American divorces prior to the introduction of no-fault divorce laws in the United States. Reformers rejected the idea that marriage is sacred, but they placed sufficient legal and procedural barriers in the path of divorce to make getting out of a marriage difficult and expensive.

The lot of women under the Reformers was little better than under canon law. Women were expected to endure abusive marriages, and they had no legal rights to their children. A wife had no legal personality before the courts, and her husband had the right to dispose of all their property. A woman was obliged to follow her husband, and if she did not, she could be accused of desertion, and he could divorce her. If the wife committed adultery, the

husband could sue her for divorce and damages. Even the refuge of the convent was no longer available, if she wished to divorce her husband.

The French Revolution

Prior to the French Revolution, divorce was almost unknown in Catholic France. The Revolutionaries proclaimed that marriage was a social contract and could be broken by mutual consent. Divorces were freely granted, and the courts did not inquire into the cause. When Napoleon gained power, he asked a committee of lawyers to prepare his famous Code. Many members of the committee were trained in canon law and wanted marriage to remain indissoluble, but Napoleon insisted that divorce by mutual consent be available. He believed divorce should be private and honorable, rather than public and squalid. Napoleon argued that most couples married young and often made mistakes that should be corrected by divorce. Napoleonic Law also allowed divorce on the grounds of cruelty.

Under Napoleonic Law, civil divorce procedures were complex and expensive, so divorce by mutual consent was difficult. The courts required the consent of the living parents of the couple who wanted to divorce, and the couple had to assure the court that they had made arrangements for the care and custody of their children and the division of their assets. The divorcing parties were required to appear in court three times before they were granted a divorce. Divorce in France was not allowed during the first two years of marriage,

after twenty years of marriage, or when the wife turned forty-five years of age, even if she wanted the divorce.

Divorce could be obtained on grounds of adultery, cruelty, and the commission of certain crimes. Generally, the innocent spouse received custody of the children. The Napoleonic Code, despite its many restrictions on divorce, was a major change from canon law and the restrictive marital laws of the Reformers. Divorce by consent and divorce after three years of judicial separation became embedded in the laws of many countries. After the fall of Napoleon, canon law was reinstated and not abolished until 1884, when the French civil code was introduced.

English Divorce Law

Prior to the Norman Conquest, divorce by mutual consent, desertion, adultery, impotence, long absence, and captivity was available in Saxon England. William I introduced canon law and displaced ancient English laws borrowed from Rome. After Henry VIII established the Church of England to replace the Catholic Church, divorces were granted on grounds of adultery, and the parties were allowed to remarry. However, it was centuries before the English Parliament passed the Divorce Act of 1857, giving jurisdiction over divorce to the English Supreme Court. Under this new statute, a husband could obtain a divorce on grounds of adultery and could sue for damages. However, a wife could only divorce her husband if she proved adultery, desertion, cruelty, bigamy, or incest. Additionally, she could not sue for damages.

American Divorce Law

Because the American colonies had no established church, many did not follow canon law. Marriage in New England was based on a contract signed before a civil magistrate. The right to divorce was recognized, and adultery was the main ground, although some colonial authorities also recognized desertion, cruelty, and impotence as valid grounds for divorce. Among the Southern colonies, canon law was generally observed, and divorce was not available until after the American Revolution. In 1782, the Articles of Confederation granted states exclusive authority over marriage and divorce. State laws were strongly influenced by court decisions because judges were allowed wide

Divorce laws have varied enormously throughout history and across different cultures. In each instance, however, the laws highlight universal concerns about morality, the stability of families, and the distribution of property.

discretion to grant divorces. There is no single divorce law in America because each state has its own set of statutes. Many states follow English common law and divide property at divorce according to whose name is on the title, while community property states presume that all property owned at the time of divorce is community property to be divided equitably.

Divorced men and women in early twentieth-century America were considered morally suspect, especially divorced women. After all, it was the woman's job to protect the morality of the family, and divorce was seen as an ethical failure. During the 1920s, women's roles began to change radically as young, educated females began to pursue careers rather than marriage and family. Many of these women were not satisfied with the traditional status of women. They wanted equality, opportunity, sexual fulfillment, and love within their marriage. Because they were financially independent, these women did not need husbands to support them; and when they married, they intended to continue working while rearing their children. Family size was limited by the increasing availability of effective birth control methods. However, even if women worked outside the home, they were still expected to be the homemaker and caretaker of children. These expectations placed a serious burden on educated, young, working women, and many rebelled. They often filed for divorce or did not marry at all.

