

★ DECEMBER, 2006 ★

**IN THIS ISSUE**

- Treat Jurors Respectfully..... 1
- TLR Around the State & USA... 2
- Speakers Bureau ..... 4
- Proportionate Responsibility ..... 5
- Jury Selection ..... 6
- Justice Nathan Hecht ..... 8

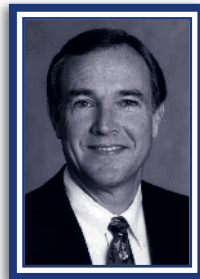
**OUR MISSION**

Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action; legal, academic, and market research; and grassroots initiatives. The common goal of our more than 15,000 supporters is to make Texas the Beacon State for Civil Justice in America.

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## Treat Jurors Respectfully



*Michael Stevens*

Founding Father John Adams observed that the most sacred duty of government is to provide “equal and impartial justice to all citizens.” In keeping with that view, both the United States and Texas constitutions guarantee each of us the right to trial by an impartial jury. If our jury system is to work justly, the selection process must be designed to seat, in fact, an impartial jury. Yet, our current Texas civil trial system allows lawyers and jury consultants ample opportunity to pick jurors that are partial to their respective clients.

One way to improve jury selection is to prevent attorneys from asking prospective jurors abusive or inappropriate questions. A couple of years ago, I was summoned to jury duty in a Harris County trial court. I consider jury service a duty that is critical to maintaining our free and orderly society, as do most citizens. I was shocked, however, to be presented a questionnaire prepared by the lawyers containing an extensive list of questions, many of which were incredibly intrusive on my privacy. I was even more astounded when private investigators showed up to photograph my home that evening, apparently to further profile my financial condition prior to the next morning’s jury selection.

When a prospective juror is asked whether he is liberal or conservative, which magazines he reads, which historical figures he most admires, or which television programs he enjoys, it is obvious that those questions are not designed to determine the impartiality of the prospective jurors. Rather, they are personality profile questions designed to identify persons whom a lawyer presumes will render a verdict favorable to a particular party.

The lawyers and jury consultants for each party are attempting to choose partial jurors, not impartial ones. Allowing them to do so undermines the fundamental purpose of trial by jury, which is to have the facts in the lawsuit determined by persons who will fairly and impartially reach their verdict on the evidence presented at trial. Texas civil trial courts are almost unique in the degree to which they allow attorneys to control the jury selection process. In federal courts, in most state courts, and even in Texas criminal courts, the trial judge controls the questioning of prospective jurors more tightly than is customary among our state’s civil trial judges. It is time that Texas judges in civil cases exercise more control over the questioning of prospective jurors to make the process more efficient and to ensure that a fair and impartial jury is seated.



Michael Stevens  
TLR Executive Committee Member

# TLR Around the State and Around the USA

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## TLR RECEIVES JUSTICE AWARD



*Team TLR at the GOP Convention*

TLR received a national award from the Foundation for the Improvement of Justice (FIJ) in September. The Atlanta-based group was formed in 1984 to encourage improvement in various systems of justice through effective innovation. TLR's Community Affairs Director Mary Tipps and TLR PAC Director Justin Unruh traveled to Atlanta for the awards gala, which was attended by justice advocates from around the country.

TLR was nominated for the honor by State Sen. Kyle Janek of Houston, who worked closely with TLR in 2005 to pass SB 15, which is the nation's best cure to the abuses in asbestos and silica litigation. Senator Janek's Chief of Staff, Patricia Vojack, also attended the exciting event. "We are very proud that TLR's work to restore balance to our courts in Texas is being recognized nationally," said Tipps. "This award will serve as inspiration and motivation for the challenges we still face in Texas."

## LEGISLATIVE CONFERENCES

In July, TLR traveled to San Francisco for the annual meeting of the American Legislative Exchange Council. A highlight of the meeting was the presentation of the Pacific Research Institute's U.S. Tort Liability Index Study, which ranked Texas's civil justice system the best in the nation because of reforms championed by TLR. Nearly forty Texas lawmakers and their spouses attended a dinner hosted by TLR at the historic Julius Castle restaurant overlooking San Francisco Bay. Speaker Tom Craddick and his wife, Nadine, and Senators Jeff Wentworth of San Antonio and Todd Staples of Lufkin were among the many legislators who enjoyed the good food and great views.

