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Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2026 Vol. 15, No. 2 Editor Emerita Lynne Liberato Editor-in-Chief Hon. John G. Browning

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By Sharon Sandle

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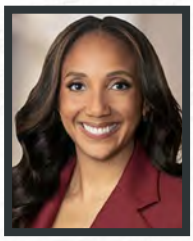

Jasmine S. Wynton

Message from the *President*

As we settle into the winter season, I am reminded that history itself has its seasons. There are moments of progress and innovation, periods of difficulty and retrenchment, and times when reflection allows us to see more clearly the arc of our shared past. This issue of the Journal invites precisely that kind of reflection. It spans more than a century of Texas jurisprudence and public life—moving from a spotlight on a late nineteenth-century jurist, to modern procedural reform, to the transformative social change brought about by Title IX. Together, these articles illuminate the evolving character of justice in Texas.

We begin with Perry Cockerell's richly detailed study, "Henry W. Lightfoot: Chief Justice from Paris." In his own time, Judge Henry William Lightfoot was something of a celebrity—widely known and respected for his service as the first Chief Justice of the Fifth Court of Civil Appeals for the Fifth District from 1893 to 1897. Yet today, his name is largely unfamiliar, and no single volume gathers his life story, his experiences, or the substance of his judicial work. Cockerell's article fills that void.

We are also pleased to publish Part II of Richard R. Orsinger's important examination of "The History of Tex. R. Civ. P. 76a on Sealing Court Records." Orsinger provides a detailed historical and analytical examination of Rule 76a, which governs the sealing and unsealing of court records, and traces efforts over three decades to revise this rule. Rule 76a sits at the intersection of transparency and privacy—two principles that are frequently in tension but equally central to the rule of law. On one side lies the public's right of access to open courts; on the other stands the obligation to safeguard sensitive personal information, trade secrets, and the privacy interests of both parties and non-parties. In an era when public confidence in government institutions is often fragile and calls for openness grow louder, the history of Rule 76a serves as a reminder that transparency in judicial proceedings is not merely procedural; it is foundational to maintaining trust in the administration of justice.

Finally, Executive Director Sharon Sandle brings us an article drawn from her compelling presentation, "Cinderella Season: Title IX and the Evolution of Women's Sports in Texas," delivered at last year's Texas Supreme Court Historical Society panel at the Texas State Historical Association's Annual Meeting. Her article traces how a federal statute that initially attracted little notice would become the most consequential civil rights laws affecting women's athletics. In revisiting the early decades of Title IX, Sharon shows how Texas became a revealing microcosm of the broader battle

over Title IX's meaning and reach—where powerful athletic traditions, institutional resistance, and student-led demands for equity collided. The phrase "Cinderella Season" captures both the suddenness and the improbability of change—how doors that had long been closed began to open, sometimes hesitantly, sometimes dramatically. Her account reminds us that the legacy of Title IX is both inspiring and yet unfinished, as disparities in resources, participation, and opportunity persist even today.

Taken together, the articles in this winter issue illustrate the range and depth of the Society's work. We document the life and legacy of a Texas jurist, trace the development of a procedural—yet deeply consequential—rule, and examine the transformative impact of federal legislation on gender and athletics in Texas. Each contribution complements the others. And all three pieces underscore that the law, like history itself, is dynamic, adaptive, and never fixed in place. It evolves in response to changing societal values, the advocacy of individuals, institutional pressures, and shifting understandings of justice. And it is through this continual evolution that both history and the law reveal their enduring beauty.

As president, I am continually struck by how much there is still to discover about Texas legal history. Every archival record, every overlooked opinion, every personal narrative adds texture to our understanding of who we are as a legal community. I am grateful to our authors for their scholarship, to our Editor-in-Chief for his steady guidance and dedication to maintaining the Journal's high standards, and to our members for sustaining the Society's work.

I hope you will find this issue both informative and inspiring. May it encourage you to look more closely at the foundations of our jurisprudence and to appreciate the individuals—on the bench, at the bar, and beyond—who have shaped the course of Texas law.

With warm regards,
Jasmine Wynton

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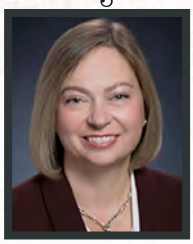
Executive Director's Page



Sharon Sandle

Texas Law:

Architecture and Resilience

History often gravitates toward personalities and dramatic moments. We remember speeches, inaugurations, and turning points. Those moments matter. But law endures not because of isolated events; it endures because institutions endure.

At this year's Texas State Historical Association Annual Meeting, the Texas Supreme Court Historical Society will sponsor a panel titled "Texas Forever: Law from the Villa de San Felipe Courthouse through Texas's 1876 Constitution." The anniversary of the 1876 Constitution provides a natural opportunity to reflect on the institutional architecture that has governed Texas for 150 years. Constitutions are blueprints that allocate authority, define judicial power, and establish limits. But a blueprint alone does not sustain a system. Institutions must function, retain authority, and adapt without losing coherence.

The articles in this issue of the Journal illustrate how that process works.

In his profile of Henry W. Lightfoot, Perry Cockrell describes one of the stewards of the legal institutions of Texas. Institutions do not operate themselves. They are maintained by professionals who exercise fairness, rigor, and responsibility. A court's legitimacy is reinforced not merely by its constitutional authority but by the conduct of those who serve within it. In the second part of his two-part series on the history of Tex. R. Civ. P. 76a, Richard Orsinger brings the focus to institutional accountability. Questions about access to court records and the proper use of sealing orders may appear technical, but they strike at the heart of judicial legitimacy. The rule of law requires articulated standards and disciplined application. When courts balance openness against privacy, they are not improvising; they are exercising institutional authority within defined procedural frameworks. The refinement of Rule 76a demonstrates that institutions evolve through careful calibration, not abrupt departure.

The Texas Constitution can hardly be praised as concise. At over 92,000 words, it is second only to Alabama's constitution in length. And it is one of the most frequently amended, with over 500 amendments to date. Whether because of or despite its length and complexity, it has proven remarkably durable. But endurance should not be mistaken for inevitability. I hope that our panel at the upcoming TSHA Annual Meeting adds to the conversation about the constitutional history of Texas and how it reflects our state's character and shapes our future. Personalities will always capture attention, but it's important to examine our institutions as well. I hope you will join us for the TSCHS panel and continue this conversation about the architecture and resilience of Texas law.

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Fellows Column

By Warren W. Harris, Chair of the Fellows

As you have read in these columns, the Fellows undertake projects like our judicial civics program, Taming Texas, to educate the bar and the public on the third branch of government and the history of our Supreme Court. The Fellows are also a critical part of the Society's annual fundraising. We are pleased that we added several new Fellows in 2025, and information on each of these Fellows is below:

Hon. Christina "Chris" Bryan was sworn in as a United States Magistrate Judge in January 2018. Prior to her appointment to the bench, Judge Bryan was a partner in a commercial litigation boutique with a broad litigation practice representing clients primarily in the energy and healthcare industries. Following graduation from Harvard Law School, she served as a law clerk for the Honorable Homer Thornberry of the United States Court of Appeals for the Fifth Circuit in Austin, Texas. Judge Bryan has served the greater Houston community through her work as a member of the board of directors or as volunteer for several non-profit organizations and she is currently a member of the Garland Walker Inn of Court. Judge Bryan enjoys hiking, skiing, watching Astros baseball, and spending time with her family and two dogs.

Trey Peacock has built a national reputation for winning complex business disputes through mastery of science and data for more than twenty-five years at Susman Godfrey in Houston. He has served as lead trial counsel for both plaintiffs and defendants in state and federal courts across twenty states. Known for his ability to quickly absorb and clearly present highly technical material, Trey has achieved successful outcomes in matters involving offshore rig construction, intricate oil and gas title histories, random number generation, toxicology and epidemiology, and advanced environmental air modeling. Recognized as a Litigation Star by *Benchmark Litigation* and a Leading Plaintiff Financial Lawyer by *Lawdragon*, Trey has also been honored as a Winning Litigator by the *National Law Journal*. A Beaumont, Texas native, he graduated with Honors from Princeton

University and The University of Texas School of Law before clerking on the Ninth Circuit. Trey serves on the Freedom Project Network board and is an avid fly fisherman, snowboarder, and triathlete.

Mindy G. Davidson retired as executive director of the Houston Bar Association in 2024 after serving for five years. She brought more than three decades of legal, corporate, and nonprofit leadership to the role. An experienced attorney and strategic advisor, she has guided executive teams and boards on governance, fiduciary responsibility, and organizational strategy. Davidson built her career advising on executive and broad-based compensation and benefits programs. She was a Senior Director at Alvarez & Marsal and previously was Lead Counsel of Compensation and Benefits for LyondellBasell. A graduate of Wellesley College and Boston University School of Law, Davidson also holds multiple nonprofit leadership and finance certifications from Rice University and is a Senior Certified Professional through SHRM. A Life Fellow of the Houston Bar Foundation, she serves on the Houston Area Women's Center board and is a Leader in the Center for Women in Law.

Josh Davidson was a Partner at Baker Botts for more than thirty years and was the long-time head of the firm's Capital Markets practice. Upon reaching retirement age at the end of 2024, he transitioned to the role of Senior Counsel. He continues to handle a wide range of corporate and securities work, and is nationally recognized for his experience in transactions involving master limited partnerships and other alternative entities such as YieldCos and royalty trusts. He has participated in hundreds of common and preferred equity and investment grade and high yield debt public offerings and private placements, including over seventy initial public offerings as well as liability management transactions, including debt and equity tender and exchange offers. Josh primarily works with companies in the pipeline, midstream, oil and gas, coal, renewable energy, shipping, and refining industries.

Joe Greenhill is a partner in Kelly Hart & Hallman's Appellate and Litigation sections, bringing extensive experience shaped by his clerkships with Texas Supreme Court Justices John Devine and David Medina. A respected advocate, he has earned repeated recognition, including Texas Super Lawyers, Best Lawyers: Ones to Watch, *360 West* magazine and *Fort Worth Magazine* Top Attorney honors, and placement on the Up-and-Coming 100 and Top 100 Texas Rising Stars lists. Greenhill is an active member of the Texas legal community, serving as Chair of the Tarrant County Bar Association's Appellate Section and participating in the Texas Bar Foundation, Eldon B. Mahon Inn of Court, and the Texas Supreme Court Historical Society. He also serves on the board of The WARM Place.

Thomas R. Phillips, retired Chief Justice of the Supreme Court of Texas, joined the Austin office of Baker Botts in 2005. His practice focuses on complex issues and appeals, particularly matters before the Supreme Court of Texas and the state courts of appeals. After clerking for Texas Supreme Court Justice Ruel C. Walker, he began his career in Baker Botts' Houston trial department and later served as judge of the 280th District Court in Harris County. Phillips was Chief Justice from 1988 to 2004, winning four statewide elections. Board Certified in Civil Trial Law since 1981, he has also served on the CPR Panel of Distinguished Neutrals since 2005.

Russell Post is a board-certified appellate specialist with a three-decade career spanning landmark advocacy before the U.S. Supreme Court, the Texas Supreme Court, the Louisiana Supreme Court, the Fifth Circuit, and numerous other federal and state appellate courts. Known for pairing broad intellectual perspective with precise legal strategy, he represents plaintiffs and defendants across virtually every area of civil law. Ranked Band 1 in Chambers USA and elected a Fellow of the American Academy of Appellate Lawyers, Post is widely regarded as one of Texas's leading appellate advocates. He is regularly engaged early in litigation to shape strategy, resolve complex legal issues, craft the jury charge, and preserve error with the appellate endgame in mind. A perennial honoree in Lawdragon 500, Best Lawyers, and Texas Super Lawyers' Top 100, Post leads Beck Redden's acclaimed appellate practice and serves as Chair of the firm's Executive Committee.

If you are not currently a Fellow, please consider joining the Fellows and helping us with our important work. If you would like more information, please contact the Society office or me.

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($5,000 or more annually)

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David E. Chamberlain
Lauren and Warren Harris*
Hon. Nathan Hecht and Hon. Priscilla Richman
Joseph D. Jamail, Jr.* (deceased)
Thomas S. Leatherbury
Richard Warren Mithoff*

Greenhill Fellows
($2,500 or more annually)

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Marianne M. Auld
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Mindy and Joshua Davidson
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Macey Reasoner Stokes
Cynthia K. Timms
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Charles R. "Skip" Watson, Jr.
R. Paul Yetter*

*Charter Fellow

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Editor-in-Chief's Column

Hon. John G. Browning

America at 250:

Celebrating the Declaration of Independence, and History in All Its Forms

I recently penned a short column of about 1,400 words for another legal history publication. I'd be astonished if anyone told me it would be remembered by anyone the following month, let alone for centuries to come. But then again, I wasn't writing the Declaration of Independence—all 1,337 words of it.

250 years after its adoption on July 4, 1776, at Independence Hall in Philadelphia, the Declaration of Independence still resonates not only as one of the most widely read (and imitated) political documents ever, but also as its principal author Thomas Jefferson would describe it years later, "an expression of the [A]merican mind."[1] While John Adams, Benjamin Franklin, Robert Livingston, and Roger Sherman would join in the effort (the Declaration underwent eighty-six edits), the document was primarily Jefferson's work. The preamble alone—"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"—functions as a kind of mission statement for the fledgling nation. Indeed, it has been hailed as "the greatest sentence ever crafted by human hand."[2]

Beyond its stature as a statement of political values, the Declaration of Independence is in many ways a plaintiff's petition or complaint, setting forth twenty-seven grievances against King George III and British rule generally. This is hardly surprising, since all the drafters other than Franklin were lawyers. Many of those who signed the Declaration of Independence were lawyers as well, and at least sixteen of them went on to distinguished judicial careers after the Revolution. Several of these signatories became the chief justice of state courts, such as Delaware, Pennsylvania, and New Hampshire. Five of the signers received appointments to the federal bench. William Paca served on the District of Maryland bench, William Hooper would go on to the District of North Carolina, and Francis Hopkinson became a judge of the District of Pennsylvania.

Two of the signatories served on the United States Supreme Court. James Wilson went from brokering compromises at the Constitutional Convention to ensure ratification to being one of the original six justices on the Supreme Court in 1789. Sadly, Justice Wilson was better with jurisprudence than he was with his own finances. In his later years, he was absent from the Court for long stretches,

[1] Letter of Thomas Jefferson to Henry Lee, May 8, 1825.

[2] Walter Isaacson, *The Greatest Sentence Ever Written* (2025), *2.*

Signatures from the 1823 facsimile of Timothy Matlack's engrossed copy of the Declaration of Independence

usually in debtors' prisons or "riding circuit" to evade his creditors. Wilson died of a stroke in 1798 at the age of fifty-five. Justice Samuel Chase began his judicial career as a Maryland state judge from 1788 to 1796 and then went on to serve on the Supreme Court until his death in 1811.

Justice Chase's fiery temperament and often criticized rulings earned him the enmity of many in the legislative branch, culminating in his impeachment by the House of Representatives. However, he was acquitted in the Senate—no doubt because the majority of senators felt that simply disapproving of or disagreeing with a judge's decisions was not a valid basis for removing him from judicial office. As Chief Justice William Rehnquist observed nearly two centuries later, this unsuccessful attempt at impeachment "assured the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them."[3] In today's divisive climate, rife with threats made by lawmakers against "rogue" or "partisan" judges, this lesson about judicial independence is worth remembering.

The Declaration of Independence was both in 1776 and today, a statement of national aspirations and not a codification of legal obligations. Yet it is worth reminding ourselves of the words spoken a century ago by then President Calvin Coolidge on the sesquicentennial of the Declaration of Independence:

> Amid all the clash of conflicting interests, amid all the welter of partisan politics, every American can turn for solace and consolation to the Declaration of Independence and the Constitution of the United States with the assurance and confidence that those two great charters of freedom and justice remain firm and unshaken.[4]

In this Winter 2026 issue, we are pleased to bring you the conclusion of Richard Orsinger's article on the history of Rule 76(*a*), as well as Perry Cockerell's profile of late 19th century appellate justice Henry Lightfoot. We are also proud to showcase our Executive Director Sharon Sandle's compelling story of Title IX's impact on Texas campuses, and Texas law. And, of course, we hope you enjoy our usual slate of recurring columns and news items.

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[3] William H. Rehnquist, *Grand Inquests* (1992), *114.*

[4] Calvin Coolidge, "Address at the Celebration of the 150th Anniversary of the Declaration of Independence in Philadelphia, Pennsylvania" (July 5, 1926).

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The History of Tex. R. Civ. P. 76a on Sealing Court Records

• Part 2 of 2 •

By Richard R. Orsinger ©2025

Part 1 of this article can be found in the Summer 2025 Issue of the Texas Supreme Court Historical Society Journal.

On January 1, 1999, Rule 166b on the history of sealing records was replaced by Rule 192.6(b), which said that the court "may make any order in the interest of justice and may – among other things – order that "(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a." So unfiled discovery continues to be governed by Rule 76a.2(c), which includes in "court records" discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade.

The issue resurfaced in *Biederman v. Brown*, 563 S.W.3d 291, 302 (Tex. App.--Houston [1st Dist.] 2018, no pet.), where a journalist and documentary film producer filed an intervention in an old case, asking to unseal the deposition of attorney Russell Budd regarding a memo created by the Baron & Budd law firm that was used in various asbestos-related cases. The trial court dismissed the proceeding for lack of jurisdiction. The appellate court held that the deposition had been filed solely for in-camera inspection and therefore was not a court record as defined in Rule 76a. Regarding the claim that the deposition should be considered unfiled discovery, the Texas Attorney General filed an amicus brief saying that the trial court had jurisdiction as the deposition was unfiled discovery. The appellate court held that Biederman had failed to prove that the deposition was a court record, so the trial court did not have continuing jurisdiction under Rule 76a.