Conclusion

Divorce laws have varied enormously throughout history and across different cultures. In each instance, however, the laws highlight universal concerns about morality, the stability of families, and the distribution of property. While the specifics vary across cultures, the general trend has been toward more liberal divorce laws and equitable treatment of male and female spouses. Many

consider these positive developments, but the increased ease and frequency of divorce has others worried about social consequences and has even led some to question whether marriage is becoming obsolete in modern Western society. ❖



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A close-up photograph of a person's hand holding a white, spiral-bound notepad. The notepad has the words "we too" written in black cursive. The person is wearing a brown jacket. The background is blurred, showing other people in similar jackets.

Bankruptcy in the *#MeToo* Era

By Natalie Wilson

By May 2018, it was not surprising that The Weinstein Company had been forced to file for bankruptcy protection. In the months preceding the filing, dozens of women had come forward to accuse its co-founder, Harvey Weinstein, of sexual harassment and sexual assault. For years, it had been widely rumored that Weinstein took full advantage of Hollywood's "casting couch" culture. As the tidal wave of allegations against Weinstein and others continued to swell, the #MeToo hashtag went viral, signaling how widespread these egregious abuses of power were. Similar scandals rocked Hollywood; television, print, digital, and radio media; politics; and even the federal judiciary. Given the number of potential claimants with significant damages claims, it is also no surprise that the companies facing these crises

sought bankruptcy protection to consolidate the disputes into a single forum and to limit the economic impact of the claims.¹

The obvious result of these bankruptcy filings is the detrimental impact on the victims of sexual harassment and assault in the workplace. In many cases, those victims will receive a tiny percentage of the damages they were awarded, if they receive any compensation at all. In most cases, the bankrupt business will not receive a discharge at the end of the bankruptcy case, but as a practical matter, there is unlikely to be an operating entity from which any victims can collect the balance of the sums they are owed.

A bankruptcy filing also raises the potential to avoid pre-petition settlements with victims who came forward earlier.

For example, if the company made settlement payments to another victim within ninety days of the bankruptcy filing, those payments could be recovered by the debtor or the bankruptcy trustee as a preferential payment under 11 U.S.C. § 547. In *Swope v. Grove (In re Gamma Ctr., Inc.)*, 2012 WL 4435117 (Bankr. N.D. Ohio Sept. 24, 2012), the Bankruptcy Court made summary judgment findings in favor of the Chapter 7 Trustee on all elements of the Trustee's preference claim, except it found the summary judgment evidence was insufficient to determine that the transfer had occurred within the ninety days before filing. Arguably, settlement payments could also be recovered as fraudulent transfers under 11 U.S.C. § 544 or 11 U.S.C. § 548, although there do not appear to be any reported decisions on this issue yet.

In addition to the corporate defendants, victims of workplace harassment may also sue the individuals responsible. Bankruptcy may present several hurdles in those cases, as well. Unlike corporations, individual debtors are generally entitled to a discharge of all pre-petition debts. Although there are categorical exceptions to discharge, such as for child support obligations, none applies to judgment debts arising out of sexual harassment claims. Accordingly, in order to ensure that a judgment debt is not wiped out by the bankruptcy, the claimant would have to file a nondischargeability action against the debtor.

Most commonly, such nondischargeability actions are filed under 11 U.S.C. § 523(a)(6), which exempts from discharge debts resulting from "willful and malicious injury by the debtor." The Fifth Circuit, the United States Districts Courts in Texas, and the Texas Bankruptcy Courts have not yet ruled on this issue, however, and courts around the country are split on whether damages arising from sexual harassment are nondischargeable under this section.

A California bankruptcy court found that a claim for *quid pro quo* sexual harassment was nondischargeable under this section because "intentionally and negatively conditioning an individual's employment terms with unwanted sexual advances is the equivalent of intentionally causing an injury." *In re Dason*, 588 B.R. 537, 544 (Bankr. C.D. Cal.). By contrast, the same court concluded that the claim for "hostile workplace" did not constitute "willful and malicious injury" for purposes of 11 U.S.C. § 523(a)(6) because, under that theory, "the injury. . . is dependent upon the employee's perspective" and "[a]n employer is certainly capable of unintentionally, negligently, or recklessly creating a hostile work environment." *See id.* at 545.

When the sexual harassment claim includes physical contact, the victim can bring a tort claim for battery, which may also be nondischargeable under 11 U.S.C. § 523(a)(6). Because battery is an intentional tort, which requires proving that the tortfeasor intended the conduct to cause injury, a judgment on a battery claim may conclusively establish the willfulness prong of a nondischargeability action under 11 U.S.C. § 523(a)(6). *See, e.g., Palenco v. Roth (In re Roth)*, No. 11-34121-MER, 2014 WL 684630, at *5 (Bankr. D. Colo. Feb. 21, 2014). The same court found that malice was implied under the finding that the judgment debtor had violated Colorado's Anti-Discrimination Act. *See id.*

