

2003 Timeline

SEPTEMBER

4

Houston solos Michael Ramsey, Chip Lewis and George Tyson — three of the defense attorneys representing millionaire bookie Robert Angleton against murder-for-hire charges — again ask U.S. District Judge Lee Rosenthal to remove them from the case.



Lewis

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U.S. District Judge Jerry Buchmeyer announces he's taking senior status. Four days later, U.S. Sens. Kay Bailey Hutchison and John Cornyn, both Texas Republicans, recommended Jane Boyle, U.S. attorney for the Northern District of Texas, to take his place.

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J. Michael Bradford, former U.S. attorney for the Eastern District of Texas, takes his own life. A police officer finds his body in a remote area of Hardin County in East Texas at 6:55 p.m. Bradford was 50 years old.



Bradford

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The Corpus Christi-based Kleberg law firm — which closed its doors on Aug. 15 — files for Chapter 11 bankruptcy protection, listing about \$2 million in assets and liabilities totaling about \$1.75 million.

A little-known legal organization that made headlines statewide last fall after Court of Criminal Appeals Presiding Judge Sharon Keller awarded it almost \$225,000 in state grant funds does not make the list of grantees for fiscal year 2004. The CCA declines to fund Texas Independent Legal Studies (TILS), a nonprofit corporation set up by Austin solo David A. Schulman to provide training for criminal-defense attorneys.



Keller

13

Proposition 12 passes, blessing the damage limits that the legislature placed on medical-malpractice suits as part of H.B. 4, the sweeping tort reform measure passed in June.

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The AWOL Democratic state senators decide to return to Texas from Albuquerque, N.M.

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The Unauthorized Practice of Law Committee files suit against a California-based company alleging that it operates a document preparation service that provides legal advice by nonlawyers. *UPLC v. Alight Inc. d/b/a We the People Texas Inc.*, filed in Dallas County's 44th District Court, requests injunctive relief against the company. We the People opened a storefront legal-document preparation business in Dallas in 2003.

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The Texas Supreme Court rules that a hospital was not

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It rearranges and brings together substantive provisions related to these entities that previously were spread among at least 10 other individual statutes. It organizes these provisions into an integrated statute that is more logically structured and will more easily accommodate future expansion.

The code was a joint project of the Business Law Section of the State Bar of Texas, the Office of the Secretary of State of Texas and the Texas Legislative Council, which began working on the code in 1995. It was introduced in the 1999 and the 2001 Texas legislative sessions before finally being passed into law in 2003. The changes effected by the code are largely non-substantive, but, unlike some previous codification projects, it does contain some substantive changes designed to modernize Texas' business laws.

The effective date of the code is Jan. 1, 2006, so there will be ample opportunity for lawyers to learn the new code and for the Legislature to make changes and corrections before it goes into effect.

Entities formed after Jan. 1, 2006, will be subject to the code. Entities already in existence as of that date will not be subject to the new code until Jan. 1, 2010, unless they elect to adopt the new code prior to Jan. 1, 2010, by making the necessary filing with the Office of the Secretary of State of Texas.

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CONSTITUTIONAL LAW

Two Activist Wings

by SANFORD LEVINSON

This past term, the U.S. Supreme Court handed down two opinions of particular importance in Texas.

In *Grutter v. Bollinger*, the high court upheld the use of race in the admissions process at the University of Michigan Law School. Not surprisingly, the University of Texas announced only this past month its intention to return to pre-*Hopwood* days and take race and ethnicity into account in its admissions process.

The second case struck down Texas' anti-same-sex sodomy law. Even the lawyers representing Texas in *Laurence v. Texas* did not assert that the state was actually interested in enforcing the law, only in having it on the books as an expression of opposition to same-sex practices.

Ironically, this ended up reinforcing the principal argument of the majority: that the general American ethos now supports some kind of sexual autonomy, including that of gays and lesbians. The court, therefore, was scarcely moving far out on a limb; it was adding a mild push to the recent sea change in national attitudes.

Justices Anthony Kennedy and Sandra Day O'Connor (in a concurring opinion) took pains to signal that they did not view their decisions as in any way requiring same-sex marriage, a far more controversial issue.

A further point: No present member of the court can be described as a genuine proponent of "judicial restraint," if that means a justice who truly hesitates to strike down legislative enactments. Conservatives eager to strike down Michigan's practices were eager to uphold Texas'; similarly, liberals who deferred to Michigan showed no such deference to Texas. The court is therefore divided into two activist wings, even as the issues that generate their desire to intervene in the political process may be quite different.

Sanford Levinson teaches constitutional law at the

University of Texas School of Law. He is the author, most recently, of "Wrestling With Diversity" (Duke University Press 2003).

CRIMINAL DEFENSE

Lost Power

by CYNTHIA HUJAR ORR

This year, the judiciary lost power while the executive branch gained authority, both at the expense of criminal defendants. Also, a new definition passed by the Texas Legislature could greatly expand criminal liability in a wide range of cases.

At the urging of U.S. Attorney General John Ashcroft, Congress passed the Feeney Amendment to the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, codified throughout the federal criminal code and sentencing guidelines. It limits the ability of federal judges to sentence outside the norm where previously allowed, i.e. by making downward departures from the Sentencing Guidelines reviewable in some cases and removing the potential for downward departures in others.

After eliminating some of judges' discretion, Ashcroft moved to tie the hands of prosecutors by issuing a new charging policy for U.S. attorneys. Whereas previously prosecutors were allowed to exercise discretion to fit the circumstances of a crime, they are now required to charge the most serious "readily provable" offense. This substantial policy change threatens to hamstring federal courts by providing little incentive for defendants to plead guilty short of trial.

The states also lost power to the chief executive. In *American Insurance Association, et al. v. Garamend*, the U.S. Supreme Court held that a presidential foreign affairs agreement pre-empts state law to the same extent as do treaties. Until now, many states have been able to opt out of some provisions of the USA Patriot Act, but this new pre-emption doctrine could severely limit their ability to do so. It could also limit the right to private civil litigation at the state level.

The Supreme Court also held that the mainstream ABA Guidelines for Death Penalty Counsel set the standard expected for defense lawyers in capital cases, which could impact the quality of representation in Texas.

Finally, by re-defining one word, the Texas Legislature may have created a whole new category of crime. By changing the definition of an "individual" to include unborn persons from the time of "fertilization until birth," the Legislature created issues in manslaughter, homicide, assault and intoxication assault cases. For example, the law conceivably allows prosecutions for homicide for rough sex causing a miscarriage, or wrongful abortion for saving a mother and sacrificing her unborn child without her consent.

Cynthia Hujar Orr is president of the Texas Criminal Defense Lawyers Association and co-chairwoman of the American Bar Association Criminal Justice Section's Defense Function Committee. She also serves on the board of directors for the National Association of Criminal Defense Lawyers. She is an associate with Goldstein, Goldstein and Hilley in San Antonio.

CRIMINAL PROSECUTION

Retrograde Extrapolation

by ALLISON HOLLAND

For prosecutors, 2003 was significant mainly for the ominous emergence of faulty precedent in the area of driving-while-intoxicated law and the impact it may have on the state's beleaguered breath-testing program.

The year began with a bombshell decision. On Jan. 8, in *Stewart v. State*, the 4th Court of Appeals in San