In August, TLR was on the road again, this time traveling to Nashville, Tennessee to attend the National Conference of State Legislators and to show support to Texas Senator Leticia Van de Putte of San Antonio, who was installed as this year's NCSL president. TLR also was one of several hosts for a dinner in Nashville honoring Texas House Speaker Tom Craddick and his wife Nadine.



*Representative Edmund Kuempel and Jaime Capelo*

## TLR RECOGNIZES LEGISLATOR

Back in the Lone Star State, over a hundred people were on hand in Jacksonville when TLR honored State Rep. Chuck Hopson for his support of historic tort reform legislation. TLR President Dick Trabulsi noted that this event was one in a long line of TLR receptions around the state to show TLR's appreciation to pro-reform legislators in their home districts.

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## SPREADING THE WORD

TLR Community Affairs Director Mary Tipps made a whirlwind trip to Philadelphia in August to address a group of business leaders and physicians who want to follow Texas's lead in enacting medical liability reform in Pennsylvania. Tipps talked about TLR's comprehensive strategy that has led to tort reform's success in Texas and discussed the positive impact the reforms have made on access to health care in our state.

Other states are also looking at TLR as a model as they fight for tort reform. In October, several members of the Civil Justice Associations in California and Colorado traveled to Texas and spent two days with TLR staff reviewing strategies that have proved effective here. TLR Speakers Bureau Director Beverly Kishpaugh provided our guests with detailed information on how to build and motivate a grassroots public information network that can be mobilized on short notice to communicate with lawmakers. TLR's twelve years of battling for tort reform in Texas has given us valuable experience that tort reform organizations in other states are finding instructive.

TLR manned one of the most popular booths at the Texas State Republican Convention in San Antonio, which is one of the largest political gatherings in the nation. Over 10,000 people attended the three-day meeting, and TLR's booth was a gathering place for persons interested in discussing lawsuit reform.

## PAC FUNDRAISING ACTIVITY

Two well attended TLR PAC fundraisers were held in October. TLR CEO Dick Weekley and his wife, Meg, hosted a reception at their home in Houston and TLR Senior Chairman Leo Linbeck, Jr. and his wife, Betty, hosted a dinner following the reception. TLR political consultant Denis Calabrese gave an insightful review of today's national political landscape. In Dallas, TLR PAC contributors attended a reception in the home of Dr. and Mrs. Ernest Beecherl, where they heard Wall Street Journal columnist John Fund praise TLR as the most effective civil justice reform organization in America; he also shared his interesting observations about American politics and government.



*Senators Shapiro and Nelson  
with Beverly Kishpaugh*



*Civil Justice Associations  
of California and Colorado*



*Representative Joe Crabb,  
wife Nancy, and Sara Tays*



*Joy Sterling, Joe Manero,  
and Jeff Clark*

# Speakers Bureau Gives an “Up Close and Personal” Connection To Texans for Lawsuit Reform

*From Amarillo to Eagle Pass, from Lufkin to El Paso, at early morning meetings, special luncheons and dinner sessions, the TLR’s Speakers Bureau brings the message of lawsuit reform to civic and professional groups across the state.*

TLR has given over a thousand speeches to business and civic groups around the state since our founding in 1994, including over 150 in the past year. TLR Speakers Bureau Director, Beverly Kishpaugh, says that dozens of speeches have already been scheduled for 2007.

The TLR Speakers Bureau makes sure that every group in Texas that is interested in learning about lawsuit reform has a speaker for their organization. Dick Trabulsi, President of TLR, noted: “The Speakers Bureau is one of the great strengths of TLR because our speakers establish a personal connection between our organization and thousands of Texans every year. Because they are willing to travel many miles to deliver a speech, our speakers frequently take an entire day out of their busy lives to spread the word, sometimes finding themselves in remote areas of

our state. Our Speakers are volunteers from around the state, members of our staff and consultant team, and TLR leaders themselves.”

One of our Speakers tells the story about his speech in a tiny West Texas village. After the opening prayer, the group rose to pledge their allegiance to the flag. Unfortunately, someone forgot to bring the flag to the meeting, but there was a poster of John Wayne. Undaunted, the Texans put their hands over their hearts and delivered the pledge – facing, of course, the portrait of the Duke!

“Our Speakers think of themselves as educators, and they are right,” said Kishpaugh. “Lawsuit reform is a detailed and complex subject and informing the public on this important issue takes more than a bumper sticker or a thirty-second ad. They meet with all these groups armed with the most current information on everything

from appeal bonds to caps on punitive damages, and are prepared to explain the details and answer questions.”