A careful plaintiff's attorney, mindful that a judgment debtor may file for bankruptcy protection after being found liable for sexual harassment or sexual assault, can thus take steps to preserve his or her client's ability to recover

As more victims of workplace sexual harassment and sexual assault begin coming forward, it is likely that litigation relating to bankruptcy will also increase. Thinking about objections to discharge and possible estoppel defenses early on should be part of every litigant's strategy.

the damages awarded in such judgment. Ensuring that the underlying litigation establishes the judgment debtor's intent to injure the victim will increase the chances of prevailing in a nondischargeability action. Conversely, a prudent debtor's attorney will carefully examine the judgment against a potential client who has been found liable for sexual harassment or sexual assault to determine the chances of having the obligation discharged and evaluating of whether filing for bankruptcy is worthwhile for the potential client.

As discussed above, a bankruptcy filing by the judgment debtor may pose difficulties for a victim of sexual harassment or sexual assault who is attempting to collect on the judgment. But sometimes, it might be the victim's prior bankruptcy case that causes the problem. Upon filing for bankruptcy protection, every debtor is required to file lists of assets and liabilities (called Schedules), which are signed under penalty of perjury. The failure to list a claim for sexual harassment or sexual assault on the Schedules may judicially estop a plaintiff from later pursuing such claims. For example, in a case filed in the Eastern District of Texas, the plaintiff/former debtor was judicially estopped from pursuing undisclosed sexual harassment and retaliation claims where (1) the debtor knew about the claim at the time his bankruptcy petition was filed because he had received an EEOC "right to sue" letter; (2) he had been granted a no-asset discharge; and (3) he had motive to conceal the claim in order to obtain a windfall at the expense of his creditors. *See Estel v. Bigelow Mgmt., Inc.*, 323 B.R. 918, 922-23 (E.D. Tex. 2005).

Judicial estoppel can also be used by a defendant to limit damages in instances where the plaintiff/former debtor represented that the sexual harassment claim was worth less than the damages claimed in a subsequent lawsuit. In July 2018, a district court in Utah dismissed with prejudice a sexual harassment claim, finding that the plaintiffs were judicially estopped from recovering damages because, while the suit was pending, they had filed for bankruptcy protection under Chapter 13, and the plaintiff wife had represented on her sworn schedules that the value of the sexual harassment claim was \$0. The bankruptcy court had accepted that position by confirming a Chapter 13 plan with only nominal payments to creditors, and the district court found that the plaintiffs/debtors had motive to conceal the value of the asset so that they could reap a windfall. *See Peterson v. SCIS Air Sec. Corp.*, No. 2:16-cv-849-DS, 2018 WL 3336600, at *5 (D. Utah July 6, 2018). The case has been appealed to the Tenth Circuit.

The rules of judicial estoppel can have harsh results, but many courts consider that a feature of the doctrine, not a bug. The purposes of judicial estoppel “include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999) (citation and internal quotation marks omitted). Therefore, preventing a debtor who has made false sworn statements about the existence or value of assets from benefiting from those same assets is seen as just desserts. That the result also harms innocent creditors is of secondary concern to protecting the integrity of the bankruptcy process, and one that can sometimes be assuaged by allowing a bankruptcy trustee to pursue the omitted asset for the benefit of creditors. *See, e.g., Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011).

As more victims of workplace sexual harassment and sexual assault begin coming forward, it is likely that litigation relating to bankruptcy will also increase. Thinking about objections to discharge and possible estoppel defenses early on should be part of every litigant’s strategy. ❖



Natalie Wilson is a Shareholder at Langley & Banack, Inc, where her practice focuses primarily on commercial bankruptcy and related litigation.

ENDNOTES

¹In addition to The Weinstein Co.’s bankruptcy, for example, the restaurant group led by Chef Mike Isabella, a former contestant on *Top Chef*, and Bikram Choudry Yoga, Inc., the parent company of the eponymous proprietary yoga practice, both filed for bankruptcy protection following allegations of sexual misconduct.



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Elizabeth Jandt
Facebook (June 14, 2016)

St. Mary's University School of Law Twentieth Woman Graduate

Over the past year, Stephanie Huser, a former student of mine, has helped me with an on-going history project about the early women graduates of St. Mary's University School of Law. Ms. Huser has spent months combing through newspaper archives and other publicly available information, looking for puzzle pieces needed to tell the stories of the law school's first women graduates. I asked Ms. Huser to interview the law school's twentieth woman graduate, Elizabeth Jandt, as part of that effort. Ms. Huser wrote the following profile to share Ms. Jandt's amazing story with our readers.