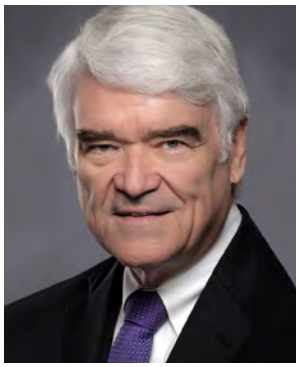
Subsequent Activity. The Supreme Court Advisory Committee has at one level or another considered changes to Rule 76a, and the adoption of rules for sealing records in the appellate courts.

2003. The meeting Agenda for SCAC's April 11, 2003 meeting included this item: "4.5 Sealing Court Records: TRCP 76A. The SCAC has been asked to review the effectiveness and operation of Texas Rule of Civil Procedure Rule 76a addressing the appropriateness of and method for sealing court records." A memo was attached to the Agenda saying:

> During the 12 years since the passage of Rule 76a, the Supreme Court has accumulated 17 three ring binders of Rule 76a filings. Since January 1, 2002, there have been 31 filings. Facial examination of the pleading does not often disclose the reason for the court sealings. Among the types of cases in which sealing orders have been requested in the last six months are: suits relating to adoption issues and suits seeking the

sealing of documents filed by an opponent following the inadvertent production of the document. One attorney routinely files motions in probate cases stating that the disclosure of the amounts paid to beneficiary's would be improper. The Court does not receive notification if a motion under Rule 76a is granted or denied.

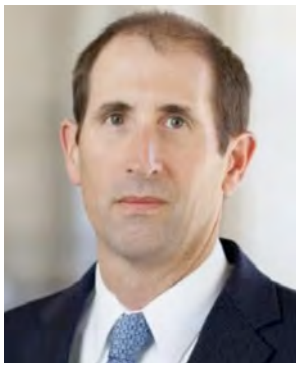
In its April 11, 2003 meeting, the SCAC did not discuss Rule 76a or sealing court records.


Justice Nathan Hecht

2006. The Supplemental Materials for the SCAC's October 20, 2006 meeting contained the results of a survey conducted by Supreme Court Rules Attorney Jody Hughes of how the courts of appeals deal with the filing and retention of records sealed by a trial court.[1]


Chip Babcock

2007. A February 5, 2007, letter from Justice Nathan Hecht to SCAC Chair Chip Babcock referred to the Committee the question of "whether the Appellate Rules should include a provision that requires parties in parental-rights-termination cases to identify minor children only by their initials, and that would allow courts to strike any appendices or exhibits containing minors' names."[2] An October 12, 2007 memo by Court Rules Attorney Jody Hughes recapped the SCAC's discussions on proposed TRAP 9.8.[3] The SCAC members suggested edits to the proposed TRAP 9.8 during its October 19, 2007 meeting.[4]


Jody Hughes

2008. On March 10, 2008, the Supreme Court adopted TRAP 9.8, "Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases." The Comment to the rule change said: "This is a new rule. Family Code §109.002(d) authorizes appellate courts, in their opinions, to identify parties to suits affecting the parent-child relationship (SAPCR) by fictitious names or by initials only. This law allows courts to protect the privacy interests of minor children involved in SAPCR proceedings, including suits to terminate parental rights. Similarly, Family Code §56.01(j) prohibits identification of a minor child or his family in an appellate opinion related to juvenile court proceedings. However, as appellate briefing becomes more widely available through electronic media sources, appellate courts' efforts to protect minor children's privacy by disguising their identities in

[1] Justice Nathan Hecht's letter of 2-5-2007, referring to the SCAC proposed changes to the Rules of Appellate Procedure, pdf p. 7 https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2007/supplementary/sc02162007.pdf p. 41. https://www.txcourts.gov/All_Archived_DocumentsSupremeCourtAdvisoryCommittee/Meetings/2007/transcripts/sc10192007.pdf

[2] *Ibid.,* pdf 12.

[3] SCAC 10-19-2007 discussion of TRAP 9.8, pdf pp. 16582-16605, pdf pp. 8-31 https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2007/transcripts/sc10192007.pdf.

[4] 12-13-2013 Order adopting TRCP 12c and TRAP 9.9 https://www.txcourts.gov/media/273991/order-13-9165.pdf.

appellate opinions may be defeated if the same children are fully identified in briefs and other court papers available to the public. The rule provides for the use of initials or fictitious names to protect the identity of a minor child following a parental-rights termination proceeding or juvenile court proceeding. Any fictitious name used for a parent or child should not be pejorative or suggest the person's true identity. The rule does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases."

2013. On December 13, 2013,[5] the Supreme Court adopted Tex. R. Civ. P. 21c, which defines sensitive data and provided that sensitive data must be redacted from any document filed with a court unless the inclusion of the sensitive data "is specifically required by a statute, court rule, or administrative regulation." At the same time the Supreme Court adopted TRAP 9.9, Privacy Protection for Documents Filed in Civil Cases, defining "sensitive data" as all but the last three digits of social security or other taxpayer-identification numbers, bank or financial accounts, and driver's licenses, passports, etc. Sensitive Data must be redacted from documents filed with courts. The redaction must be using the letter "X" for each redacted digit. A document containing unredacted sensitive data must notify the clerk in the upper left-hand corner that the document contains sensitive data. The court "may" strike documents containing sensitive data. Remote access to documents with sensitive data cannot be made available to internet access.


Judge Stephen Yelenosky


Lisa Hobbs

During the SCAC meeting on September 27, 2013, Travis County District Judge Stephen Yelenosky shared his opinions on certain practices surrounding Rule 76a. He said that attorneys cannot enter into Rule 11 agreements that seal files without complying with Rule 76a. He also said that parties cannot show an unredacted document to the court while delivering a redacted copy to the court reporter. He also said that exhibits marked in a hearing or trial are court records under Rule 76a. Committee member (and former Supreme Court Rules Attorney) Lisa Hobbs disagreed about redacting, saying that courts are required by law to redact certain things. After some discussion, they still disagreed.

June 2016. The Agenda for the SCAC meeting on June 10, 2016, included "Proposed Appellate Sealing Rule and Rule 76a."[6] The materials for the meeting included a Memo from SMU Law Professor Bill Dorsaneo dated June 8, 2016, proposing a TRAP Rule 9 that set out instructions for moving in the appellate court to seal documents, submitting documents in a sealed envelope, the appellate court identifying what record is sealed, temporary sealing orders, and a requirement that the appellate court state specific facts supported by affidavit showing why records should be sealed, etc. The standard proposed by Professor Dorsaneo was enclosed in


Prof. William V. Dorsaneo III

[5] Agenda for the 6-10-2016 SCAC meeting, pdf p. 2 https://www.txcourts.gov/media/1386575/1-AGENDA-SCAC-June-10-2016-3rd-Amended-.pdf

[6] Supplemental Materials for the 6-10-2016 SCAC meeting, pp. 255-263 https://www.txcourts.gov/media/1386572/june-10-2016-scac-notebook.pdf.

brackets, and came verbatim from Rule 76a, "to protect a specific, serious and substantial interest of the movant which clearly outweighs the presumption of openness that applies to court records, any probable adverse public health and safety; and that no less restrictive means than adequately and effectively protect the specific interests asserted."[7]

September 2016. The Agenda for the SCAC meeting on September 16-17, 2016[8] contained this item: "Proposed Appellate Sealing Rule and Rule 76a," from Professor Dorsaneo's appellate rules subcommittee. The materials for the meeting contained an 8-31-2016 "conference call redraft" of TRAP 9 laying out rules for sealing documents in appellate courts.[9] The proposed Rule was comprehensive, with definitions, the transfer of a sealed document from trial to appellate court, motions to seal in the appellate court, the requirement of specific facts supported by affidavits or other evidence, provisional sealing until the motion is ruled upon, filing a response, abatement pending ruling on sealing, temporary orders, motions to unseal documents, referral to the trial court for further hearings, contents of the sealing order, hearing, in camera review, a public order ruling on sealing request, appeal from trial court sealing orders as a severed final judgment, and the power to abate an appeal pending further action in the trial court. The matter was discussed, but no vote was taken.[10]

December 2016. December 20, 2016 was the last day of a series of emails in which Professor Dorsaneo put forth his proposed revisions to proposed TRAP 9.2(d) (sealing documents in appellate courts), Rule 193.4 (hearing and ruling on objections and assertions of privilege) and Rule 76a.[11] Professor Dorsaneo summarized:

> I plan to present each of the proposed rule amendments to the Advisory Committee in January 2017, if possible. The main objectives that have been dealt with in the proposed amendments are:
>
> 1. Sequencing and coordination of procedures for handling documents by Civil Procedure Rule 193.4 (b) - (d) and proposed Appellate Rule 9.2(d)(1)(c), (2), (6) to facilitate confidentiality and avoid inadvertent disclosure.
>
> 2. Specification of the form of documents filed under seal in appellate courts in both paper and electronic form in Proposed Appellate rule 9.2(d)(6) based on definitions contained in other current rules; and
>
> 3. Miscellaneous proposed amendments to Civil Procedure Rule 76a and

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7 Agenda for the 9-16-2016 SCAC meeting, pdf p. 1 https://www.txcourts.gov/media/1436264/scac-september-16-17-2016-agenda-3rd-amended.pdf.

8 Materials for the 9-16-2016 SCAC meeting, pdf pp. 387-393 https://www.txcourts.gov/media/1436263/scac-september-16-17-2016-notebook.pdf.

9 Transcript from the 6-10-2016 SCAC meeting, pdf pp. 27087-27176 https://www.txcourts.gov/media/1405601/SCAC-06-10-16-Transcript.pdf.

10 Materials for the 2-3-2017 SCAC meeting, pdf p. 183-84. https://www.txcourts.gov/media/1437132/scac-enotebook-232017-meeting.pdf.

11 2-3-2017 SCAC meeting Agenda, pdf p. 1 https://www.txcourts.gov/media/1437131/scac-february-3-2017-agenda.pdf.

proposed Appellate Rule 9.2(d) designed to coordinate the procedures for handling documents produced for in camera review under Rule 76a.

2017. The Agenda for the February 3, 2017, SCAC meeting[12] included the topic of "Proposed Appellate Sealing Rule and Rule 76a." Included with the materials for the meeting was a Memorandum from Bill Dorsaneo dated October 24, 2016,[13] which began:

> While reviewing the draft of proposed Rule 9.2(d), it has become increasingly clear to me that the procedures followed in the trial courts probably should be sequenced and coordinated with the procedures following in the appellate courts. As a result, I have revised the draft of proposed Civil Procedure Rule 193.4. Subdivisions (b) and (c) of the draft are designed to provide more detailed guidance to counsel and to trial judges about how documents filed "under seal" or "presented to the court in camera" are presented or produced to the court and how the court should handle them thereafter in anticipation of an appeal or mandamus review of the trial court's order concerning disclosure of the documents.
>
> The revised draft of proposed Rule 9.2(d) also contains paragraphs concerning the procedures for transmission of documents that were filed under seal or presented for in-camera inspection in the trial court under Rule 193.4 (see proposed Appellate Rule 9.2(d)(3) and 9.2(d)(6). I have also prepared a draft revision of those portions of Civil Procedure Rule 76a to match the current draft of proposed Appellate Rule 9.2(d).

The materials included proposed amendments to TRAP 9.2,[14] Rule 76a,[15] and Rule 193.4.[16] as well as a memo from the State Bar of Texas Committee on Court Rules with proposed changes to TRCP 21c relating to Sensitive Data.[17] Professor Dorsaneo's proposals were discussed by the Committee, but no vote was taken.[18]

2020. In 2020, the Office of Court Administration issued an article about public access to Zoom and other remote court proceedings. While the subject was not court records, it did contain some statements of policy that could be applied to court records. The article [footnotes omitted] said:

> The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts. Although the Supreme Court has never specifically held that the public has a First Amendment right of access to civil proceedings, federal and state

[12] Materials for the 2-3-2017 SCAC meeting, pdf, 185 https://www.txcourts.gov/media/1437132/scac-enotebook-232017-meeting.pdf.

[13] *Ibid.,* 172-178.

[14] *Ibid.*, 181.

[15] *Ibid.,* 172.

[16] *Ibid.,* 193-5.

[17] Transcript from 2-3-2017 SCAC meeting, pdf pp. 28086-28124.

[18] Texas Office of Court Administration article on *Background and Legal Standards – Public Right to Access to Remote Hearings During COVID-19 Pandemic* https://www.txcourts.gov/media/1447316/public-right-to-access-to-remote-hearings-during-covid-19-pandemic.pdf.

courts that have considered the issue have overwhelmingly held that there is a public right to access in civil cases under the 1st Amendment.

Courts must ensure and accommodate public attendance at court hearings. However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm. Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public. When a violation occurs, the Supreme Court held that a person whose rights to a public trial are violated do not have to "prove specific prejudice in order to obtain relief" and that the "remedy should be appropriate to the violation."

As recognized by *Waller* court, there may be times when a court finds that the rights or interest of privacy of the proceedings outweighs the rights or interests of a public trial. But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in Waller regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties' agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.[19]

2021. **Human Trafficking**. In 2021, the Texas Legislature added Section 98.007 to the Texas Civil Practice and Remedies Code, permitting a claimant in a human trafficking damage suit to use a pseudonym and to avoid revealing identifying information, such as address, telephone number, and social security number, in court filings. Section 98.007 also prohibits the Supreme Court from amending or adopting rules in conflict with that section. The statute does not say what happens if an attorney or pro se litigant files a pleading without pseudonyms. Can the document be sealed without complying with Rule 76a? The Supreme Court Advisory Committee's Subcommittee on Legislative Mandates draft memo of June 16, 2021, discussed the mandates in detail.[20]

Rule 76a. On October 25, 2021, Chief Justice Nathan Hecht sent a letter to SCAC Chairman Chip Babcock referring the following matter to the SCAC: "Texas Rule of Civil Procedure 76a. Since its adoption in 1990, the Court has received a number of complaints about Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. The Committee should draft any rule amendments that it deems advisable and,

[19] The 6-18-2021 SCAC Subcommittee on Legislative Mandates draft memo discussed the provisions in HB 1540 (human trafficking) and HB 2669 (misdemeanor criminal convictions of minors) requiring the protection of sensitive data. The memo can be found in the materials submitted with the Agenda, pdf p. 293 https://www.txcourts.gov/media/1452400/scac-june-18_2021-meeting-notebook.pdf.

[20] See the Subcommittee Chair's 3-22-2022 Memo: On the Sedona Conference Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal (December, 2021), contained in the materials for the March 25, 2022 SCAC meeting, p. 138 https://www.txcourts.gov/media/1453919/scac-meeting-notebook-20220325.pdf.

in making its recommendations, should take into account the June 2021 report of the Legislative Mandates Subcommittee." The topic was referred to the Subcommittee on Rules 16-165a on November 2, 2021. The Subcommittee, and other interested SCAC-members who volunteered to work on the project, met several times via Zoom and engaged in email discussions about what changes, if any, should be made to Rule 76a. The Subcommittee Chair reviewed and brought forward the sealing practices of Federal district courts around the United States. The Subcommittee also examined the proposal regarding a rule for sealing court records promulgated by The Sedona Conference, a Section 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law.[21] The Subcommittee considered many different approaches, including proposals made by the participants in the subcommittee process. A consensus on one recommendation could not be reached. The Subcommittee forwarded to the SCAC a proposed draft that was a composite of different perspectives. The Subcommittee identified concerns: trade secrets; information that is confidential under a constitution, statute, or rule; information subject to a confidentiality agreement or protective order; information subject to a pre-suit non-disclosure agreement with a non-party; and an order changing the name of a person to protect that person from a well-founded fear of violence. From a procedural perspective, the Subcommittee suggested posting public notice of hearings with the State's web site for public notices instead of at the county courthouse. The Subcommittee's proposed rule changes are contained in the meeting materials for August 19, 2022.[22] At the August 19 SCAC meeting there was a lengthy discussion about all aspects of Rule 76a.[23]

2022. At the September 30, 2022 SCAC meeting, the Subcommittee's proposed changes were further discussed. The meeting materials contain 90 pages of historical and contemporary documents relating to sealing court records and Rule 76a in particular, including the Subcommittee's 8-12-2022 Memorandum to the SCAC setting out proposed changes to Rule 76a, Justices Gonzalez's and Hecht's concurring and dissenting statement on the adoption of TRCP76a and amendment to Rule 16b, the Texas Uniform Trade Secrets Act, Rule 192.6 relating to protective orders, a Flow Chart showing for the Sedona Conference's Model Rule on Sealing in Federal Court (Dec. 2021), the Sedona Conference Rule, the Subcommittee's 3-22-2022 Memo on the Sedona Conference's proposed sealing rule, and more.[24] The Subcommittee's proposed amended Rule 76a deleted unfiled discovery from court records that are subject to Rule 76a. SCAC Chair Chip Babcock spoke in favor of excluding unfiled discovery from court records: "I believe, based on my practice in terms of representing mostly defendants in cases, that the unfiled discovery issue is very cumbersome with 76a if you are really going to follow 76a, and it doesn't, in my judgment, advance the interests that 76a was -- is and was at the time meant to support, which is the public should know what the judicial branch is doing in deciding cases, and that means that the public ought to be able to find out what

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[21] Materials for 8-19-2022 SCAC meeting, pdf p. 504-07 https://www.txcourts.gov/media/1454717/scac-meeting-materials-for-august-19-2022.pdf

[22] The SCAC discussion of Rule 76a begins at pdf p. 34049 of the transcript. https://www.txcourts.gov/media/1454821/scac-meeting-transcript-20220819.pdf.