In addition to community and civic groups, TLR speakers frequently address builders, realtors, chambers of commerce, professional groups and trade associations, where they must become familiar with the perspectives of the groups they are to address. Recently, TLR Speakers have addressed groups of women accountants, heavy highway contractors and health underwriters.

Speakers invariably come away from a speech with more support for TLR. “More than fifteen thousand Texans comprise the TLR supporter base and that number increases every time another speech is delivered,” comments Dick Weekley. “Getting the word out has been critical to building our supporter base throughout our vast state. The most effective way to communicate with legislators is through their own constituents. Our supporters represent 1253 occupations and live in 787 Texas cities and towns. This would not have been possible without the Speakers Bureau.”

According to Chip Hough, a TLR Speaker from San Antonio, “Everywhere I speak, people are concerned about the culture of litigation in America and the fear of lawsuits that cast a chilling effect on normal activity. I am able to bring the good news that the Texas legislative reforms of recent years are making a real difference.”

TLR Speakers are available to attend civic and business group meetings in your area. If you are interested in having a speaker come to your organization, please contact Beverly Kishpaugh at 972-480-8123 or [bevkish@aol.com](mailto:bevkish@aol.com).



*Alan Harrel, TLR Speaker*



*Chip Hough, TLR Speaker*

## Texas Supreme Court Reinforces Proportionate Responsibility Reform

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Justice Dale Wainwright

The integrity of the proportionate responsibility statute was at issue in a recent decision by the Texas Supreme Court, *F.F.P. Operating Partners vs. Xavier Dueñez*. Because of the importance of the legal principle of proportionate responsibility – the concept that a party should pay only those damages attributable to its own fault – there were many amicus curiae (“friend of the court”) briefs filed with the Court in addition to the briefs filed by the litigants themselves. TLR was among the parties filing amicus briefs.

One of TLR’s first legislative proposals, in 1995, was to amend the proportionate responsibility statute to enable juries to allocate fault among responsible parties, according to the evidence produced at trial. The 1995 reform changed the statute in two meaningful ways: first, to allow defendants to bring certain responsible parties into litigation so that jurors could allocate fault among them; second, to provide that a defendant could not be required to pay the entire judgment unless his percentage of responsibility was greater than 50%.

Previous to the 1995 reform, a defendant could be found to be only 11% at fault but nevertheless be

Jurors were confounded by the nonsensical anomaly in the law that allowed them to hear evidence as to a party’s fault but did not allow them to assign fault to that party when rendering a verdict. This problem has been cured by successive proportionate responsibility reforms in 1995 and 2003 (HB 4). Now, jurors can assign fault to each responsible party, based on the evidence presented at trial.

The plaintiff trial lawyers constantly attack this common sense reform – in the press, the legislature, and the courts. TLR works on all three fronts to make sure there is no erosion to this or any other tort reform. One way we protect the hard-won reforms of recent years is to monitor cases in Texas appellate courts and file amicus briefs in support of reforms that are being challenged, which we did in *Dueñez*.

The issue in *Dueñez* was whether the proportionate responsibility statute applies to cases brought under the Texas Dram Shop Act, which creates civil liability for selling alcohol to an already intoxicated person. The Court’s opinion, authored by Justice Dale Wainwright, gives full force to the language of the proportionate responsibility statute itself in holding that the statute ap-

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*If the Texas Supreme Court had decided Dueñez differently, plaintiff lawyers would have been encouraged to seek avoidance of the proportionate responsibility statute in many causes of action.*

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required to pay 100% of the damages. The jury could assign fault only to those named as a defendant by the plaintiff, which allowed plaintiff attorneys to omit responsible parties from the case. Jurors often heard evidence during trial showing a certain party to be at least partially blameworthy, but when asked at the end of trial to allocate fault to that party, they could not do so because the party was not listed on the verdict form.

plies to Dram Shop cases. The Court reasoned, in part, that the proportionate responsibility statute specifically excludes certain kinds of lawsuits from its scope and that Dram Shop cases are not on the exclusion list. Therefore, Dram Shop causes of action are subject to the statute in the same way that other lawsuits are.