—Regina Stone-Harris

Elizabeth Jandt

An Attorney of Many Firsts

By Stephanie Huser

As a female law student at St. Mary's University School of Law, I was eager to assist with a project that involved researching the school's first female graduates. As I read through the newspaper and journal articles on Ms. Elizabeth Jandt, it became quite clear, as with so many on the list, that she is a very impressive person. Not only was she the first practicing female attorney in Guadalupe County, but she was also the first female to hold an elected position as County Attorney and defeat a male incumbent in Guadalupe County.¹ She, too, was the first female graduate who was the daughter of an alumnus of St. Mary's University School of Law.

Elizabeth was born and raised in Seguin, the county seat of Guadalupe County, and was one of two children born to Elbert and Thelma McDonnold Jandt. Since the sixth grade, Elizabeth knew she wanted to be a lawyer. When most middle school adolescents were focused on mastering their studies, she was busy plotting which classes to take and what college to attend so that she could one day be a lawyer. Like her father, she graduated from Texas Lutheran College in Seguin and then St. Mary's University School of Law in San Antonio in 1963. Mr. Jandt graduated from St. Mary's in 1936 and was a successful lawyer with his own practice in Seguin, where Elizabeth later worked and practiced. Her mother managed the accounting at the office. Her younger brother, John, was also an attorney,

who later worked as a Fire Marshal for the City of Seguin and retired from the State Commission on Fire Protection. Both parents and her brother have since passed away.

Today, in a quaint, main street office building in downtown Seguin, you can find Elizabeth Jandt working diligently on her clients' cases, fulfilling her duties as magistrate judge for the county, or hammering out the details of her day with Sandy, her office manager of twenty-five years. However, if you are not from the area, you might not know about her impressive background.

Sitting in her Seguin office on a Tuesday morning in July 2018, I learned quite a bit about Elizabeth, but three things really stood out. The first is that her father was her role model and her biggest supporter. He, too, was an impressive attorney. He argued in front of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit. He was also one of the first defense attorneys in the state to try a case involving vehicular homicide. His career, however, never got in the way of his attending every school event she or her brother had. She told me how proud he was when she went to law school, and how he helped her with her County Attorney campaigns.

While growing up and during law school, Elizabeth worked in her father's office, learning the ins and outs of being an attorney. She explained how she started off by stuffing pocket parts, reminding me that there were no copy



Lucille Stubbs, *Seguin's First*, THE SEGUIN GAZETTE, Dec. 18, 1963, at 4-1.



Jandt First Woman County Attorney, THE SEGUIN GAZETTE, May 9, 1968, at 1-1.

machines back then. She drew maps by hand and typed copies of documents, earning enough to pay her law school tuition. She says she was lucky to graduate without debt and feels sorry for today's law students who graduate with a lot of debt.

The second thing that stood out is that Elizabeth was never afraid or reluctant to pursue her goals—even though women were in the minority in the practice of law. When Elizabeth was in law school in the early 1960s, it was very different than today. She remembered being one of very few women in her class. "There was one girl in my class that didn't make it out of the first semester," she recalled. I asked her if she ever felt intimidated or felt like she was treated differently because she was a woman, and she replied, "Not really." She wasn't squeamish when she had to speak in class about criminal cases involving murder or rape because, before attending law school, she had seen it all working for her father's firm. She did recall one professor who refused to pronounce her name correctly, even though she politely corrected him a couple of times. She said that, on her last day, the same professor congratulated her and correctly pronounced her last name. "He knew all along how to pronounce my name!" she said. But that was the extent of it. She was there to learn the law and do her best—nothing else got in the way of her goals.

Just four years out of law school, Elizabeth defeated the incumbent

Guadalupe County attorney of twenty-eight years, Attorney Alwin Pape, in a remarkable upset in the Democratic Primary election. The vote was a clear-cut 2,206 to 1,883 victory. The *Seguin Gazette* captured her feelings about being the first woman in history to ever defeat a male candidate for county office. Elizabeth told the newspaper staff, "You get quite a humble feeling when you realize that so many people trust you. I'm very grateful for this privilege to serve my county."

When I asked her about what made her decide to run, I expected her to say that, because she was a woman, she wanted to gain the respect of her fellow male attorneys. However, she did not say that. She was very matter-of-fact, "It wasn't my first campaign. I actually ran for office right out of law school." She said it had nothing to do with being a woman. Her father told her it was a great way to advertise and get her name recognized for future business. Back in the sixties, attorneys could not advertise like they can now. She did not win her first election, but after winning the second one, she reminisced on how elated and proud she was to serve Guadalupe County.

I found it inspiring and fascinating that, during our entire interview, she never seemed to think of herself as a trailblazer—one of the first women to lead the way for future women lawyers of Guadalupe County. During my interview, I asked her what it was like being the first female in many of her pursuits, and she never once said that

she was cognizant of that. She was more self-aware of being the youngest person in the room, as she was not only the first female county attorney, she was also the youngest county attorney in Guadalupe County's history. I asked her if she encountered any resistance from more seasoned attorneys in the office, and she said her strategy was to treat everyone with respect and refrain from telling anyone how to do his or her job. This strategy served her well. She thought of herself as being there to help—not to boss everyone around.