[23] The materials from the 9-30-2023 SCAC meeting can be accessed at https://www.txcourts.gov/media/1454951/scac-meeting-notebook-20220930.pdf The first page contains a list of documents and a link to each one.

[24] Transcript of the 9-30-2022 SCAC meeting, pdf pp. 34169-70 https://www.txcourts.gov/media/1454951/scac-meeting-notebook-20220930.pdf

the judges are saying about the cases and why they are saying it. Unfiled discovery doesn't satisfy either of those two objectives."[25] The Committee voted unanimously to eliminate unfiled discovery from the description of court records in Rule 76a(2)(c).[26] The Committee voted 13 to 6 to have a presumption that trade secrets should be sealed, but not add other categories to the list where the presumption shifts in favor of sealing.[27] The Committee voted 14 to 5 to change Rule 76a to say that a hearing on a motion to seal or unseal is not required unless requested.[28] And the Committee voted 16 to 3 that Rule 76a should contain a provision requiring the court to take the public interest into account, separate and apart from the parties' advocacy.[29]

No further SCAC activity has occurred regarding Rule 76a. As of January 5, 2025, the Supreme Court has not promulgated any changes to Rule 76a, or Rule 192.6(b) pertaining to unfiled discovery.

Trade Secrets. Under Tex. R. Evid. 507, "[a] person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice." The Rule goes on to say: "If a court orders a person to disclose a trade secret, it must take any protective measure required by the interests of the privilege holder and the parties and to further justice." Rule 76a.2(c) excludes from "court records" "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights." In *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987), the Court considered whether to grant mandamus to set aside a protective order prohibiting the plaintiff's lawyers from sharing trade secrets contained in unfiled discovery in a products liability suit without first obtaining the trial court's approval. The Court noted that the Texas Rules of Civil Procedure had for thirty years "included provisions specifically tailored to prevent dissemination of trade secrets" (*Ibid.*, 346). The Court also cited three prior Supreme Court decisions noting "the importance of protecting trade secrets through protective orders." (*Ibid).* The Court weighed this protection against "public policies favoring the exchange of information" with other persons "involved in similar suits against automakers" (*Ibid.*, 347). The Court said: "Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." (*Ibid).* The Court continued: "In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery

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[25] *Ibid.*, 34224-45.

[26] *Ibid.,* 34251.

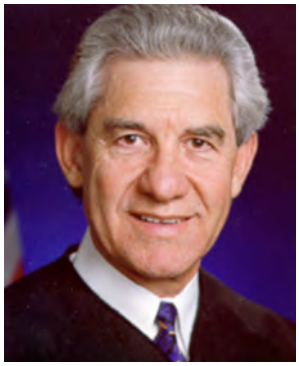
[27] *Ibid.,* 34282.

[28] *Ibid.*, 34295.

[29] In Tex. R Civ. P. 21c, sensitive data is defined as "(1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number; (2) a bank account number, credit card number, or other financial account number; and (3) a birth date, a home address, and the name of any person who was a minor when the underlying suit was filed." Rule 21c also included in sensitive data "the identity of a claimant in a suit brought under Chapter 98 of the Texas Civil Practice and Remedies Code if the claimant requests confidentiality, including the name, address, telephone number and social security number of the claimant." Order Adopting Tex. R. Civ. P. 21c, pdf https://www.txcourts.gov/media/273991/order-13-9165.pdf

efforts, even though the opponents share similar discovery needs and will litigate similar issues." (*Ibid).* The Supreme Court held that the protective order was overbroad and granted mandamus to set the order aside. In April of 1992, in *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (Per Curiam), the Supreme Court issued a writ of mandamus against Dallas County District Judge John Marshall, saying that he had abused his discretion by refusing to conduct a hearing under Rule 76a regarding Eli Lilly & Co.'s request to limit the disclosure of certain documents as trade secrets. In its Opinion, the Supreme Court said: "Although the rule's definition of 'court records' excludes 'discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights,' Tex.R.Civ.P. 76a(2)(c), it does not mean that access to trade secrets cannot be limited in other types of litigation. Regardless of the cause of action, a properly proven trade secret is an interest that should be considered in making the determination required by Rule 76a. If the trial court determines the documents are 'court records' within the meaning of the rule, it must decide whether any specific, serious, and substantial interest, including a trade secret interest, has been established that justifies restricting access to the documents in question." In November of 1992, the Dallas Court of Appeals issued a writ of mandamus against Judge John Marshall in Upjohn Co. v. Marshall, 843 S.W.2d 203 (Tex. App.–Dallas 1992, orig. proceeding), for denying Upjohn Co.'s request to seal documents that it intended to use as exhibits during trial, which the appellate court viewed as interference with the temporary stay it had granted in an appeal from Judge Marshall's ruling on a motion to seal the same documents when they were unfiled discovery. The Supreme Court overruled the Dallas Morning News' petition for writ of mandamus to overturn the Dallas Court of Appeals' temporary stay order, which was accompanied by a Dissenting Opinion by Justice Lloyd Doggett, and an Opinion by Justice Raul Gonzalez supporting the ruling, and an Opinion by Chief Justice Tom Phillips decrying Justice Doggett's departure from the Court's tradition not to comment on decisions regarding the composition of the Court's docket, which prompted Justice Gonzalez's Opinion. *Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 657 (Tex. 1992) (orig. proceeding). In *Computer Assocs. Intern v Altai*, 918 S.W.2d 453, 455 (Tex. 1994), the Supreme Court defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." In *In re Cont'l Gen. Tire*, 979 S.W.2d 609 (Tex. 1998), the Supreme Court held that "when a party resisting discovery establishes that the requested information is a trade secret under Rule 507, the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claim or defense." While *Continental Tire* was a discovery case where one party to a lawsuit was seeking the trade secrets of the opposing party, its principles apply equally to a situation where the opposing party who is attempting to force public disclosure of the trade secret in litigation already has


Judge John Marshall


Justice Raul Gonzalez


Justice Lloyd Doggett


Chief Justice Tom Phillips

the opponent's trade secrets and the issue is how to protect those trade secrets from becoming public knowledge in the course of the lawsuit. In 2013, the Legislature made Texas the 48th state to adopt the Uniform Trade Secrets Act. Tex. Civ. Prac. & Rem. Code § 134A.006, provides:

> § 134A.006. PRESERVATION OF SECRECY.
>
> (a) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means. There is a presumption in favor of granting protective orders to preserve the secrecy of trade secrets. Protective orders may include provisions limiting access to confidential information to only the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

What constitutes "an action under this chapter" is not specifically defined, but it can be said to include a lawsuit pertaining to past, present, or threatened misappropriation of a trade secret. It would seem not to include, for example, a products liability case which seeks discovery and dissemination of a trade secret incident to a suit for personal injury.

Tex. Civ. Prac. & Rem. Code § 134A.002(6) defines "trade secret" in the following terms:

> "Trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:
>
> (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

In *HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021), the Supreme Court ruled that the presumption of openness in Rule 76a does not apply to cases governed by the Trade Secret Act, but that the procedures of Rule 76a do apply. (*Ibid.,* 259-62). The Court said that "after TUTSA, parties seeking to seal records containing alleged trade secrets in misappropriation actions no longer have to show a specific, serious, and substantial interest that outweighs the presumption of openness and any adverse health or safety effects of sealing." (*Ibid.,* 261). The Supreme Court reversed the trial court's order sealing exhibits used in trial and remanded it to the trial court for reconsideration, because the trial court did not follow the procedures of Rule 76a. The issue was remanded to the trial court "for further proceedings." (*Ibid.*, 267). After remand the case made its way

back to the Supreme Court, because after remand the court of appeals had held that *HouseCanary, Inc*. was not entitled to ask the trial court for a narrower sealing order. *HouseCanary* appealed this determination, arguing that the court of appeals wrongly denied it the opportunity to seek a more limited sealing order, but *HouseCanary*'s petition for review was denied on December 20, 2024.

Sensitive Data. In 2008, the Supreme Court adopted Texas Rule of Appellate Procedure 9.8, relating to the use of fictitious names for minor children and parents involved in a parental rights termination case. On December 13, 2013, the Supreme Court adopted Texas Rule of Civil Procedure 21c, which defines sensitive data[30] and provided that sensitive data must be redacted from any document filed with a court unless the inclusion of the sensitive data "is specifically required by a statute, court rule, or administrative regulation." Redaction is not required for wills and documents filed under seal. The redaction must be done by substituting "X" for each digit or character of the sensitive data, or indicating redaction in some other manner. Also on December 13, 2013, the Supreme Court adopted Texas Rule of Appellate Procedure 9.9, providing for the redaction of sensitive data in the appellate record, briefs, and court opinions.[31]

The Right to Privacy. The writings in the area of public access to court records predominantly stress openness of court processes, without much being said about the privacy of individuals who come or are brought into the court system. Every individual has a privacy interest in avoiding the disclosure of certain personal matters under both the United States and Texas Constitutions. *See Nguyen v. Dallas Morning News, L.P.*, No. 02-06-00298-CV, 2008 WL 2511183, at *14 (Tex. App.--Fort Worth June 19, 2008, no pet.) (mem. op). While the Texas Constitution, which was adopted in 1876, does not separately enumerate a right to privacy, the Supreme Court of Texas has ruled that the Texas Constitution protects personal privacy from unreasonable intrusion. *See Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987). Thus, courts have ruled that certain personal matters fall within a constitutionally- protected zone of privacy, including matters related to the marital relationship, procreation, contraception, family relationships, child rearing and education, and medical records. *In Re Srivastava*, No. 05-17-00998-CV, 2018 WL 833376, at *4 (Tex. App.--Dallas February 12, 2018, orig. proceeding) (mem. op.); *Nguyen v. Dallas Morning News*, L.P., No. 02-06-00298-CV, 2008 WL 2511183, at *4 (Tex. App.--Fort Worth June 19, 2008, no pet.) (mem. op). "Information contained in employment records may, under some circumstances, be included within this protected zone." (*Nguyen v. Dallas Morning News, L.P.*, 4). Rule 76a does not expressly mention privacy rights in its standards for sealing court records. A memorandum by the Lawyers for Civil Justice discussing the importance of privacy rights, and how they should be balanced against the public's interest in seeing filed court records, is contained in the materials for the March 25, 2022 SCAC meeting.[96] Although no vote was taken to do so, the SCAC excluded cases arising under the Family Code from the operation of Rule 76a.

Circumventing Invasion of Privacy Protections. Tort law recognizes a right to avoid public exposure of private facts. The Texas Supreme Court said in *Industrial Foundation of the South v. Texas*

[30] Order adopting Texas Rule of Appellate Procedure, pdf. p. 21.

[31] Lawyers for Civil Justice, *Comment To the Advisory Committee on Civil Rules -- Sealing Fate: the Proposal to Restrict Judicial Discretion over Sealing Confidential Information Would Impose Unworkable Standards on the Courts, Conflict with Statutory Privacy Rights, and Stoke Unprecedented Satellite Litigation* (3-24-2021) https://www.txcourts.gov/media/1453919/scac-meeting-notebook-20220325.pdf pdf p. 210.

Industrial Accident Board, 540 S.W.2d 668, 684 (Tex. 1976): "Once information is made a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given to such information, at least if the information is at all newsworthy." Rule 76a does not expressly mention applying the zone of privacy prevailing in tort law to the sealing of court records. To allow a party to put private facts of another party or of third persons in court filings in a manner that would be tortious in other circumstance puts Rule 76a in opposition to Texas tort law.

Limitations on Discovery. Issues of public access to private information can arise in connection with objections to discovery requests. If information is not produced in discovery then it cannot be "discovery, not filed of record," and it cannot come within the scope of Rule 76a.2(c), and be subjected to the standards and procedures of Rule 76a. Sometimes an objection is made to discovery not to keep the information from the requesting party but instead to keep the information produced from being filed or used in court, thus making it a public record. Many discovery disputes can be avoided by entering into an agreed protective order that information provided in discovery will not be disseminated to third parties and will not be filed unless under seal. Some protective orders require the requesting party to return the information at the conclusion of the lawsuit and destroy all copies. Such agreed orders are routinely granted by trial judges without a hearing. This dynamic was raised as an argument against including unfiled discovery as "court records" subject to Rule 76a. If the mere production of documents in discovery risks making those documents court records, then the party seeking to restrict public access to the information has no alternative but to oppose the discovery request, thus proliferating discovery disputes which are the bane of trial judges and require lawyers' time and cost the clients money. This gave rise to the concerns expressed in and around the SCAC deliberations about the amendment to Rule 166b(5), requiring a discovery-related protective order sealing documents to comply with the provisions of Rule 76a "with respect to all court records subject to that rule." The reach of Rule 76a procedures applied to unfiled discovery was limited by *General Tire, Inc. v. Kepple*, 970 S.W.2d 520 (Tex. 1998) (Hecht, J.), in which the Supreme Court held that Rule 76a applied only to unfiled discovery that constitutes "court records" under Rule 76a(2)(c), meaning that it "concern[s] matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." If the unfiled discovery did not constitute "court records," then under Tex. R. Civ. P. 165b(5) the court "for good cause shown" can order that results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. The procedures in Rule 76a regarding public notice, hearing, intervention, etc., were held not to apply to the decision of whether the unfiled discovery constitutes court records. This allowed business as usual to continue regarding protective orders for unfiled discovery that did not have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government. The frequency with which courts sua sponte actually evaluate the protected information is unknown, but it is doubtful that judges routinely require unfiled discovery to be reviewed in camera when presented with an agreed protective order. However, in a case of notoriety, or where media or other third parties are raising a clamor, a judge might be prompted to require in camera inspection of such documents.

Tax Returns and Other Highly Sensitive and Personal Information. In *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959), the Supreme Court held that Federal income tax returns are

privileged from discovery except for portions of the returns that are relevant and material to the issues in the suit. The remainder of the tax returns was held to be privileged and not discoverable. In *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex.1962), the Supreme Court wrote:

> Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between litigants outweighs protection of their privacy. But sacrifice of the latter should be kept at a minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can only be information of relevancy and materiality to the matters in controversy.

In *Tilton v. Marshall*, 925 S.W.2d 672, 683 (Tex. 1996), the Supreme Court considered an order compelling the discovery of "tithing records" of an evangelical minister. The Court said: "Here, the burden imposed by the discovery order derives from the fact that the documents ordered disclosed are not only irrelevant but also highly sensitive and personal. In many respects, this request resembles those for tax returns." The Supreme Court characterized tax returns as "highly sensitive" and "personal." This reflects the public policy in this state that Federal income tax returns are confidential, privileged, and not subject to discovery (absent limited exceptions) much less subject to disclosure to the public at large through the artifice of attaching Federal tax returns to a petition and filing it with a court. The Court went on to say: "We are similarly reluctant to allow unnecessary disclosure of a litigant's tithing records, which contain information of a highly personal and private nature and which in many cases may be a subset of a person's tax records" (*Ibid*., 683). Here the Supreme Court reaffirmed the "highly personal and private nature" of Federal income tax returns. The Court went on:

> As we held regarding the forced production of tax records, where the irrelevant portions of which were not safeguarded from discovery, "[a] litigant so subjected to an invasion of privacy has a clear legal right to an extraordinary remedy since there can be no relief on appeal; privacy once broken by the inspection and copying ... by an adversary cannot be retrieved." *Maresca*, 362 S.W.2d at 301.

While the case involved whether the records should be produced in discovery, the principles relied upon in deciding the case would apply equally to a court order prohibiting the dissemination of such records if they are produced in discovery, or if they are already in the hands of the opposing party. A question arises whether a person seeking to redact or seal tax returns, and information from tax returns, and other sensitive personal information that is contained in court records, should have to meet the burden under Rule 76a(1)(a) to show "a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness," or whether as to this type of information should enjoy a presumption in favor of sealing. As discussed earlier in this article, in 2022 the SCAC voted to reverse the presumption as to trade secrets, as required by *HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254, 259-62 (Tex. 2021), but not for other types of information.

Abrogating Privileges. Texas Rules of Evidence 509 and 510 set out the physician-patient privilege and the mental health information privilege, respectively. Both privileges are subject to

exceptions in Rule 509(d)(4) and Rule 510(d)(5), which provide that the privilege does not apply "[i]f any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition." The Supreme Court called this the "litigation exception" to the privileges, in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). This case was a discovery dispute in which the plaintiff sued a physician for medical malpractice and sought the defendant doctor's medical and mental health records, claiming that the physician's negligence resulted from his mental or physical condition. The Supreme Court held that the privileged information was discoverable to the extent that the defendant's condition related in a significant way to a party's claim or defense. (*Ibid.*, 843). The Court said, "patient records should be revealed only to the extent necessary to provide relevant evidence relating to the condition alleged." (*Ibid).* The question arises whether a court can restrict the dissemination of information that would be privileged but for the litigation exception, at the unfiled-discovery stage, and can order the information sealed if it is to be filed, or sealed if offered into evidence in a hearing or trial. Stated more generally, if information is privileged against all the world other than an opposing litigant, can the information be protected from release to non-litigants?