If the Court had decided *Dueñez* differently, plaintiff lawyers would have been encouraged to seek

# Jury Selection Should Be Focused On Seating Fair And Impartial Jurors

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Our litigation system can work only if there is widespread public trust that disputes can be resolved in courts efficiently and fairly. Since trial by jury is a constitutional right in America and in Texas, a fair trial is largely dependent on whether the jury hearing the case is impartial.

Society has a lot at stake in the jury selection process. If jury selection is inefficient, people summoned to jury service will resent the waste of their time and therefore will seek to avoid jury service in the future. Further,

who are favorable to her client. Society's interest, however, is in establishing a system that produces a jury composed of persons who are fair and impartial to all parties, rather than a jury composed of some persons who are partial to one party and other persons who are partial to another party.

One way in which lawyers attempt to determine the partiality of prospective jurors is to ask questions designed to "profile" prospective jurors as favorable to a plaintiff or a defendant. Here are the types of questions that are used for juror profiling:

*Prospective jurors should not be "profiled" by attorneys and jury consultants.*

if jury selection is widely perceived as manipulated by the lawyers and jury consultants to produce something other than an impartial jury, citizens lose confidence in the courts as a place to resolve their disputes.

Unfortunately, as Michael Stevens' front page commentary indicates, Texas's current jury selection process is neither efficient nor well designed to encourage citizen participation in juries or to empanel a fair and impartial jury. Texans For Lawsuit Reform Foundation will soon publish a thorough study of the Texas jury system, including how jurors are selected and how they participate in trials. The paper will make numerous suggestions for improving jury selection and jury service.

A basic problem in the current jury system is that attorneys and their jury consultants are allowed too much opportunity to choose jurors who are partial to their respective clients. This is contrary to the societal goal of having verdicts rendered by impartial jurors. A lawyer, as trial advocate, can be expected to use the jury selection process to produce the best result for her client, which is to seat as many jurors as possible

- » Politically, do you consider yourself to be: Liberal, Moderate, Conservative, Other?
- » Which comes closer to describing you? Warm-hearted or Clear-headed.
- » Please list the newspapers, magazines, professional journals, or periodicals to which you subscribe or regularly read.
- » Please list any civic, social, professional, or religious organizations to which you now belong or have belonged in the past.
- » How many hours a week do you spend watching television?
- » Please list 3 people you admire most.
- » Please list 3 people you admire least.
- » What do you enjoy doing in your spare time?
- » Please list the one person you feel most influenced your life and tell us why.

What do any of these questions have to do with choosing twelve impartial jurors from the panel of prospective jurors? Nothing. Why should the lawyers know how much time a prospective juror spends watching television, or how she spends her spare time, or whom

she admires or doesn't? Why should a citizen called to jury service be required to write an essay on the "one person who most influenced" his life? When we respond to a jury summons, is it to undergo psychoanalysis, or to hear evidence in a lawsuit and render a just verdict?

These types of questions are intended to be used by lawyers and juror consultants to analyze environmental and psychological factors to profile prospective jurors. This kind of questioning strikes most citizens as being intrusive and time wasting, leaving them with a bad impression of the judicial system and discouraging them from responding to a jury summons in the future.

Profiling questions should have no role in selecting citizens to sit on a jury. If you want to fulfill your civic obligation to serve on a jury, you should not be dismissed because a jury consultant presumes that a Unitarian who watches CNN, admires Jack Kennedy, and bicycles on the weekend will be unsympathetic to his client. It is not unusual, in lawsuits with much at stake, for a trial team to be composed of attorneys, handwriting experts, psychologists and private detectives (who often research the background and financial condition of prospective jurors). The system is not functioning properly when we are subjected to having our handwriting analyzed and our houses photographed to serve on a jury.

Clearly, the founding fathers of our nation and our state did not envision, when establishing the right to trial by jury, that juries would be selected by a team of experts whose job is to predict how a prospective juror will render a verdict before that juror has heard the evidence. It is time for Texas to get back to the basics in choosing jurors. The current system is so susceptible to manipulation that reasonable persons could conclude that a totally random selection of any twelve citizens would more likely produce an impartial jury than the system we now have.

The appropriate determination to be made about a prospective juror is this: can he or she listen to the evidence presented at trial and render a verdict based on the evidence? The current practice of "profiling" prospective jurors hinders the societal goal of seating fair and impartial juries, takes too much time, and is offensive to Texans who have the civic virtue to show up at the courthouse when summoned for jury duty.