My favorite part of the interview was when I asked her which of her cases or projects have resonated with her. "Do you remember the UT tower shooter? Do you know the Austin policeman that shot him, Ray Martinez?" I replied that I did, and she said that one of the last things she did before she left office was work on a project with him. He was a retired Texas Ranger at the time, and the Seguin Police Department was trying to eliminate prostitution in the city. The police tried to conduct a sting operation to arrest the individuals involved. However, the officers had a hard time with their operation, so she suggested a plan. She called Ray and offered to pay him out of her "Hot Check Fee" fund, if he could help with an undercover operation. She giggled a little when she said Ray was perfect for the sting because ladies found him attractive. With a little help from a local car dealership, she outfitted Ray with a van that no one in town would recognize. Ray, being a

former Texas Ranger, was able to borrow surveillance equipment, and they set up the sting. As she suspected, the ladies took the bait, and they were able to arrest and charge thirteen or fourteen cases over a ten-day period. The only downside was having to explain to the County Commissioners, who reviewed the budget and expenditures, why there were some out-of-the ordinary purchases coming out of the fund. She explained that Ray had to make the sting believable and, in one instance, had to buy condoms when a prostitute

followed him into a store! She reassured the commissioners that it was all about making the situation believable.

She shared many interesting cases and stories with me. She also spoke of the many great attorneys that she and her dad worked with over the years, including Fred Semaan (a former famous criminal defense attorney in Bexar County), A. A. Semaan (former Bexar County District Judge), Charlie Butts (former Chief Prosecutor for Bexar County), and his wife, Shirley Butts (retired Justice of the Fourth Court of Appeals). "We were not

buddies in the courtroom, but we were good friends outside the courtroom. Business is one thing, and friendship is another," she said.

The third thing that stood out was that Elizabeth has practiced law for more than five decades, which you would not believe if you met her! To most, a thirty-year career is impressive, but fifty-five years and counting sets the bar high. When I asked her, at the end of our interview, if she had any plans to retire, she called out to Sandy smiling. They both agreed that they have tried to cut down her caseload, but more and more cases keep coming in. I got the feeling she was not in a hurry to retire.

In addition to her full workload, Elizabeth is very active in her church and is the President of the Alamo Dog Obedience Club. When I asked her how she became interested in this organization, she said it all started when she took her feisty westie, Beau, in for training. "It all evolved from there," she said. She now oversees the organization and participates in dog shows. Her next project is to train her ten-month-old border collie, Rocky.

With so many accomplishments and her commitment to public service, Elizabeth is an inspiration. Having the privilege to meet and interview her is an experience I will not soon forget, and a motivator when the rigors of law school seem to be getting the best of me! As for Seguin and Guadalupe County, both are lucky to continue to benefit and learn from the trailblazer who is Elizabeth Jandt. ❖



Stephanie Huser is a second-year student at St. Mary's University School of Law. She expects to graduate in 2021. Ms. Huser serves as a Dean's Research Fellow. She has made her former teacher very proud.

ENDNOTES

¹Jandt First Woman County Attorney, SEGUIN GAZETTE, May 9, 1968, at 1-1.

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Fourth Court Update

Right to Counsel in a Parental Termination Proceeding

By Justice Irene Rios

A parent's right to the companionship, care, custody, and management of children is a constitutional interest "far more precious than any property right." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). The Family Code guarantees indigent parents the right to counsel in government-initiated parental rights termination cases. TEX. FAM. CODE ANN. § 107.013(a)(1). The right to counsel includes the right to effective assistance of counsel. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

The Fourth Court of Appeals has previously held that an incarcerated father received ineffective assistance of counsel because his court-appointed counsel did not appear at trial and because the father, "who also was not able to appear because of his counsel's failure to make arrangements with the state-jail facility, was not represented at trial by his appointed counsel or anyone else." *In re J.M.O.*, 459 S.W.3d 90, 94 (Tex. App.—San Antonio 2014, no pet.).