Filing Someone Else's Private Information. TRCP 76a does not require that a litigant give advance notice to opposing parties or to a non-party that the litigant intends to file the other party's or non- party's confidential information in a court proceeding, thereby making it a "court record" under Rule 76a. Nor does Rule 76a explicitly provide that the opposing party or non-party may request that the court seal its confidential information before a party files it and makes it a court record. A requirement of advance notice to opposing parties and non-parties of the prospective filing of confidential information could be coupled with the Sedona Conference's concept of "Presumptively Protected Information," such as "Personally Identifiable Information," "Protected Individually Identifiable Health Information," "[i]nformation otherwise protected from disclosure by federal, state, or local laws, regulations, or rules governing data privacy," and other information that could be used to steal identity or target an individual, such as national, state, or local government-issued identification, passwords, personal email addresses, personal telephone numbers, personal device internet protocol (IP) addresses, residence addresses, etc., to require that a party intending to file an opposing party's or non-party's presumptively-protected information must give advance notice to the other party or non-party and refrain from filing the information until a period of time elapses or the court permits the filing.

Trial Exhibits and Trial Aids. In *Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 657 (Tex. 1992) (orig. proceeding), three of the Justices who issued individual Opinions accepted the proposition Rule 76a applied to sealing trial exhibits. In *HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254, 257 & 262 (Tex. 2021), the Supreme Court ruled that Rule 76a procedures apply to the sealing of exhibits used in trial. Court records are defined in Rule 76a as "all documents of any nature filed in connection with any matter before any civil court" (subject to exceptions). If a lawyer uses a Power Point slide show during jury selection, or the evidence phase, or the argument stage, have the images been "filed" and are they court records?

Closing the Courtroom. How do the standards of Rule 76a correlate with closing courtrooms to public view? Rule 76a centers on the concept of "court records" while Rule 18c governs public access to the court proceedings. Rule 18c focuses on whether media recording will

distract or impair the dignity of the proceedings and requires the consent of the parties and each witness whose testimony will be recorded or broadcast. The requirement of consent seems at odds with the standards for sealing court records set out in Rule 76a. As of the time this article is being written, the Supreme Court Advisory Committee has submitted two revisions to Rule 18c, one requiring consent of parties and witnesses to record or broadcast court proceedings, and the other leaving the matter in the court's discretion with a list of factors to consider. As of January 5, 2025, the Supreme Court has not acted on these recommendations.

Conclusion. The history of Rule 76a, regarding the sealing of court records, reflects an accelerated process. The Governor signed the legislative enactment on June 14, 1989, that directed the Supreme Court to devise a rule on sealing court records. The Supreme Court turned to its Advisory Committee to develop the rule. The Committee Chairman appointed an ad hoc subcommittee on July 15, 1989. The ad hoc subcommittee held two public meetings on November 18 and December 15 of 1989, and written comments were received from the public. The Supreme Court held a public session on September 30, 1989, in which it received comments on proposed rule changes, including sealing court records. The Advisory Committee held meetings on February 9 and February 16, 1990, in which sealing rules were discussed and finalized. Shortly after they were published in the Texas Bar Journal Rule 76a and amended Rule 166b(5) were promulgated by the Supreme Court on April 14, 1990, ten months after the Governor's signature started this process.

It began with a legislative directive, followed by two public meetings and written comments, and accelerated through a rapid rule-making process based upon majority votes in two meetings by a dwindling number of committee members, and finally with adoption by the Supreme Court with two dissents. Along the way, the decision was made to amend Rule 166b(5) to subject protective orders relating to unfiled discovery to Rule 76a standards and procedures. The representativeness of the vote on Rule 166b(5) was questioned by the chairman who ran the meeting in which the vote was taken, and in a dissenting statement by two Supreme Court Justices. Eyebrows were raised at the time and can be raised now.

Viewed in retrospect, the hurried process of developing a rule governing the sealing of court records was a success. Rule 76a supplanted the discussion over whether the public had a right to access civil court records under the state or federal Constitutions or the common law by implementing a rule-based presumption of openness and the requirement of public notice and hearing before court records can be sealed. The trial court's ability to issue confidentiality orders regarding unfiled discovery, based on good cause shown without the necessity of public notice and a hearing, was confirmed in *General Tire, Inc. v. Kepple*, except where sealing would have a probable adverse effect on the general public health or safety, or the administration of public office, or the operation of government. Rule 76a has remained in effect without change for thirty-four years. Subsequent efforts to create comparable procedures for Texas appellate courts have failed to gain traction, suggesting that the plaintiff-versus-defendant struggle that in 1989-1990 was the driving force behind the more general desire to curtail uncontrolled sealing of court records, was unique to that time. The SCAC is no longer impacted by efforts by segments of the Bar to gain an upper hand in litigation through changes in the rules of procedure and the rules of evidence. Changes to Rule 76a are now in the hands of the Texas Supreme Court. The Court itself is undergoing a transition with the retirement of Chief Justice Nathan Hecht, who has been

the court liaison to the Advisory Committee from the time of Rule 76a through December 31, 2024. Perhaps the last page will finally be turned, and we will start a new chapter in the saga of Rule 76a and the sealing of court records in Texas courts.

RICHARD R. ORSINGER, *a family law and civil appellate attorney in San Antonio, Texas, was appointed to the Texas Supreme Court Advisory Committee in 1994 and serves as chair of the subcommittee that proposed changes to Tex. R. Civ. P. 76a in 2021-2022.*

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Henry W. Lightfoot:
Chief Justice from Paris, Texas

By Perry Cockerell

Introduction

After I completed my book *"Texas Jurist: The Life, Law and Legacy of B.D. Tarlton"* in 2022 about the first Chief Justice of the Second Court of Civil Appeals in Fort Worth, I decided to look east to discover who was the first chief justice of the Fifth Court of Civil Appeals in Dallas. In 1893, Governor James Hogg appointed Thomas Jefferson Brown as the first Chief Justice to the Dallas Court of Civil Appeals. When a vacancy occurred on the Texas Supreme Court, the governor moved Brown to the high court and nominated Henry William Lightfoot of Paris, Texas to the Dallas court. Lightfoot accepted the appointment and was elected to a six-year term.

The Lightfoot family came from Tennessee and migrated to Lawrence County, Alabama where Thomas Lightfoot, Henry Lightfoot's grandfather acquired a plantation. Lightfoot's father, John Frazier Lightfoot, was a farmer. Henry Lightfoot was born on his family's farm on December 29, 1846. At age six, his father died. Five years later, his mother married James A. Patterson, an attorney. The family farm was sold, and the family moved to Courtland, Alabama to live with Patterson.

In 1862, at the age of sixteen, following two older brothers serving in the Confederacy, Lightfoot enlisted in the Confederacy as a private in Company H of the 11th Regiment. He served until the end of the Civil War. After the war, Lightfoot attended a private school in Nashville, Tennessee to prepare for law school. He graduated from Cumberland University in Lebanon, Tennessee in 1869. He practiced law for two years with E. H. Foster in Lawrence County, Alabama.

In 1872 he dissolved his law partnership with Foster and left for Sherman, Texas where he formed a law partnership with Henry O. Head. Lightfoot was like many of the first attorneys who migrated to Texas to practice law. They were Civil War veterans who educated themselves in law and were ready for new adventures in the west. Lightfoot moved to Texas, the land of opportunity, real property, an expanding population and a railroad system.

While in Sherman, Texas, Lightfoot met former Confederate General Sam Maxey at a legal event in Bonham, Texas. In 1873, Lightfoot moved to Paris, Texas to join with Maxey to form the law firm of Maxey & Lightfoot. Maxey became Lightfoot's mentor, legal partner, and best friend. Maxey liked Lightfoot so much that he reserved his adopted daughter, Dora Maxey, age seventeen, for Lightfoot, age twenty-seven. At Maxey's urging, Lightfoot began a relationship with her and married her in 1874. Lightfoot became a successful attorney, a state senator, president of

the Texas Bar Association, and Chief Justice of the Fifth Court of Civil Appeals established in Dallas, Texas in 1893. Lightfoot served on the court for four years, from 1893 to 1897. He chose to resign to return to the practice of law in Paris. In 1901, at the age of fifty-four, his life was cut short when he was struck ill while on a business trip in Skagway, Alaska. The return of his body to Paris, Texas for burial made national news.

1. Henry W. Lightfoot family roots.

Grandparents: Dr. Thomas and Sarah Lighfoot.

Henry Lightfoot's grandfather was Dr. Thomas Lightfoot, a medical doctor who was born in Brunswick County, Virginia in 1768. In 1801 he married Sarah Allen of Davidson County, Tennessee. They settled in Lawrence County, Alabama where the U.S. government was issuing land patents for 80 and 160 acres at a price of $1.25 to $2.00 per acre. Three patents were issued to Lightfoot from 1822 to 1831. Some records show that the plantation was over 1,300 acres. One patent is not clear and the other two patents show grants of at least 485 acres.

Dr. Thomas and Sarah Lightfoot had five children: Henry Cole, John Frazier, Narcissa Walker, Nancy Ann and Robert W. They were a highly respectable and well to do family.[1]

Parents: John and Maleana Lightfoot

On October 8, 1833, John Frazier Lightfoot married Maleana J. McKissack. They had had nine children: Thomas, James Monroe, Archibald McKissak, Sally Ann, John Frazier, Maleana, Henry William**,** Marcus Orville and Lucy Mozelle.

In the 1850 U.S. Federal Census, John F. Lightfoot is listed as a 44-year-old farmer born in Tennessee owning real estate in Lawrence County, Alabama valued at $6,880. The farm was in area called Myrtle Grove.[2] There were fourteen people in the household.[3]

In 1852, John Frazier died at the age of forty-seven. The plantation was left to his wife in lieu of a dower and to the children in equal parts.[4] At the time of her husband's death, Maleana had five minor children.

In 1857 Maleana married James A. Patterson,[5] an attorney with an eight-year-old daughter, Annie Eliza Patterson. Annie's mother was Nancy Martin Patterson, who was probably deceased

In 1858 Maleana petitioned the court to sell the family farm and to distribute the proceeds.[6]

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1 *The Dallas Morning News,* September 4, 1901.

2 https://www.findagrave.com/memorial/206918287/maleana_jones-lightfoot_patterson

3 1850 Federal Census, District 7, Lawrence Co., AL.

4 Newspaper article – The State of Alabama – Lawrence County, Probate Court, August Term 1858.

5 (1813-1892).

6 *Ibid*.

In the 1860 U.S. Federal Census, Henry Lightfoot is listed at age ten and living in the household of James A. Patterson in Franklin County, Alabama.[7] There were a total of fifteen listed in the household of Patterson. Henry Lightfoot attended four years at an academy in Tuscumbia, Alabama.[8]

2. The Civil War

On March 5, 1862, Lightfoot enlisted in the Confederate army at Leighton, Alabama.[9] He followed two of his older brothers who were already serving in the Confederacy. Lightfoot's oldest brother, Thomas Lightfoot, was serving as a Captain with Carlton's Regiment in the Arkansas Cavalry in Company E.[10] He also served in Company I, 15th Arkansas Cavalry, Slemon's Brigade.

John F. Lightfoot, an older brother, was serving in the 16th Regiment, Alabama Infantry, Company I.[11] On April 6, 1862, John Lightfoot was killed in the battle of Shiloh that took place in southwestern Tennessee. The battle resulted in a Union victory with major casualties on both sides.

Henry Lightfoot served in Company H of the 11th Alabama Cavalry,[12] in the 63rd Regiment, Company G,[13] also known as the 10th Alabama Cavalry Regiment. This unit was under the command of Brigadier General Philip D. Roddey. During his time in the war, Lightfoot would have engaged in fighting campaigns in Mississippi, Alabama and Tennessee.

In 1864, before the war ended, Lightfoot's mother, Maleana died at the age of fifty-two. She was buried in Colbert County, Alabama. James Patterson buried her next to her first husband, John Frazier Lightfoot.

On February 6, 1865, Thomas Lightfoot was captured in Jefferson County Arkansas on February 6, 1865, and was held at Pine Bluff and then sent to the Military Prison at Little Rock, Arkansas. He was released in May 1865 after taking the amnesty and oath of allegiance.[14]

Henry Lightfoot served until the end of the war when the 11th Regiment surrendered in May 1865 Decatur, Alabama.[15]

7 1860 U.S. Federal Census, Eastern Subdivision, Franklin Co., AL.

8 A.W. Neville, *The History of Lamar County*, The North Texas Publishing Co. Paris, Texas 1937.

9 Application 51666, Widow's Application for a Pension, Mrs. H.W. Lightfoot, Austin, Travis County, Texas.

10 https://www.nps.gov/civilwar/search-soldiers-detail.htm?soldierId=3D2770B3-DC7A-DF11-BF36-B8AC6F5D926A; Alternate Name: M376, Roll 14.

11 https://www.nps.gov/civilwar/search-soldiers-detail.htm?soldierId=9F2770B3-DC7A-DF11-BF36-B8AC6F5D926A

12 https://www.nps.gov/civilwar/search-soldiers.htm#q=Henry++W.+Lightfoot&fq%5B%5D=Side%3A%22Confederacy%22&fq%5B%5D=State%3A%22Alabama+%22

13 M374/Roll 26; complied roll by A.J. Cowart, 1910.

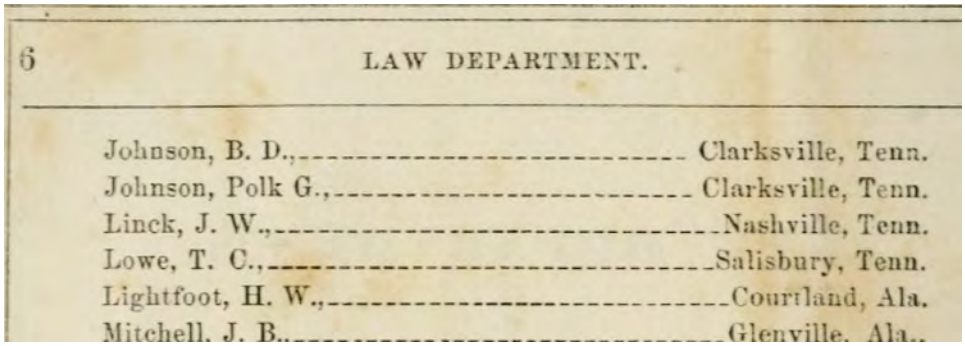
14 Tonya Chandler, Research Report, Southern Roots Genealogical Services, *Henry Lightfoot,* November 19, 2025.

15 Application 51666, Widow's Application for a Pension, Mrs. H.W. Lightfoot, Austin, Travis County, Texas. In his pension file, Mrs. Lightfoot believed that her husband was in the "Rodgers Regiment Forrest Cavalry" but no records were found by the pension board to prove the statements; Tonya Chandler, Research Report, Southern Roots Genealogical Services, *Henry Lightfoot,* November 19, 2025, 10.

Lightfoot was nineteen when the Civil War ended. He returned to the property of his stepfather, James Patterson to work as a field hand and to save money to attend law school.[16] He attended a private school near Nashville, Tennessee,[17]only thirty miles east of Cumberland University in Lebanon, Tennessee where he would attend law school.

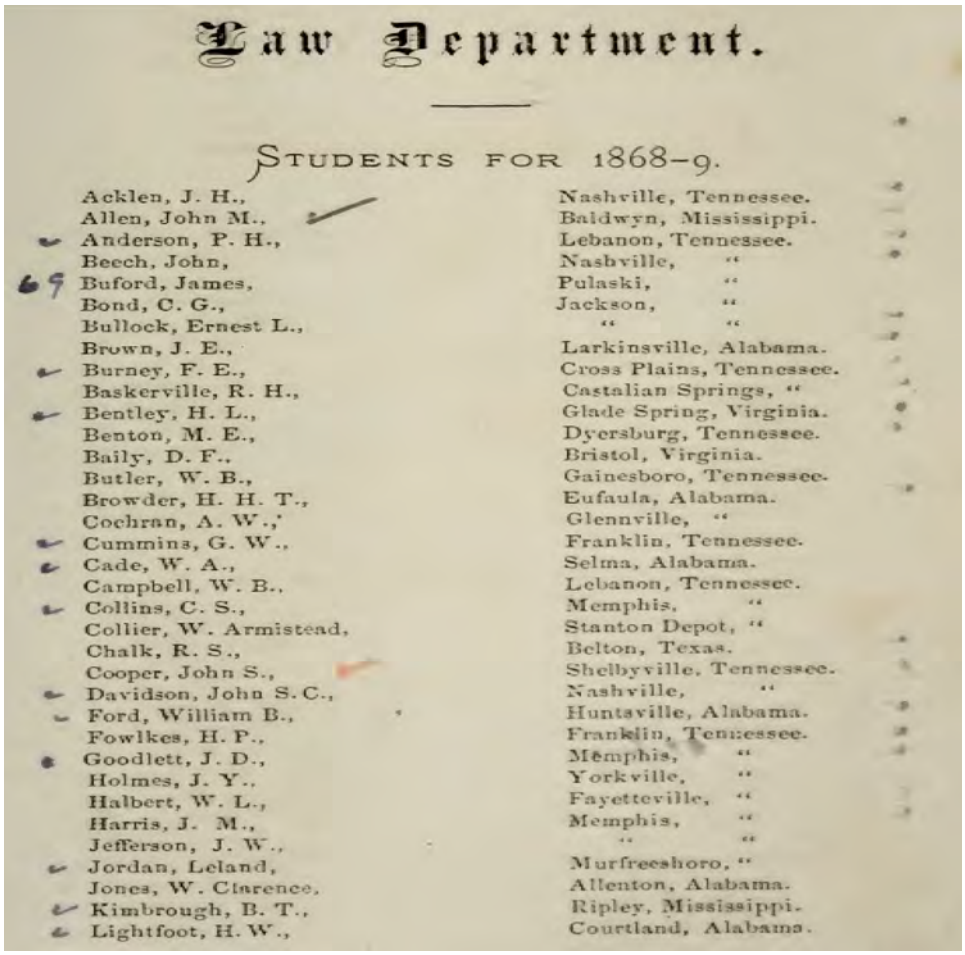
3. Law School

In the fall of 1868, Lightfoot entered Cumberland University.[18] He is listed as a law student in the 1868 and 1869 Catalogue of Cumberland University.