Is it any wonder that fewer and fewer citizens are responding to jury summons and that there is a precipitous decline in jury trials?

avoidance of the statute in other causes of action, and a Pandora's Box of exceptions to proportionate responsibility might have been unlocked. It is noteworthy that the Court's decision in *Dueñez* does not relieve any defendant in this matter from liability – it simply states that the allocation of fault among responsible parties in this case, as other cases, is subject to the proportionate liability statute.

### **DUEÑEZ TEACHES US THREE IMPORTANT LESSONS:**

First, it is imperative to monitor cases in our state's appellate courts for attacks on civil justice reforms and to be ready to file amicus briefs in support of those reforms.

Second, the Texas Supreme Court, as presently comprised, takes a sound analytical approach to legal issues. We must continue to support competent, conservative judicial candidates throughout our court system.

Third, this case was filed in trial court many years ago. In pretrial proceedings, the trial judge ruled that the proportionate responsibility statute did not apply to Dram Shop cases – an incorrect ruling, as it turns out. Unfortunately, the trial judge's ruling on a controlling question of law could not be appealed until the conclusion of the trial. Therefore, an enormous amount of time and money was wasted as this case progressed through a jury trial and through two appellate courts on its way to a final resolution of the controlling question of law. The courts, the citizens who were called as prospective jurors and those who were picked to sit on the jury, and the parties themselves would have been far better served by having the final appellate determination of the controlling issue made prior to the case having gone to trial.

This case clearly illustrates why Texas should adopt the federal court practice of allowing an appeal from a trial judge's ruling on a controlling question of law. This practice would prevent the enormous waste that results from going through trial before getting appellate review on a question of law that might determine the ultimate outcome of the case.

*"If it is not necessary to decide more to dispose of a case, it is necessary not to decide more."*

— Chief Justice John Roberts,  
U. S. Supreme Court

# Texas Supreme Court Justice's Integrity Is Affirmed

## *Justice Hecht is Respected Across the Nation*

Texas Supreme Court Justice Nathan Hecht is nationally known for his knowledge of the law, his thoughtful and consistent judicial philosophy, and his work on behalf of the administration of justice. He enjoys a well-deserved reputation for integrity and scholarship, and for having been instrumental in establishing the Texas Supreme Court as one of the most respected courts in our nation.

Therefore, TLR was deeply concerned when the Texas Commission on Judicial Conduct issued a Public Admonition against Justice Hecht, alleging he violated the Code of Judicial Conduct by making public statements supportive of his close friend, former White House Counsel Harriet Miers, after she was nominated by President George W. Bush to the United States Supreme Court.

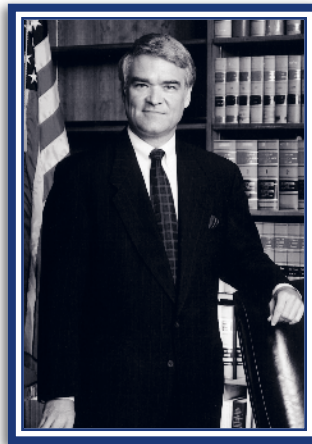
TLR considered the admonition of Justice Hecht to be completely unjustified. When Justice Hecht filed an appeal from the Commission's determination, TLR filed a "friend of the court" brief in his support with the Special Court of Review appointed to hear his appeal. Attorney Richard G. Munzinger of El Paso wrote a superb amicus brief for TLR, providing

his services pro bono because of his respect and admiration for Justice Hecht.

On October 20th, the Special Court ruled in favor of Justice Hecht, effectively rescinding the Commission's admonition. In its ruling, the Special Court noted that the judicial code of ethics on which the admonition was based was designed to stop judges from endorsing candidates in political races. Speaking publicly about a friend who is nominated to the United States Supreme Court is not an endorsement in a political race.

TLR General Counsel Hugh Rice Kelly applauded the Special Court of Review's decision, calling it "a victory for the people of Texas who are so ably served by Justice Hecht." Kelly observed that TLR is unique in its willingness to engage in a wide range of activities, including the public and legal support of state officials

and judges who are committed to a fair and balanced civil justice system. "When an outstanding judge like Nathan Hecht is unjustly accused or attacked, TLR will do what is appropriate and effective to make sure that the truth is known and justice is done," Kelly commented.



*Justice Nathan Hecht*

## TLR'S AUSTIN OFFICE HAS MOVED

*Our new address is:*

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