More recently, in *In the Interest of J.A.B.*, the Fourth Court, sitting en banc, examined a claim of ineffective assistance of counsel relating to counsel's absence during a portion of a parental termination proceeding. 2018 WL 5018765, ___ S.W.3d ___ (Tex. App.—San Antonio Oct. 17, 2018, pet. denied) (en banc). The Texas Department of Family and Protective Services filed a petition to terminate Father's parental rights. On the date of the bench trial in the underlying case, Father was not present in the courtroom because he was incarcerated. *Id.* Appointed trial counsel appeared on Father's behalf and announced "not ready," which was overruled by the trial court. *Id.*

During trial, the Department called a single witness—the caseworker—in support of terminating Father's parental rights. *Id.* Shortly after the caseworker began testifying, Father's trial counsel informed the trial court he had an "actual client in a termination hearing" in another court. *Id.* Trial counsel asked to be excused and "come back here very shortly." *Id.* Counsel assured the trial court the hearing could continue without counsel's presence. *Id.* Counsel left the courtroom and did not return until after the Department rested. *Id.* Nevertheless, the trial court granted counsel permission to conduct a brief cross-examination of the caseworker. *Id.* Counsel rested, and no other witnesses testified. *Id.*

The court issued a panel opinion concluding that Father received ineffective assistance of counsel. The Department filed a motion for rehearing, arguing the panel opinion conflicted with the court's opinion in *In re. D.R.R.*, 2017 WL

3044575 (Tex. App.—San Antonio July 19, 2017, pet. denied) (mem. op.), a case in which trial counsel arrived late to trial and was absent during the testimony of one of three witnesses.

On rehearing, the en banc court withdrew the panel opinion and issued an en banc opinion, denying the Department's motion for rehearing and again concluding that Father received ineffective assistance of counsel. *J.A.B.*, 2018 WL 5018765. The court noted that, unlike previous cases in which counsel "wholly" failed to show up for trial, counsel in this case was present "when the case was called, announced 'not ready,' and later briefly cross-examined the Department caseworker." *Id.* at *2. The court further noted counsel's absence for "virtually all of the Department's case, including all of its evidence in support of terminating Father's parental rights, as well as the cross-examination of the Department's sole witness" by the other parties' attorneys. *Id.*

The court agreed Father's counsel was not present for a critical stage of litigation and concluded that Father satisfied the first *Strickland* prong of showing deficient performance. *Id.* at *2-*3. The court further concluded "a presumption of prejudice is warranted . . . in light of trial counsel's absence during a 'critical stage' of litigation" and held that, to the extent this opinion could be construed as conflicting with the court's prior opinion in *D.R.R.*, *D.R.R.* is overruled. *Id.* at *3.

Although the dissent-concurrence agreed with the ultimate outcome of the case, it disagreed with the decision to overrule *D.R.R.* *Id.* (Martinez, J., concurring and dissenting). The dissent-concurrence pointed out that the appellate arguments presented in *D.R.R.* and *J.A.B.* were very different and argued there was no conflict between *J.A.B.* and *D.R.R.* *Id.* Accordingly, the dissent-concurrence would have denied the Department's motion for rehearing without overruling *D.R.R.* ❖



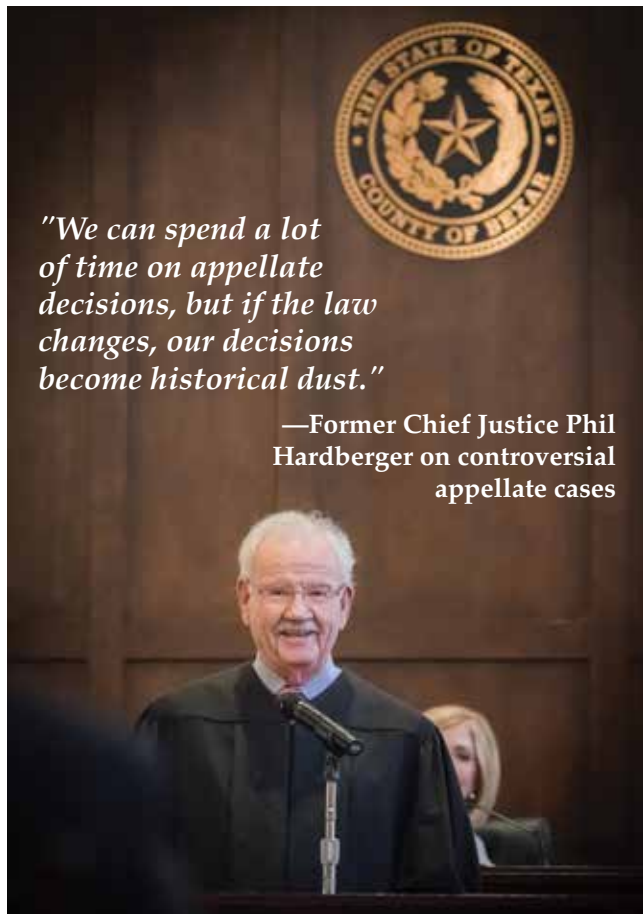
Justice Irene Rios has served on the Fourth Court of Appeals since January 2017. Justice Rios previously served as Judge of County Court at Law No. 10, in Bexar County, for fourteen years. Prior to her appointment to the bench, Justice Rios spent nine years in private practice. She is a Fellow of the Texas Bar Foundation and has served as a Special Master of Major Litigation.