6 LAW DEPARTMENT.

Johnson, B. D.,	Clarksville, Tenn.
Johnson, Polk G.,	Clarksville, Tenn.
Linck, J. W.,	Nashville, Tenn.
Lowe, T. C.,	Salisbury, Tenn.
Lightfoot, H. W.,	Courtland, Ala.
Mitchell, J. B.,	Glenville, Ala.,



Law Department.

STUDENTS FOR 1868–9.

Acklen, J. H.,	Nashville, Tennessee.
Allen, John M.,	Baldwyn, Mississippi.
Anderson, P. H.,	Lebanon, Tennessee.
Beech, John,	Nashville, "
Buford, James,	Pulaski, "
Bond, C. G.,	Jackson, "
Bullock, Ernest L.,	" "
Brown, J. E.,	Larkinsville, Alabama.
Burney, F. E.,	Cross Plains, Tennessee.
Baskerville, R. H.,	Castalian Springs, "
Bentley, H. L.,	Glade Spring, Virginia.
Benton, M. E.,	Dyersburg, Tennessee.
Baily, D. F.,	Bristol, Virginia.
Butler, W. B.,	Gainesboro, Tennessee.
Browder, H. H. T.,	Eufaula, Alabama.
Cochran, A. W.,	Glennville, "
Cummins, G. W.,	Franklin, Tennessee.
Cade, W. A.,	Selma, Alabama.
Campbell, W. B.,	Lebanon, Tennessee.
Collins, C. S.,	Memphis, "
Collier, W. Armistead,	Stanton Depot, "
Chalk, R. S.,	Belton, Texas.
Cooper, John S.,	Shelbyville, Tennessee.
Davidson, John S. C.,	Nashville, "
Ford, William B.,	Huntsville, Alabama.
Fowlkes, H. P.,	Franklin, Tennessee.
Goodlett, J. D.,	Memphis, "
Holmes, J. Y.,	Yorkville, "
Halbert, W. L.,	Fayetteville, "
Harris, J. M.,	Memphis, "
Jefferson, J. W.,	" "
Jordan, Leland,	Murfreeshoro, "
Jones, W. Clarence,	Allenton, Alabama.
Kimbrough, B. T.,	Ripley, Mississippi.
Lightfoot, H. W.,	Courtland, Alabama.

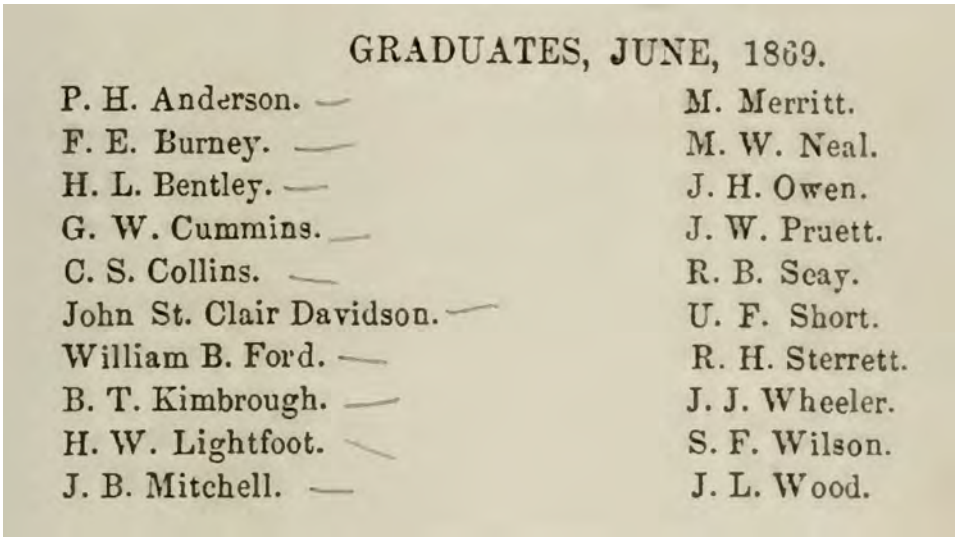
[16] Brown, John Henry, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[17] Application 51666, Widow's Application for a Pension, p. 23; Mrs. H.W. Lightfoot, Austin, Travis County, Texas.

[18] Brown, John Henry, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

There were thirty law school students in Lightfoot's class in 1868-1869.

Only twenty law graduates are shown in the June 1869 graduation from Cumberland University:



GRADUATES, JUNE, 1869.

P. H. Anderson.	M. Merritt.
F. E. Burney.	M. W. Neal.
H. L. Bentley.	J. H. Owen.
G. W. Cummins.	J. W. Pruett.
C. S. Collins.	R. B. Seay.
John St. Clair Davidson.	U. F. Short.
William B. Ford.	R. H. Sterrett.
B. T. Kimbrough.	J. J. Wheeler.
H. W. Lightfoot.	S. F. Wilson.
J. B. Mitchell.	J. L. Wood.

In the July 10, 1869, an article in the Alabama State Journal highlighted Lightfoot and three other law students for their arguments in a moot court event. The article stated that, "Mr. H.W. Lightfoot, of Courtland, Ala., followed for the defendant in an elaborate argument, which for polished rhetoric and the grace with which it was delivered, was second to no effort made upon this occasion."[19]

Lightfoot graduated Cumberland University in 1869 with high honors.[20] His graduation speech "possessed unusual merit, gave promise of a successful career that he has since carved out for himself at the bar, and was favorably commented upon in the leading Tennessee and Alabama papers."[21]

4. Lawrence County, Alabama

Lightfoot began his legal practice in the cities of Moulton and Courtland, in Lawrence County, Alabama. It was common for attorneys to provide a copy of their law card to the local newspaper who would print it and provide advertisement for new attorneys. *The Moulton Advertiser* noted his law card in an article that appeared on November 12, 1869, that said he was a young gentlemen of fine legal attainments, attentive to business and that he "cannot fail of success, and those of our friends who in trust business to his hands may rest assured that it will receive his prompt attention."

More than a month later, Lightfoot's law card ad appeared in the December 24, 1869 edition of the *Moulton Advertiser:*

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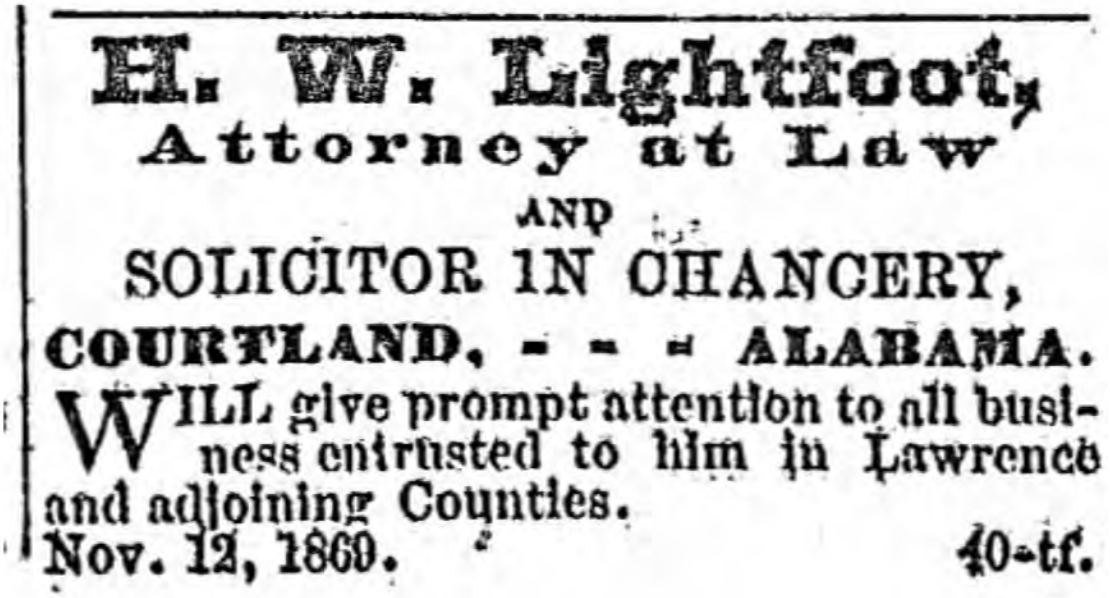
[19] *The Alabama State Journal* (Montgomery, AL), 10 July 1869, 4.

[20] Brown, John Henry, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[21] *Ibid*.

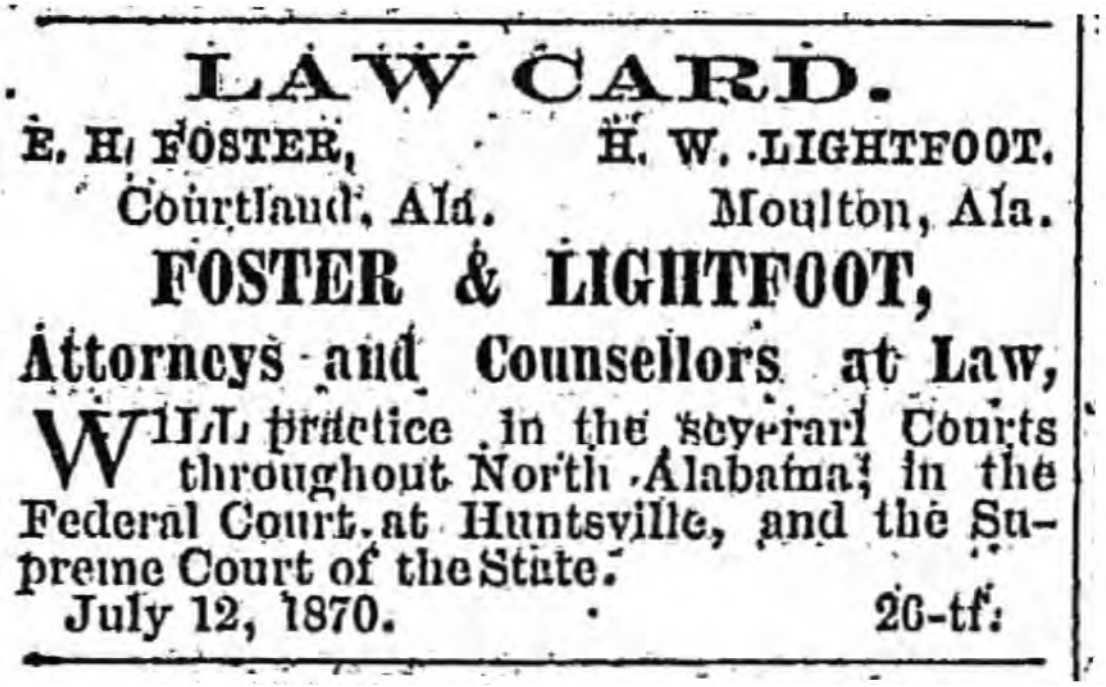


H. W. Lightfoot,
Attorney at Law
AND
SOLICITOR IN CHANCERY,
COURTLAND, - - - ALABAMA.
WILL give prompt attention to all business entrusted to him in Lawrence and adjoining Counties.
Nov. 12, 1869. 40-tf.

In the June 10, 1870 edition of the *Moulton Advertiser,* Lightfoot received praise in an article entitled "*Kittaskie*" where children from church schools called "Sabbath Schools" had met outdoors to hear readings. The article mentioned Lightfoot as an "accomplished young friend" who delivered an excellent literary collation and that he "impressed upon the audience the social, political and moral necessity of the sabbath school."

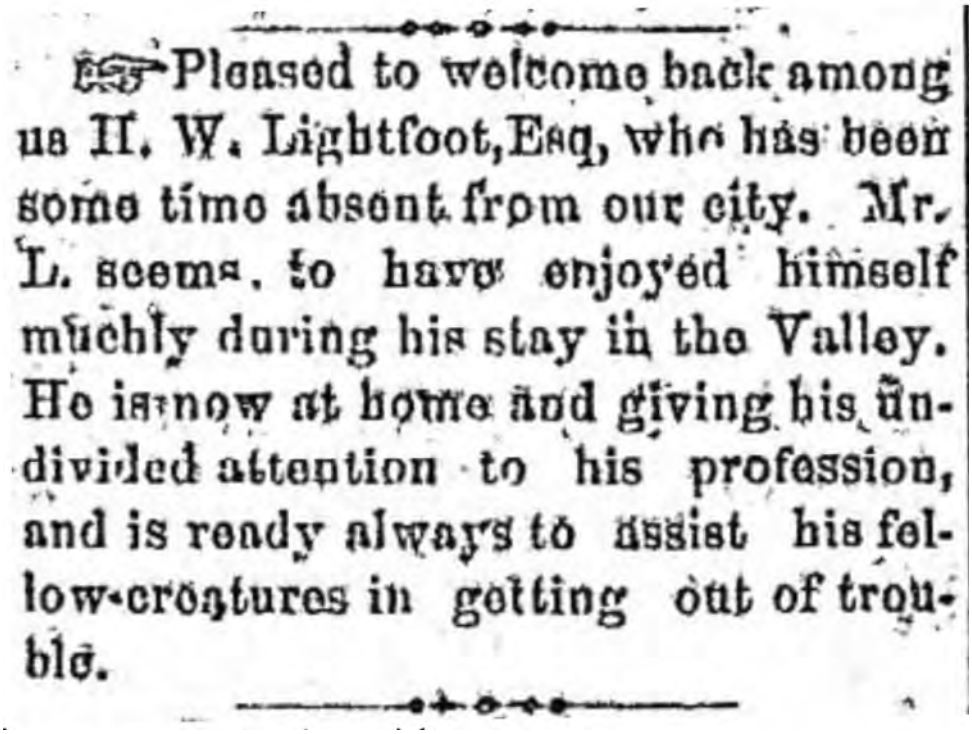
5. Foster & Lightfoot

By July 1870, Lightfoot was in law partnership with E. H. Foster in Moulton, Alabama. The *Moulton Advertiser* published their law card on July 29, 1870:



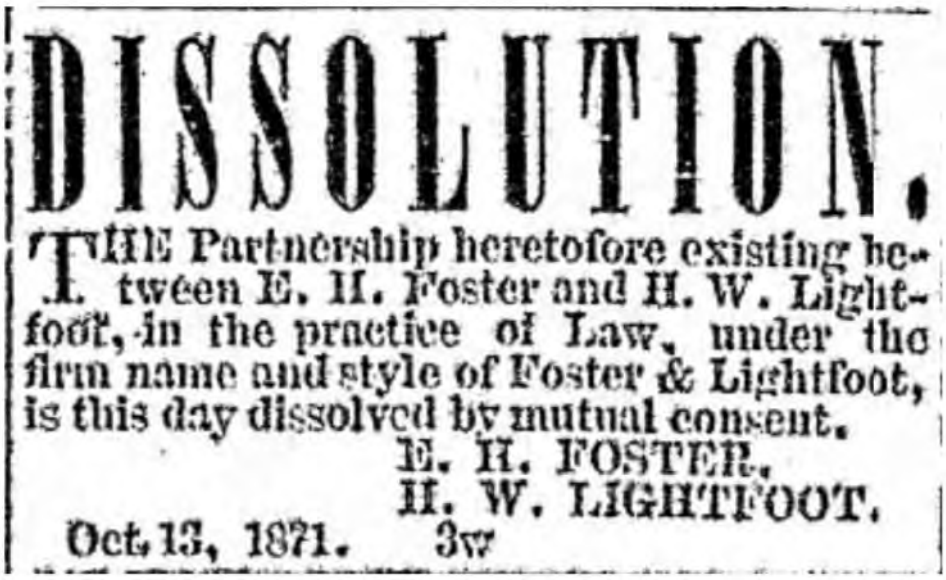
LAW CARD.
E. H. FOSTER, Courtland, Ala.
H. W. LIGHTFOOT. Moulton, Ala.
FOSTER & LIGHTFOOT,
Attorneys and Counsellors at Law,
WILL practice in the several Courts throughout North Alabama; in the Federal Court at Huntsville, and the Supreme Court of the State.
July 12, 1870. 26-tf.

This article appeared on March 3, 1871 in *The Moulton Advertiser*:



☞Pleased to welcome back among us H. W. Lightfoot, Esq, who has been some time absent from our city. Mr. L. seems to have enjoyed himself muchly during his stay in the Valley. He is now at home and giving his undivided attention to his profession, and is ready always to assist his fellow-creatures in getting out of trouble.

By October 1871, Lightfoot had decided to dissolve his partnership with E. H. Foster. This article appeared on October 13, 1871 in *The Moulton Advertiser*:



DISSOLUTION.