125th Anniversary of the Texas 4th Court of Appeals

"Wouldn't it be nice if every household in America could witness this level of passion, care, thoughtfulness and commitment to justice manifest. It would be a therapy for the transient outrages of the moment," said Dean of St. Mary's University School of Law Steve Sheppard. It was moments like these that emotionally punctuated the celebration of the

125th Anniversary of the Texas 4th Court of Appeals.

Texas' 4th Court of Appeals celebrated with a historical program that highlighted the Court's history, Chief Justices, Justices and interesting court decisions. A full house of guests and dignitaries filled the Bexar County Historical Courtroom on November 27 where Chief Justice Sandee Bryan Marion presided over the ceremony. County Judge Nelson Wolff read a special proclamation from the Commissioners Court. Special presenters included former Chief Justice, Mayor Phil Hardberger, former Chief Justice Alma Lopez, former 4th Court Justice and current Supreme Court of Texas Justice Paul Green and former Chief Justice Catherine Stone.



"We can spend a lot of time on appellate decisions, but if the law changes, our decisions become historical dust."

—Former Chief Justice Phil Hardberger on controversial appellate cases

"There were many 'firsts' in the 4th Court of Appeals in terms of the court leadership that were celebrated as national judiciary milestones. I am proud to see so many judges representing seats from throughout Texas who joined us today to celebrate."

—Keith Hottle, Clerk of the Court, 4th Court of Appeals



"It was an honor to participate in this historic event. The presenters and many of the honored judges are among the many judicial leaders that have influenced our legal careers since the beginning of our practice."

—Sam Houston and Nissa Dunn of Houston Dunn



"This was a great presentation of the history of the court and I always enjoy these opportunities to visit and reconnect with my colleagues."

—Texas Court of Criminal Appeals Judge Bert Richardson



Former Chief Justice Alma Lopez.

Judicial Retirement Open House

Thursday November 29, the members of the San Antonio Bar were pleased to honor Justice Karen Angelini, Judge Solomon Casseb, III, Judge Sid Harle and Judge Tom Rickhoff at their retirement. Each judge was presented with an engraved crystal memento and a proclamation from the Bexar County Commissioners Court.

1. SABA Board with Bexar County Judiciary. 2. SABA President Santos Vargas honors Judge Solomon Casseb, III, for his years of service as a Judge of the 288th District Court and his 45 years of devotion to the profession.



3: From Left: Judge Peter Sakai, Past SABA President Gary Hutton and SABA member Ed Cano. 4. Judge Tom Rickhoff sings a verse of "Leaving on a Jet Plane" while SABA President Santos Vargas honors him on his retirement from Bexar County Probate Court 2 and more than 49 years of loyal public service. 5. SABA President Santos Vargas honors Judge Sid Harle for his years of service as a Judge of the 226th District Court. General Administrative Counsel Melissa Barlow Fisher presented Judge Harle with his 25-year service pin from Bexar County. 6. Past SABA President Justice Karen Angelini and SABA members Lynelle Moore and Lisa Tatum, past State Bar of Texas President. 7. SABA President Santos Vargas honors former SABA President Justice Karen Angelini for her 21 years of service as a Justice for the 4th Court of Appeals and her 38 years of dedication to the profession.

Federal Court Update

By Soledad Valenciano and Melanie Fry

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

If you are aware of a Western District of Texas order that you believe would be of interest to the local bar and should be summarized in this column, please contact Soledad Valenciano (svalenciano@svtxlaw.com, 210-787-4654) or Melanie Fry (mfry@dykema.com, 210-554-5500) with the style and cause number of the case, and the entry date and docket number of the order.

Immigration; Jurisdiction; Removal

United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG (Garcia, O., Oct. 2, 2018).

Noncitizen was indicted for illegal reentry, but the original Notice to Appear (NTA) issued to the noncitizen did not include when or where to appear. After noncitizen's indictment, Supreme Court issued *Pereira v. Sessions*, holding that an NTA must include when and where a noncitizen must appear in order to be valid. Court held that because the NTA failed to include a date and time for removal hearing as required by *Pereira*, the immigration court lacked jurisdiction to order noncitizen's removal; an NTA that fails to include the time and date of the hearing fails to vest jurisdiction for a removal proceeding in an immigration court. Because the immigration court lacked jurisdiction to order his removal, the "removal" was illegal and could not form the basis for the current indictment for illegal reentry. Court therefore dismissed indictment. Sharp disagreement exists among district courts nationwide on whether deficient NTA results in immigration court's lack of subject matter jurisdiction, and no circuit appellate court has yet weighed in. Courts in the Western District of Texas, however, have uniformly

granted noncitizens' motions to dismiss when the NTA failed to include the date and time of the removal hearing because the defective notice deprived the immigration court of jurisdiction.