THE Partnership heretofore existing between E. H. Foster and H. W. Lightfoot, in the practice of Law, under the firm name and style of Foster & Lightfoot, is this day dissolved by mutual consent.

E. H. FOSTER,
H. W. LIGHTFOOT.

Oct. 13, 1871. 3w

6. Sherman, Texas

By January 1872, Lightfoot moved to Sherman, Texas[22] "seeking the larger opportunities afforded by the western world."[23]

[22] John Henry Brown, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[23] Application 51666, Widow's Application for a Pension, 23, Mrs. H.W. Lightfoot, Austin, Travis County, Texas. The date of Lightfoot's arrival in Texas is not certain. Some documents show his arrival in 1871 and 1872.

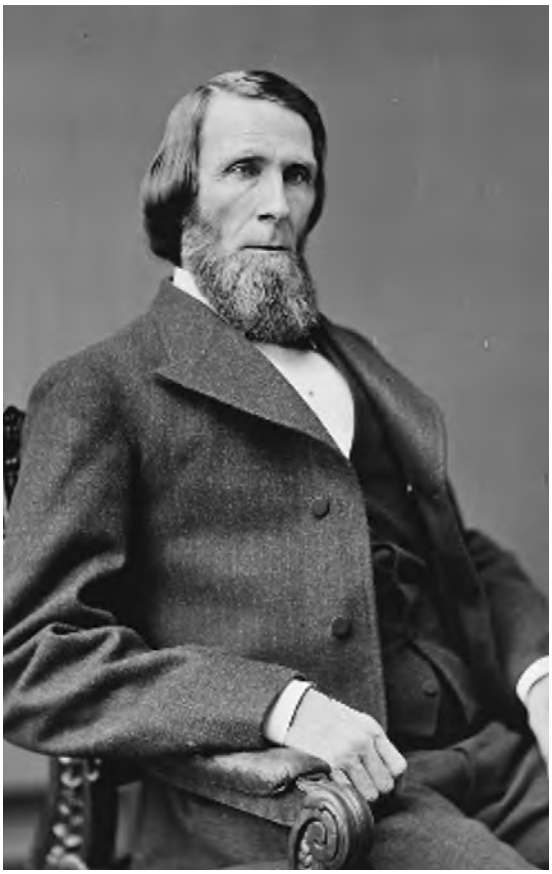
Before leaving Alabama, the Honorable Robert Lindsay, Governor of Alabama appointed Lightfoot as one of the Directors of the Agricultural and Mechanical College of Alabama (now Auburn University). This was quite an honor for Lightfoot who was twenty-five years of age. Lightfoot was unaware of the appointment and the governor was unaware that Lightfoot had left for Texas. Lightfoot had to decline the appointment. [24]


Henry O. Head

In Sherman, Lightfoot began a partnership with Henry Head, a member of the Sherman Bar. Head was a fellow graduate of Cumberland University in 1867. Head and Lightfoot would follow similar paths: they both would become appellate justices on the courts of civil appeals in Texas appointed by Governor James Hogg.

7. Sam Bell Maxey

To understand Henry Lightfoot, one must understand Sam Bell Maxey who would become Lightfoot's greatest influence. In the spring of 1872, Lightfoot was in Bonham, Texas on legal business in the district court. He met General Sam Bell Maxey at the same hotel where they stayed. This chance meeting turned out to be a turning point in Lightfoot's career. Maxey must have encouraged Lightfoot to move to Paris, Texas to practice law together.


Sam Bell Maxey

Maxey was born on March 30, 1825 in Tompkinsville, Kentucky. In 1846 he graduated from the United States Military Academy at West Point. His roommate was Thomas Jackson who earned the name "Stonewall" during the Civil War.

Maxey served in the U.S. Army during the U.S–Mexico War. After leaving the Army, he joined his father's law firm in Kentucky and married Marilda Cass Denton in 1853.

In 1857, Maxey and his father moved their families to Paris, Texas and continued their law careers. Maxey became district attorney of Lamar County. In 1860, Maxey was elected to the Texas State Senate, but Texas seceded from the United States before he took office.

In 1861 a Secession Convention was held in Austin. Maxey sent his father in his place. Maxey organized and became the colonel of the Ninth Texas Infantry Regiment that consisted of soldiers from Northeast Texas. The regiment was part of the Western Department and later the Army of Tennessee. The regiment fought in major battles in the Civil War, including Shiloh, Stones River, Chiamauga and the Atlanta Campaign.

[24] John Henry Brown, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

In March 1862 Maxey was promoted to brigadier general. In 1863 he saw action at the Siege of Port Hudson in the Vicksburg Campaign and at Jackson, Mississippi. He commanded as many as 3,000 men.

In December 1863 Maxey was assigned as commander of the Indian Territory where he conducted raids and captured supplies preventing a Union Army invasion of Texas. Maxey served until February 1865 when he asked to be relieved of his command. After the war he learned that Confederate General Jefferson Davis had approved Maxey's nomination to major general and that the Confederate Senate had approved it.

In July 1867, through the assistance of General Ulysses S. Grant, he secured a pardon from President Andrew Johnson, Maxey resumed his legal practice.

In 1869 Maxey built a home on Church Street. He and his wife, Marilda moved into the house with their twelve-year-old adopted daughter, Dora Rowell Maxey.

In 1872 Maxey ran for U.S. Congress but lost the race in the Democratic Party to William P. McLean.

8. Paris, Texas

When Lightfoot arrived in Paris in 1873 to form the partnership of Maxy & Lightfoot, he was described as a "young strapping attorney."[25] For the next twenty years they worked together to form one of the most lucrative practices enjoyed by any firm in Texas.[26] Over the years the firm added new partners and became known as Maxey, Lightfoot & Gill and Maxey, Lightfoot & Denton. Their name appeared on many appellate cases taken to the Texas Supreme Court.[27]


Dora Belle Rowell

9. Dora Moore Maxey

The Maxeys had no children but in 1862, Maxey and his wife took in and adopted five-year-old Dora Belle Rowell who was born in on April 3, 1857.

Her mother, Mary Katherine McGowen died at childbirth. In 1862 her father Thomas Rowell brought her to Paris for safekeeping while he served in the Confederacy. In April 1862, Rowell was killed in the Civil War at the Battle of Shiloh.

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[25] A.W. Neville, *The History of Lamar County,* The North Texas Publishing Co. Paris, Texas 1937.

[26] John Henry Brown, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[27] *Cross & Cross, Administrators v Crosby, et al,* 42 Tex. 114 (1874); *Jones v Walter,* 44 Tex. 200 (1875); *Miller v State,* 43 Tex. 580 (1875); *Long & Berry,* 45 Tex. 400 (1876); *Hancock v Henderson, Guardian*, 45 Tex. 479 (1976); *Wells v Dyer*, 45 Tex. 432 (1876); *Addison v State,* 3 Tex. App. 40 (1877); *Cavanaugh v Peterson*, 47 Tex. 197 (1877); *Hale v Hale,* 47 Tex. 336 (1877); *Davis v State,* 5 Tex. App. 48 (1878); *The Paris Exchange Bank v Beard,* 49 Tex. 358 (1878); *Lamar County v Clements,* 49 Tex. 347 (1878); *Wallace & Co, et al v Campbell,* 54 Tex. 87 (1880); *Robertson v Johnson,* 57 Tex. 62 (1882).

At age ten, Dora attended the Buckner School in Paris, learning how to play the piano and to paint. At age seventeen, the Maxeys sent her to the Caldwell Female Institute in Henderson, Kentucky. While she was attending the Institute, Sam Maxey learned that Kentucky governor Thomas Wooten's son was writing Dora from Princeton University.[28] Mrs. Maxey encouraged the Wooten-Maxey union. [29] However, Maxey had Lightfoot in mind for his daughter. He encouraged Lightfoot, eleven years older to write her and Lightfoot did so. [30]

Maxey instructed his daughter: "correspondence with young men should never be carried on. A polite note should be answered, of course, but a schoolgirl has no business with correspondence with young men."

10. Marriage to Dora Bell Maxey

On November 3, 1874, Henry and Dora were married. Texas Governor Richard Coke and Kentucky Governor Preston Leslie attended the wedding. This young attorney had a life and destiny already set out for him.

The couple lived in the Sam Bell Maxey home.

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[28] Betsy Mills and Ron Brothers. *The Death and Cemetery Records of Lamar County, Texas,* ReBroMa Press, 2008, http://www.lamarcountytx.org/cemetery. (11/08/2025)

[29] *Ibid*.

[30] *Ibid*.

Dora Belle Maxey

Maxey Bell Lightfoot.

On November 15, 1875, Maxey Bell Lightfoot, the couple's first child, was born.

In 1876 the Lightfoot's built their own home across the street from the Sam Bell Maxey home.

Unfortunately, on October 10, 1876, their son, Maxey Bell Lightfoot, died at age 10 months. He was buried in Evergreen Cemetery in Paris, Texas.

Sallie Lee Lightfoot

On June 8, 1878, their second child, Sallie Lee Lightfoot was born.

Thomas Chenoweth Lightfoot

On August 12, 1880, their third child, Thomas Chenoweth was born.

Grave marker of Maxey Bell Lightfoot

Dora and Henry Lightfoot

11. Politics and Law

Both Sam Maxey and Henry Lightfoot's influence in Texas would continue to grow over the years. Besides having a successful law practice, both were interested in politics.

Texas Legislature.

On January 28, 1874, Sam Maxey was elected by the Texas Legislature to the first of two terms in the United States Senate. His term would begin in March 1875. The responsibilities of the law practice in Paris fell on Lightfoot.

Democratic National Convention.

In January 1876, Lightfoot was elected by the Democratic State Convention in Galveston, Texas as a delegate to the National Convention in St. Louis, which nominated Tilden and Hendricks.[31]

Texas Senate.

In 1880 Lightfoot was elected to the Texas state senate without opposition.[32] Lightfoot served on fourteen committees in the Legislature.

Lightfoot's term expired after two years because of the redistricting following the Census of 1880 caused and all terms to expire. [33] Lightfoot chose not to seek reelection.

12. Death of Dora Lightfoot

On July 13, 1884, tragedy struck the Lightfoot household when Dora Lightfoot, wife of Henry, passed away from cancer at the age of twenty-seven.

Dora's death left Lightfoot with two minor children, Sallie Lee at age six and Thomas at age four. After her death, Lightfoot moved back in the Maxey house where Miralda Maxey cared for them.

Grave Marker of Dora Maxey Lightfoot

Despite being single and a father of minor children, Lightfoot continued with his political life. In September 1884, he was named Chairman of a committee for Grover Cleveland and

[31] John Brown, John Henry, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[32] *Ibid*.

[33] A.W. Neville, "Backward Glances, Changes in Senatorial Districts by Lamar," *The Paris News,* March 14, 1951.

Thomas Hendricks. In 1888, he was a delegate again at the Democratic convention where he seconded the nomination of Grover Cleveland from the Texas delegation.[34]

13. Mack Crook trial

Crook, the former sheriff of Lamar County who was charged with murder of Sheriff Elect Black in 1884. It was called "the greatest murder trial north Texas has ever witnessed" and began in Sherman, Texas.[35]

14. State Democratic Convention

In 1888 Lightfoot was elected by the State Democratic Convention as a delegate to the National Convention at St. Louis that nominated Grover Cleveland and Thomas Hendricks. Lightfoot seconded the nomination of Cleveland "which he did in a short and felicitous address that met with favor, both in the convention and at home."[36]

15. Federal Court in Paris, Texas?

In January 1886, *The Dallas Morning News* reported that Lightfoot was making a trip to Washington, D.C. to see Senator Maxey to push for a federal court in Paris, Texas.[37]

16. Prohibition

In 1887 when the Legislature adopted prohibition against the sale of alcohol, Lightfoot was one of the strongest champions making speeches for prohibition.[38] The voters refused to adopt the amendment.

17. Marriage to Etta Imogene Wooten

On December 5, 1889, Lightfoot married Etta Imogene Wooten in Austin, Texas.[39] They spent their honeymoon in New Orleans. [40]

Etta Wooten was the daughter of Thomas Dudley Wooten who served as a Confederate army surgeon during the Civil War. In 1865 Dr. Wooten settled in Paris, Texas. In 1876 he moved to

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[34] A.W. Neville, *The History of Lamar County*, The North Texas Publishing Co. Paris, Texas 1937.

[35] *The Dallas Morning News,* November 21, 1888.

[36] John Henry Brown, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[37] *The Dallas Morning News,* January 27, 1886.

[38] A.W. Neville, *The History of Lamar County*, The North Texas Publishing Co. Paris, Texas 1937; Betsy Mills and Ron Brothers. *The Death and Cemetery Records of Lamar County, Texas,* ReBroMa Press, 2008, http://www.lamarcountytx.org/cemetery. (11/08/2025).

[39] Dr. Wooten served as a surgeon during the Civil War. After the war, Dr. Wooten practiced medicine in Paris, Texas. By 1876 he established a large practice in Austin, Texas. He became one of the original regents of the University of Texas in 1881 and served as president of the board from 1885 until his death in 1906.

[40] *The Dallas Morning News,* December 15, 1889.

Austin where in both places he achieved a considerable reputation as a surgeon."[41]

18. Texas Bar Association

On July 11, 1889, Lightfoot was elected president of the State Bar Association. In his annual address delivered August 6, 1890, he discussed the Railroad Commission amendment to the State constitution to be voted upon in November 1889.[42]

In August 1890, Lightfoot did not attend the annual Texas Bar Association meeting in Galveston because Sam Maxey became ill. Lightfoot sent a telegram that it was impossible for him to be present "and that Senator Maxey was slowly improving."

19. Lightfoot Children

Wooten Dudley Lightfoot

On October 22, 1890, Wooten Dudley Lightfoot was born in Paris, Texas. This was the first child with Etta Lightfoot in his second marriage.

Will Henry Lightfoot

On August 23, 1892, Will Henry Lightfoot was born in Paris, Texas. This was his second child with Etta Lightfoot.

20. Impeachment of Land Commissioner W.L. McGaughey

In 1893, Lightfoot defended Land Commissioner W.L. McGaughey, in his impeachment proceeding before the Texas Senate. This was the first impeachment trial in Texas history. McGaughey was a Civil War hero who was shot multiple times during the war, in the head, side and in the heel. McGaughey and Lightfoot both came from Lawrence County, Alabama and served in the Civil War in the Alabama Infantry.

After the Civil War, McGaughey moved to Texas and in 1885 he was elected to the Texas House of Representatives and in 1890 as Land Commissioner. Things did not work out well when McGaughey was impeached for incompetence. An investigation claimed that he had sold property in Harris and Liberty counties to any purchaser, rather than actual settlors, and that they were prior to the time they were officially offered for sale.[43]

Lightfoot, as his defense attorney, considered McGaughey's actions as negligent but not criminal or impeachable. Lightfoot believed that impeachable offenses had to rise to the standard of criminal law. Lightfoot moved to dismiss the impeachment proceeding arguing that there was

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[41] https://en.wikipedia.org/wiki/Thomas_Dudley_Wooten.

[42] A.W. Neville, *The History of Lamar County*, The North Texas Publishing Co. Paris, Texas 1937.

[43] Cortez A.M. Ewing, "The Impeachment of Colonel W.L. McCaughey,"*The Southwestern Social Science Quarterly,* Vol. 15, No. 1 (June 1934): 52-63.

no jurisdiction because to impeach required evidence of an indictable crime based on written criminal law. Lightfoot argued that article 15 of the constitution was not self-executing and that there was no crime committed. The prosecution argued that the article of impeachment in the constitution was self-executing and that an offense may be impeachable and still not indictable.[44]

On May 5, 1893, after "one of the most interesting and important trials ever held in this State,"[45] McGaughey was acquitted. [46]

21. Fifth Court of Civil Appeals

In 1893, the legislature established the Fourth Court of Appeals in San Antonio and the Fifth Court of Appeals in Dallas. Governor Hogg initially named Thomas Jefferson Brown as the first chief justice, but when an opening occurred at the Texas Supreme Court, on August 9, 1893, Hogg named Henry Lightfoot as Chief Justice for the Fifth Supreme Judicial District of Texas. He named N.W. Finley from Tyler and Anson Rainey from Waxahachie as associate justices.

On Monday, September 4th, the Fifth Supreme Judicial District formally opened and became responsible for appeals from thirty-two counties ranging from northeast Texas from Dallas to the Oklahoma border, east to the Arkansas and Louisiana borders, and south halfway to Houston. The Court took up offices in the southeast corner of the third floor of the county courthouse known as the "Old Red" courthouse. In in the fall of 1894, Lightfoot, Finley and Rainey were reelected to a six-year term.

22. The Lightfoots in Dallas

It is not clear where the Lightfoot family lived in Dallas when Henry Lightfoot served on the court of civil appeals in Dallas. Lightfoot's two children with Dora Lightfoot, Sallie Lightfoot and Thomas Lightfoot were not happy about having to move to Dallas. They were teenagers who already had their life in Paris, Texas. Sallie Lightfoot wrote letters to Miralda, the wife of Sam Maxey, complaining of the move.

23. Sam Maxey Dies

On August 16, 1895, Sam Maxey traveled to Eureka Springs, Arkansas for the recuperative warm springs but died there of a gastrointestinal ailment at the age of seventy. His body was returned to Paris and his funeral was attended by many friends.

24. Henryetta Lightfoot

On December 6, 1896, Etta Lightfoot had their third child, Henryetta, who was born in Dallas. One can only imagine the Lightfoot household in 1896: three minor children: Wooten at age six, Will Henry at age four, and now newborn, Henryetta from his second wife. Then there

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[44] *The Dallas Morning News*, April 26, 1893.

[45] John Henry Brown, *Indian Wars and Pioneers of Texas*, 1880, 736-738; Austin, Texas.

[46] A.W. Neville, *The History of Lamar County,* The North Texas Publishing Co. Paris, Texas 1937.

were eighteen-year-old Sallie and sixteen-year-old Thomas.

At some point Sallie returned to Paris, Texas to live in the Maxey House. The home was occupied by Leighla, the wife of Sam Bell Maxey, the great nephew of Sam Bell Maxey, and Miralda Maxey, the wife of Sam Bell Maxey.

The salary for the appellate justices was $4,000 per year.

The pressure on Lightfoot was enormous. Could he stay on the court for the full six years?

25. Tribute to Sam Bell Maxey

On June 11 ,1896, Judge Lightfoot, read a memorial to Sam Bell Maxey before the Association of the Graduates of the United States Military Academy at West Point.[47]

26. 1897 Stonewall Jackson

On April 30, 1897, Judge Lightfoot delivered an address for the unveiling of the statute of Stonewall Jackson in Dallas that was placed in what is now the Dallas Pioneer Park.

By today's standards, Lightfoot's actions were politically incorrect. In 2020, the Dallas City Council voted to remove the statue and that of Robert E. Lee, Jefferson Davis and Albert Sidney Johnston.

27. Judicial Opinions

During his four years on the court, Chief Justice Lightfoot wrote over 300 opinions. The court dealt with numerous types of cases from issues involving breach of contract, creditor's rights, eminent domain, family law, fraudulent conveyances, labor and employment, landlord tenant, municipal law, partnership, personal injury, probate, taxation, real estate litigation, telecommunications to wrongful death. Of these cases, Lightfoot authored at least seventy-seven opinions that reversed lower court rulings or jury verdicts based on procedural or substantive errors.

The most common areas of litigation involved damage claims against railroad companies for personal or property damages. Lightfoot handled sixty-six appeals involving claims against railroad companies. He reversed thirty-three judgments in those cases.

Real estate was another area that was actively litigated. These cases ranged from claims for adverse possession, breach of warranty of title, foreclosure of vendor's or home improvement liens, homestead exemptions, landlord tenant disputes, mechanic's lien foreclosures, real estate sales contracts and conveyances to trespass to try title involving adverse possession claims.

As an intermediate court, Lightfoot's opinions were not groundbreaking decisions that would affect the state for years to come. Lightfoot was always applying existing law from the

[47] Louise Horton, *Sam Bell Maxey, A Biography,* University of Texas Press, 194 (1974).

Texas Supreme Court. Sometimes he examined difficult issues by looking to treatises, out of state cases, and English common law which Texas adopted in 1840.

Due to word limitations for an article, this section is an overview of many of Lightfoot's reversal opinions which offer the basis for the error. A more extensive analysis will be in the forthcoming book to be released in 2026.

In Lightfoot's era, juries were charged with numerous questions called "special issues" to answer. These jury verdicts included instructions submitted by the attorneys to the jury usually designed to tilt the jury one way or the other. Many of the cases were complicated real estate disputes that had difficult facts to understand because of numerous of transfers of properties. Thus, many of his opinions are tedious recitations of specific facts and analyzing proposed issues and instructions which were claimed to be erroneous or were not submitted and should have been. Many of these fact situations will never be faced again as Texas in the 1980s adopted a broad form submission of jury questions with uniform instructions from Texas Pattern Jury Charges designed to create a neutral system that could be relied on by the courts and parties.

Texas Supreme Court cases. Two cases decided by Lightfoot were taken up by the Texas Supreme Court. In one case the court reversed the opinion from the court and noted Lightfoot's dissent. [48] In the second case the court reversed the Lightfoot opinion.[49]

Party cannot recover on a contract not pled. In *W. Union Tel. Co. v. Smith*,[50] the Texas Supreme Court reversed the Dallas Court of Civil Appeals taking note of Lightfoot's dissent that a party could not recover on a breach of contract claim if that contract was not fulfilled in the lawsuit. The Texas Supreme Court agreed and remanded the case.

Restoration of consideration in a reformation case is not required if the debt is discharged. The case of *Hagan v. Conn,*[51] involved fraud perpetrated by an agent in order to secure more collateral in a deed of trust as collateral for a loan. After foreclosure of the lien, a suit for reformation was filed to remove the lien from the property that should not have been secured by the deed of trust. Lightfoot found error in the jury instruction that read that Mrs. Conn's belief as to the mistake in the amount of land in the deed of trust alone would entitle her to recover. Lightfoot held that this was error because the lender was not responsible for the error. Lightfoot also found that Mrs. Hagen could not attack her acknowledgement of the deed of trust on the grounds that she did not understand it. The trial court instructed the jury to find for Mrs. Conn, the lender.

Three years later in 1900, in *Conn v. Hagan,*[52] the Texas Supreme Court reversed Lightfoot's opinion noting that the testimony in the case pointed to a fraud perpetrated on Mrs. Hagen.

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[48] *W. Union Tel. Co. v. Smith*, 30 S.W. 937, 939 (Tex. App. – Dallas, 1894), *rev'd Western Union Telegraph Co. v. Smith*, 88 Tex. 9 (1895).

[49] *Hagen v Conn*, 40 S.W. 18, 19 (Tex. App. – Dallas 1897, *rev'd Conn v. Hagan,* 93 Tex. 334, 336, 55 S.W. 323 (1900).

[50] 30 S.W. 937, 939 (Tex. App. – Dallas, 1894), *rev'd Western Union Telegraph Co. v. Smith*, 88 Tex. 9 (1895).

[51] 40 S.W. 18, 19 (Tex. App. – Dallas 1897, *rev'd Conn v. Hagan,* 93 Tex. 334, 336, 55 S.W. 323 (1900).

[52] 93 Tex. 334, 336, 55 S.W. 323, 324 (1900).

Therefore, a mistake accompanied by fraud justified reformation. They also held that there was no requirement to tender the $1,000 consideration due because the property had been foreclosed on and Mrs. Hagen had disclaimed that property which she considered was secured by the debt. Therefore, the debt had been discharged and there was no need to restore the consideration.

Errors in Rulings on the Law

Failure to grant special exception as to damages. In *Randall v Rosenthal*,[53] Lightfoot found error when a trial court failed to grant a special exception in a suit involving a wrongful distress warrant being issued, based on a claim of $5,000 in damages because the pleading did not show what the "$5,000 consisted – whether in the value and use of the premises for a designated time, or for violence in ejecting plaintiff and his wife from the house and premises."

Recovery of costs. In *McCormick Harvesting Mach. Co. v. Gilkey,*[54] Lightfoot found that the prevailing party who recovered on a counterclaim was entitled to recover costs of court.

No judgment without sheriff's return. In *Rush v. Davenport*,[55] Lightfoot reversed a judgment where there was no sheriff's return showing service of process.

Jurisdiction in the justice court cannot be cured on appeal. In *Schwartz v. Frees,*[56] Lightfoot held that the justice court should have granted a plea in abatement and that the issue of the jurisdictional limit of the justice court could not be cured in the county court by abandoning the claim that exceeded the trial court's jurisdiction.

Debt barred by limitations cannot be used to offset a valid debt. In *Campbell v. Park,*[57] Lightfoot reversed and rendered a judgment where a debt barred by the statute of limitations had been used to offset a debt from the opposite side. Lightfoot wrote that "it is clear that the note sued on cannot be extinguished or offset by the accounts set up by defendants which are barred by limitation."

Error in refusing subrogation of lien rights. In *Pioneer Savings & Loan Co. v Paschall,*[58] Lightfoot found error in the trial court refusing to subrogate the Union to the rights of the holders of the vendor's lien notes based on payment. Lightfoot found error in the trial court refusing to submit to the jury whether the plaintiff was entitled to a lien and in what sum on the homestead of the defendants.

Failure to offer to pay the debt. In *White v. Cole,*[59] Lightfoot reversed and rendered a judgment where an assignor of a note for the sale of land based on an executory contract pled

[53] 31 S.W. 822 (Tex. Civ. App. – 1895, no writ).

[54] 23 S.W. 325 (Tex. Civ. App. - Dallas 1893, no writ).

[55] 34 S.W. 380 (Tex. Civ. App. – Dallas 1896, no writ).

[56] 31 S.W. 214 (Tex. Civ. App. – Dallas 1895, no writ).

[57] 11 Tex. Civ. App. 455, 33 S.W. 754 (Tex. Civ. App. – Dallas 1895, no writ).

[58] 12 Tex. Civ. App. 613 (Tex. Civ. App. – Dallas 1896, no writ).

[59] 9 Tex. Civ. App. 277, 279, 29 S.W. 1148, 1149 (Tex. Civ. App. – Dallas 1894).

the statute of limitations instead of offering to pay the debt. Lightfoot found that vendee in an executory contract, who has not paid the purchase money, must at least offer to pay, in order to enforce the agreement.[60]

Is the validity of legal description an issue of law or fact for the jury? It depends. In *Alexander v Newton*,[61] the field notes described a tract 112 acres north of the tract in dispute. Lightfoot found the legal description that referenced conveyance of property "that I may possess" did not convey an interest in the property beyond the amount of 112 acres. In *Morgan v. Baker,*[62] the conveyance "called for 40 acres of land in the southeast corner of the tract homesteaded by said Raymer, joining the Thomas Jackson homestead on the east, and joining W. W. Perry on the north. The configuration of the survey was shown." Lightfoot found that whether this description of the land was sufficient to identify it was a question of fact for the jury.

Expert survey evidence: invalid survey. A retracement survey of real property does not come with the force of law. It is the opinion of an expert on the boundary lines of property. Like any expert testimony, a court is not required to accept it if it is manifestly wrong. In *Williams v Beckham*,[63] Lightfoot rejected a survey prepared by a surveyor because the location of a tree was manifestly wrong.

Character evidence. In *Jackson v Martin*, [64] Lightfoot found error in allowing character evidence where three witnesses testified in favor of the defendant for his honesty and fair dealing. Lightfoot found there was no issue in the case involving the character of the defendant. In *Freedman v Bonner*, [65] a case involving a boundary dispute and adverse possession, Lightfoot found it error to allow a witness to be asked about a criminal prosecution for forgery, his defense and whether he had not bankrupted his father and mother.[66]

Error in Excluding Evidence

Error in excluding a construction contract. In *Pioneer Savings & Loan Co. v Paschall,*[67] a jury trial that involved a suit to foreclose a mechanic's lien on homestead property, the trial court excluded a construction contract signed by the builder but not the property owner. The court found that the contract was not invalid because the contract was delivered to the Union, acted upon by both parties and the house was constructed in accordance with the terms of the contract.

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[60] *McPherson v. Johnson,* 69 Tex. 487, 6 S. W. 798 (1888).

[61] 33 S.W. 305 (Tex. Civ. App. – Dallas 1895, no writ).

[62] 40 S.W. 27 (Tex. Civ. App. – Dallas, 1897, no writ).

[63] 6 Tex. Civ. App. 739, 26 S.W. 652 (Tex. Civ. App. – Dallas 1894, no writ).

[64] 41 S.W. 837 (Tex. Civ. App. – Dallas 1897, no writ).

[65] 40 S.W. 47 (Tex. Civ. App. – Dallas 1897, no writ).

[66] Lightfoot cited to the case of *Hill v. Dons,* 37 S.W. 638, 639 (Tex. Civ. App. – Dallas, 1896, no writ) that relied on the case of *Boon v. Weathered's Adm'r*, 23 Tex. 675 (1859) that holds that a witness could be impeached by general evidence only, but not by evidence of particular facts.

[67] 12 Tex. Civ. App. 613 (Tex. Civ. App. – Dallas 1896, no writ).

Error in excluding evidence of mechanic's lien. In *Owens v Hord,*[68] a suit to foreclose a mechanic's lien the court found recovery on the debt but a refusal to foreclose the mechanic's lien on homestead property. Lightfoot found that the trial court erred in excluding an itemized account with an affidavit that was filed with the county clerk that contained a description of the land where the work was performed.

Error in refusing to permit evidence of transfer information. In *Morgan v. Baker,*[69] Lightfoot found error in a suit to foreclose a mechanic's lien on homestead property when the court refused to permit the plaintiff to read in evidence of a transfer on the back of an instrument.

Refusal to allow witness to testify as to contents of deposition. In *Jarvis – Conklin Mortgage Trust Co. v Harrell,*[70] Lightfoot found error when the trial court refused to allow a witness to testify as to the contents of depositions of the plaintiff which were in contradiction upon one of the vital issues in the case.

Error in the court instructing the jury to find for a party. In Lightfoot's era there was no such remedy as a "directed verdict" where the trial court could dismiss a claim against a party if the opposing side failed to prove their case prior to the jury receiving the case. Instead, the trial courts instructed the jury to find a particular way on an issue. The remedy for the trial court to dispose of a claim or a case against a party was adopted in 1941 in Rule 268 of the Texas Rules of Civil Procedure.

No error in instructing jury to find for the defendant. In *Randall v Rosenthal*,[71] Lightfoot reversed a judgment for $500 against the creditor and the Sheriff of Dallas County based on a wrongful seizure under a distress warrant after a tenant refused to leave the premises after the lease term ended. Lightfoot found the execution to be valid, the Sheriff was protected in making the levy and had a duty to execute on the judgment. Thus, the trial court did not err in instructing the jury to find in favor of the Sheriff.

Error if the jury charge is a peremptory instruction to find for the defendant. The case of *Freedman v Bonner*, [72] involved a suit to recover thirty-four acres based on competing surveys and a claim of adverse possession. The jury was asked to determine the true south line and whether an adverse possession claim of ten years had been sustained based on a fence and fence posts that had been constructed in part. Lightfoot found this instruction to be erroneous because it took the contested issue of the enclosure along the south line from the jury. Lightfoot held that it was a peremptory instruction to find for the defendant.

Error in charging the jury to find in favor of the defendants. In *Morgan v. Baker,*[73] a trespass to try title case involving completing claims to the property, Lightfoot found that the "the court erred in charging the jury to find a verdict in favor of the defendants."

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[68] 14 Tex. Civ. App. 542, 37 S.W. 1093 (Tex. Civ. App. – Dallas 1896, no writ).

[69] 40 S.W. 27 (Tex. Civ. App. – Dallas 1897, no writ).

[70] 26 S.W. 447 (Tex. Civ. App. – Dallas 1894, no writ).

[71] 31 S.W. 822 (Tex. Civ. App. – Dallas 1895, no writ).

[72] 40 S.W. 47 (Tex. Civ. App. – Dallas 1897, no writ).

[73] 40 S.W. 27 (Tex. Civ. App. -- Dallas 1897, no writ).

Error to instruct jury to find for the plaintiff. In *McGregor v. White*,[74] there were two competing claims to title to the property. The case involved a fraudulent transfer of real estate. The trial court instructed the jury to find for the plaintiff. Lightfoot reversed because the defendant had a bona fide purchaser defense that had to be presented to the jury.

Error in instruction in finding for the defendant contingent upon finding of an issue. In *Heironimus v. Duncan*,[75] the jury was not directly asked to find for the defendant. Rather, in a trespass case, the jury was instructed to find for the defendant if the defendant failed to protect her crops. Lightfoot found this instruction misleading and remanded the case.

Error to instruct to find for a party even though the weight of the evidence may be against him. In *Ellis v Rosenberg*,[76] a suit over a fraudulent conveyance of real estate, the court found that it was error for the trial court to charge a jury to find against a party even though the weight of the evidence may be against him. The court found that the judge had a duty only to declare the law.

Error in Jury Instructions over Certain Issues

Error in instruction over the issue of furnishing an abstract of title. In *Jackson v Martin*,[77] Lightfoot found a jury instruction to be erroneous where the purchaser alleged that the seller was to furnish an abstract of title. The jury was instructed that the plaintiff could not recover if the defendant believed that the plaintiff was to furnish him with an abstract and understood the agreement and the plaintiff did so, but they differed in their minds as to what was to be done. Lightfoot found this instruction erroneous.

Error in instruction that no recovery could be had in enforcing a lien on homestead. In *Pioneer Savings & Loan Co. v Paschall,*[78] noted above, where the trial court committed error in not admitting the contract for construction of the home, Lightfoot found error in the trial court charging the jury that "You are told that no recovery can be had so far as it is sought to enforce a lien on the homestead of the defendants."

Error in instruction based on a claim barred by laches. In *Cole v Grigsby*[79] the court found error in the court's instruction on a "stale demand" as it related to an equitable estate did not hold the parties to any greater diligence than is required of parties suing for a legal estate. The "stale demand" is equivalent to the doctrine of laches where a party sits on their rights before asserting them.

Error in making right to recover under breach of warranty solely upon whether notice was given to defend the suit. In *City Bank of Sherman v Dugan*,[80] that involved the breach of

[74] 15 Tex. Civ. App. 299, 39 S.W. 1024 (Tex. Civ. App. – Dallas 1897, no writ).

[75] 11 Tex. Civ. App. 610, 33 S.W. 287 (Tex. Civ. App. – Dallas 1895, no writ).

[76] 29 S.W. 519 (Tex. Civ. App. – Dallas 1895, no writ).

[77] 41 S.W. 837 (Tex. Civ. App. – Dallas 1897, no writ).