Burial; Constitutional Law

Patterson v. Def. POW/MIA Accounting Agency, No. SA-17-CV-467-XR (Rodriguez, X., Oct. 23, 2018).

Plaintiffs, primary next of kin of seven Army service members who died while serving in the Philippines during World War II, sought to disinter their relatives' remains, buried in an American military cemetery in Manila, in order to give their fallen relatives a proper burial. Though some of the remains were previously identified and designated by the U.S. government and some are in a communal grave, identification issues remained for all service members. Plaintiffs alleged violations of the Administrative Procedure Act, Free Exercise Clause, Religious Freedom Restoration Act, and substantive and procedural due process violations. Court denied in part government's motion for judgment on the pleadings because plaintiffs hold a quasi-property right in their family members' remains, which affords Constitutional protections allowing plaintiffs' request for declaratory judgment to continue. Court also denied plaintiffs' motion to compel

production of the remains because such an order would be a discovery tool that would provide ultimate relief before a determination of the merits.

Employment Discrimination; ADA; Title VII

Gonzalez v. UPS, No. 5:15-CV-986-RCL (Lamberth, R., Sept. 28, 2018).

Plaintiff alleged his former employer both discriminated and retaliated against him on the basis of his race and disability. Even though the plaintiff alleged "two Anglo" employees of the same rank were treated more favorably, Court granted his employer's motion for summary judgment on the Title VII claims because the plaintiff did not plead any facts indicating he was a member of a protected class. Court ruled that plaintiff's requested accommodations for various and unpredictable physical and cognitive issues were *per se* unreasonable because they primarily reallocated work to other employees. Court granted the employer's motion for summary judgment on the ADA claims because plaintiff could not demonstrate that he was a "qualified individual" at the time of his termination, and the employer did not have a duty to engage in the interactive process when the employee only made a *per se* unreasonable request for accommodations.

Lawyers as Experts

Albert Sidney Johnston Chapter v. Nirenberg, No. SA-17-CV-1072-DAE (Chestney, E., Oct. 18, 2018).

Plaintiffs, a local chapter of the United Daughters of the Confederacy, complained that the removal of a monument of a Confederate soldier from a public park deprived them of their property without procedural due process. Plaintiffs moved to strike the City of San Antonio's expert (an attorney) who sought to provide an opinion regarding, *inter alia*, the factors to consider in a procedural due process inquiry and when the opportunity to be heard is considered meaningful as to time and manner. Court granted motion to strike, holding that expert's proposed testimony would not assist the trier of fact on questions of fact, and that his testimony on the ultimate question of due process was an impermissible legal conclusion.

FRE 612; Privilege

Shaffer v. Perry's Rest., Ltd., SA-16-CV-01193-FB (Chestney, E., Oct. 22, 2018).

Defendant moved to reopen a deposition to compel representative's testimony regarding what documents, if any, she reviewed in order to refresh her recollection in preparation for her deposition. She was instructed not to answer those questions during her deposition on the grounds of attorney-client and work product privilege. When a witness uses a writing to refresh her memory (whether during testimony, and if before, only if justice requires), Federal Rule of Evidence 612 entitles the adverse party to have the writing produced at the hearing, to inspect it, to cross-examine from it, and to introduce relevant portions of it. While "[n]umerous courts and scholars have recognized the potential for conflict between various rules of privilege and Rule 612," and the Fifth Circuit has yet to craft the proper analytical framework to apply. Because the court did not know whether the deponent actually consulted any documents (given her attorney's instructions not to answer), the Court ordered the deposition reopened, but only via deposition on written questions. To alleviate the issue of privilege, questions would be limited to identifying which documents were reviewed, but not which of those, if

any, were shown to her by her attorney or his staff.

Newton Factors; Remand

Ball v. Berryhill, 5-17-CV-00383-RBF (Farrer, R., Sept. 28, 2018).

Court determined that administrative law judge did not properly apply the *Newton* factors when deciding to deny disability insurance benefits. Although Social Security Administration's "treating physician rule" was recently amended, the pre-amended rule applied, given the case filing date and the amendment's effective date. Under the prior rule, treating physician's opinion must be given "great weight." A number of districts in the Fifth Circuit, including the Western District of Texas, have determined that, under the prior rule, *Newton* should apply any time the court affords the treating physician's opinion anything less than "controlling weight." Court erred in giving plaintiff's treating physician's opinion only "partial weight" and in failing to conduct a proper *Newton* analysis (now codified in 20 CFR § 404.152). Administrative law judge's error was not harmless. Court remanded case so that a proper analysis of the treating physician's opinion could occur. ❖



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