[78] 12 Tex. Civ. App. 613 (Tex. Civ. App. – Dallas 1896, no writ).

[79] 35 S.W. 680 (Tex. Civ. App. -- Dallas 1894, no writ).

[80] 5 Tex. Civ. App. 713 (Tex. Civ. App. – Dallas 1893, no writ).

warranty of title. Lightfoot found the jury charge to be in error because it made the plaintiff's right to recover solely upon whether notice was given to defend the suit. A breach of warranty suit also required proof of superior title, and the plaintiff was ousted.

Error in failing to submit an instruction. In *Rand v. Davis*,[81] Lightfoot found that a jury instruction inquiring whether the agent of Rand must have known of the fraud or acquiesced therein, should have been submitted to the jury.

Error in special issue over fraud in a real estate transaction. The case of *Rand v. Davis*,[82] was a suit involving a real estate transfer that was alleged to have been based on misrepresentations. Without discussion Lightfoot found the jury question to be erroneous. [83]

Failure to sustain an objection to a jury charge. In *Lynch v Ortlieb,*[84] Lightfoot found error when the trial court failed to sustain an objection to the charge that a claim filed in an amended petition, being a verbal agreement to repair the leased premises, did not relate back to the date of the filing of the original petition and was barred by the statute of limitations.

Error when jury verdict did not dispose of all issues. The case of *Tex. Land & Loan Co. v. Watkins,*[85] involved a dispute between the deed conveying the real estate of 60,000 acres and the mortgage that was claimed to cover 23,000 acres. Since a vendor's lien is implied from the sale of land, the issue was whether there was a waiver, accident or mistake in the deed of trust. The jury found that the deed in question was written correctly and there was no accident or mistake of the parties. Lightfoot noted that a vendor's lien springs up from the contract of purchase, unless waived by the parties. Lightfoot reversed the case because the jury charge did not dispose of all the issues in the case.

No Evidence Points

No evidence of agency relationship/damages not contemplated. The case of *Equitable Mortg. Co. v. Thorn*,[86] involved a suit over the failure to provide a loan of $300 to close on the purchase of real estate. Thorn sued the company, and the jury awarded $600 in damages. Lightfoot reversed the judgment finding no evidence of an agency relationship and that contract damages were not incidental or caused by the breach that may reasonably be contemplated by the parties at the time of the contract.[87]

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[81] 27 S.W. 939, 941 (Tex. Civ. App. – Dallas 1894, no writ).

[82] 27 S.W. 939, 941 (Tex. Civ. App. – Dallas 1894, no writ).

[83] The jury was charged: "When Mrs. Davis executed the deed to Dillon, was she induced to believe, by fraudulent representations of Dillon, and did she believe, that it was a mere instrument authorizing Dillon to sell the property as her agent, and to remove cloud, and not an absolute deed, whereby the title and right to incumber the property was vested in Dillon?"

[84] 28 S.W. 1017 (Tex. Civ. App. – Dallas 1894, no writ).

[85] 12 Tex. Civ. App. 603, 34 S.W. 1996 (Tex. Civ. App. – Dallas 1896, no writ).

[86] 26 S.W. 276, 277 (Tex. Civ. App. – Dallas 1894, no writ).

[87] Lightfoot cited to the English common law case of *Hadley v Baxendale*, 9 Exch. 341 (1854).

No evidence of proof of assumption of debt. The case of *Heath v Coreth,* [88] involved the sale and exchange of land. When the wrong property was conveyed a rescission occurred. Lightfoot found no evidence that the defendant had assumed the debt; there was no trust relationship, no privity and no consideration for the debt of another person.

Failure to grant a new trial based on excessive damages. In *Equitable Mortg. Co. v. Thorn*,[89] Lightfoot noted that the jury granted damages of $600 based on the failure to loan $300. Lightfoot said that this award indicated "very clearly that the jury must have considered improper elements of damage" and that the trial court erred in not granting a new trial.

Failure to Provide Findings of Fact and Conclusions of Law. In *Parker v. Stephens,*[90] Lightfoot found that the trial court erred in not providing findings of fact and conclusions of law after the request was made.

Costs assessed against party who could have corrected the judgment in the trial court. In *Montrose v. Fannin Cnty. Bank*, [91] Lightfoot found that the appellant who failed to make the order from the trial court to levy on the principal before making a levy on the sureties would be taxed as costs on appeal because the party could have had the judgment corrected at the trial court level.

28. Resignation

In October 1897 Lightfoot resigned from the court to return to the practice of law in Paris. [92] Governor Culbertson appointed Associate Justice N.W. Finley as the new Chief Justice.

29. Return to Paris, Texas

Upon returning to Paris, Lightfoot resumed his practice in the firm of Lightfoot, Denton & Long. Sam Bell Maxey Long was the great nephew of Sam Bell Maxey. The firm had two appeals that reached the Texas Supreme Court[93] and one case in the Dallas Court of Civil Appeals.[94]

Lightfoot continued to be active in the Paris community. He was a member of the Centenary Methodist church and active on the Board of Stewards. [95] He was the first president of the Y.M.C.A. organization in Paris. [96]

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[88] 11 Tex.Civ.App. 91 (Tex. Civ. App. – Dallas 1895, no writ).

[89] 26 S.W. 276, 277 (Tex. Civ. App. – Dallas 1894, no writ).

[90] 39 S.W. 164, 165 (Tex. Civ. App. – Dallas 1897, no writ).

[91] 23 S.W. 709 (Tex. Civ. App. – Dallas 1893, no writ).

[92] A.W. Neville, *The History of Lamar County,* The North Texas Publishing Co. Paris, Texas 1937.

[93] *Griffis v Payne*, 92 Tex. 293 (1898); *Kelley-Goodfellow Shoe Co., v Liberty Ins. Co*., 87 Tex. 112 (1894).

[94] *Texas & P. Ry. Co. v Randle*, 18 Tex. Civ. App. 348, 349, 44 S.W. 603 (1898, no writ).

[95] A.W. Neville, *The History of Lamar County,* The North Texas Publishing Co. Paris, Texas 1937.

[96] *Ibid*.

30. Trip to Skagway, Alaska

From 1896 to 1899 the Klondike Gold Rush occurred in Yukon in northwestern Canada when gold was discovered. News of the discovery caused a mass migration of 100,000 prospectors to the Klondike region. News of the discovery made its way to Paris. Lightfoot, now an attorney in private practice, began to represent clients who had invested in mining claims in Skagway, Alaska. Lightfoot was one of those investors. Not far from Paris, the town of Pleasant Grove decided to change its name and postal office to Klondike.[97]

THE TOWN OF SKAGWAY IS LIKE THE PALM OF ONE'S HAND, WITH THE LONG WHARVES REACHING OUT LIKE FINGERS

In 1901, Lightfoot traveled to Skagway, Alaska. While in the city, Lightfoot fell ill and was taken to Bishop Rowe hospital, an army hospital. Surgeons operated on him, but he never recovered. Lightfoot was diagnosed with "Bright's disease," a general term used to describe a group of kidney diseases caused by excess protein in the urine. The term was created in the 19th century by English physician Richard Bright, who described the condition. It was reported that Lightfoot's death was brought on by the "sudden and savage change in climate."[98]

THE BISHOP ROWE HOSPITAL, SKAGWAY
The Bishop and Miss Carter, head-nurse, stand on the platform

On September 3, 1901, Lightfoot's remains left Seattle, Washington by the Northern Pacific Railroad. In Billings, Montana his body was transferred to another train that left for Helena, Montana where his wife Etta Lightfoot met him. News of Lightfoot's body being transported to Paris, Texas made national news.

[97] https://en.wikipedia.org/wiki/Klondike,_Delta_County,_Texas.

[98] Betsy Mills and Ron Brothers. *The Death and Cemetery Records of Lamar County, Texas,* ReBroMa Press, 2008, http://www.lamarcountytx.org/cemetery.

In Kansas City his body was transferred to a train that would travel to Paris. In Paris, his body was taken to his home on Church Street where his funeral was held. His body was laid to rest at the Evergreen cemetery after a funeral at his home.

31. Last Will and Testament

Lightfoot's will left his son, Tom C. Lightfoot, a storehouse on Clarksville Street that had a mortgage of $5,000, which would be paid off from a life insurance policy which was originally for the benefit of Dora M. Lightfoot. He gave his interest in a grocery store being conducted by R.D. Lightfoot. He gave a storehouse on Grand Avenue to his daughter, Sallie Lee Lightfoot.

He gave his wife, Etta W. Lightfoot, and his three children, Wooten Lightfoot, Will Lightfoot and Henrietta Lightfoot, the storehouse and lot on Lamar Avenue in Paris, Texas. There was a mortgage of $7,000 on the property which would be paid out of two life insurance policies of $5,000 and $2,500 and another policy of $5,000 to his wife so she could buy a good home. He also gave her one-half of the proceeds of his ventures and investments in the Klondike Country. He gave the home at Washington and Church Street to Sallie Lee Lightfoot and Tom C. Lightfoot. The balance of his estate went to all five children.

32. Application for Pension

On December 11, 1934, Etta Lightfoot, Henry Lightfoot's second wife filed a Widow's Application for a Pension with the Comptroller of Texas based on Henry Lightfoot's service during the Civil War. The pension was initially denied when no muster showing Lightfoot's service was included with the application. After a thorough search a muster was authenticated and sent to the Comptroller's Office showing Lightfoot's name on a muster roll of Company H, 11th Alabama "Roddy's Brigade" from December 31, 1863, to February 29, 1864.[99] Mrs. Lightfoot's pension was approved on December 19, 1934. Mrs. Lightfoot collected the pension until her death on April 20, 1943.[100]

Gravesite of Henry Lightfoot


Sallie Lightfoot and Thomas Lightfoot in later years.

[99] Tonya Chandler, Research Report, Southern Roots Genealogical Services, *Henry Lightfoot,* November 19, 2025, 10.

[100] Application 51666, Widow's Application for a Pension, Mrs. H.W. Lightfoot, Austin, Travis County, Texas.

33. Justice Ocie Speer Takes Aim at Henry Lightfoot

Justice Ocie Speer

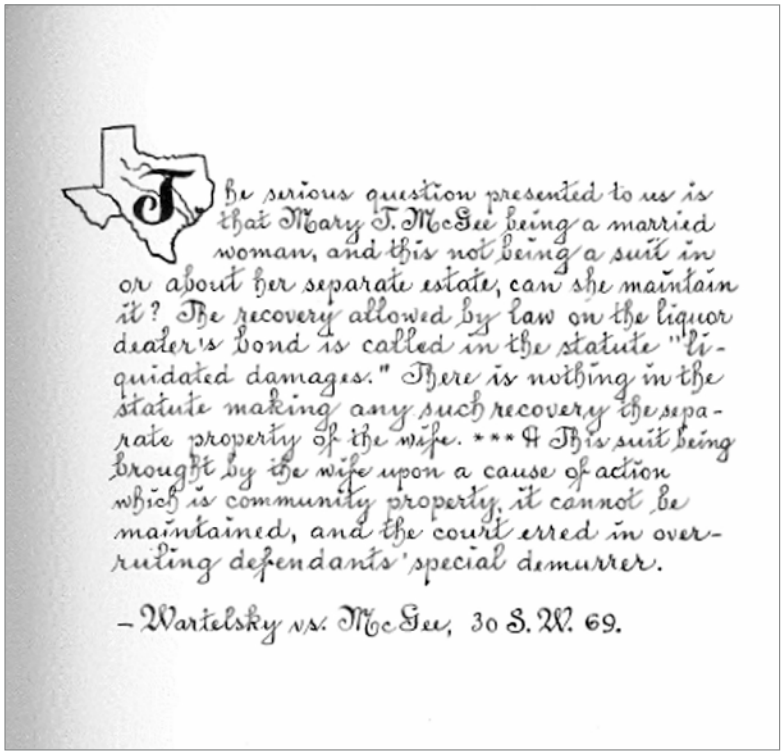
In 1936, twenty-five years after Lightfoot passed away, Justice Ocie Speer who served on the Second Court of Appeals in Fort Worth and on the Texas Commission of Appeals took a jab at Lightfoot in his book, *Texas Jurists* (1836 – 1936) which was a compilation of judicial biographies of Texas justices.

Speer made fun of Lightfoot's opinion in *Wartelsky v. McGee,*[101] where Lightfoot ruled that a married woman could not bring suit over a community property claim without joinder of her husband in the suit. The case arose in 1891 in Ellis County where a minor named N.P. McGee went to a store and purchased alcohol. When his mother, Mary McGee learned of the purchase, she sued the business owner to recover $1,000 on a bond that the business had to file in order to sell alcohol. This was no minor lawsuit. The sum of $1,000 in 1891 is equivalent to $30,895.38 in 2024. Mrs. McGee's husband's name was listed as "pro forma" on the lawsuit. The case went to trial and the trial court ruled in favor of Mrs. McGee, finding a breach by Wartelsky, and granted judgment for $1,000. The owner, Wartelsky appealed.

Lightfoot wrote the majority opinion *Wartelsky v. McGee* reversing the judgment finding that Mrs. McGee could not file suit in her name. Lightfoot wrote that since the claim was community property, Mrs. McGee, as a married woman could not recover. Instead, the lawsuit had to be brought by her husband.

By 1936, times had changed. Speer featured a photograph of Lightfoot on one page and then an excerpt from the *Wartelsky* opinion on the second page:

H. W. Lightfoot
Chief Justice, Fifth District, 1893-1897



The serious question presented to us is that Mary T. McGee being a married woman, and this not being a suit in or about her separate estate, can she maintain it? The recovery allowed by law on the liquor dealer's bond is called in the statute "liquidated damages." There is nothing in the statute making any such recovery the separate property of the wife. * * * This suit being brought by the wife upon a cause of action which is community property, it cannot be maintained, and the court erred in overruling defendants' special demurrer.

– Wartelsky vs. McGee, 30 S.W. 69.

Justice Ocie Speer highlights Justice Lightfoot's opinion in *Wartelsky v. McGee*, twenty-six years after Lightfoot's death.

[101] 10 Tex. Civ. App. 220, 221, 30 S.W. 69 (Tex. Civ. App. – Dallas 1895, no writ).

What is missing from Justice Speer's analysis is that Lightfoot and the two other justices on the Dallas Court of Civil Appeals, Anson Rainey and N.W. Finley, had no choice but to apply existing Texas law from the Texas Supreme Court in *Railway Co. v Burnett*,[102] where the court ruled that a personal trespass is committed upon the wife, then the claim belongs to the community and that the husband is the proper person to maintain the action. There was no writ of error filed in the *McGee* case to the Texas Supreme Court, meaning that the attorneys at that time found no reason to raise the issue in a higher court. The remedy was to return to the trial court and have Mr. McGee file the suit to recover the bond himself.

Speer could have taken note of Lightfoot's opinion in 1896 in the case of *Leeds v Reed*,[103] where he held that a married woman who had been abandoned by her husband and left without means had "the right to maintain the suit without being joined by the husband." Thus, Speer's attack should have been on the Texas Supreme Court, not Chief Justice Lightfoot.

Henry William Lightfoot
1846 – 1901

Women could not vote until the 19th Amendment in the United States Constitution until 1920. They could not serve on juries in Texas until 1954. It was unfair to judge Lightfoot by the standards in 1936 to the standards in 1895 and by case law that Lightfoot could do nothing about.

Judge Henry William Lightfoot was a celebrity in his day, yet he is not celebrated today. There is no resource book that consolidates his life work or experiences or summaries of his judicial rulings. This article serves to breathe life into Lightfoot's life so that he can be recognized again today as an important public servant as he was when he was alive.

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[102] 61 Tex. 638 (1884).

[103] 36 S.W. 347 (Tex. Civ. App. – Dallas 1896, no writ).

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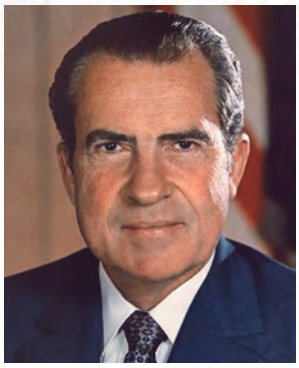
Return to Journal Index

• Cinderella Season •

Title IX and the Evolution of Sports in Texas

By Sharon Sandle

On June 23, 1972, President Richard Nixon signed the Education Amendments Act. Among the provisions of the omnibus bill were thirty-seven words that would transform the landscape for women in the United States.



President Nixon

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
>
> **Education Amendments Act of 1972, 2018, Section 1681(a)**

These thirty-seven words would become familiar to most Americans as "Title IX." And although the amendment that would become known as Title IX received little attention at the time Nixon signed the Education Amendments Act, it would transform educational opportunities for women. Nowhere was this transformation more visible than in the sports arena.

But in his remarks during the bill signing, President Nixon said nothing about gender equality. He commented on the provisions in the bill that provided student aid, saying

> In March of 1970, I asked that aid to students enrolled in postsecondary institutions be expanded and redirected to assure every qualified student that he would be eligible for a combination of Federal grants and subsidized loans sufficient to make up the difference between his college costs and what his family is able to contribute.... Unfortunately, certain restrictions placed in the law by the Congress mean that we will not be able to realize fully our principles of equity. But as confidence develops in the new programs, we look forward in the near future to having a set of Federal student assistance programs devoted to the goal of equalizing opportunities for all.[1]

Nixon appeared unaware of the effect the Act would have on educational opportunities for women. Instead, his remarks focused primarily on school desegregation and his disappointment that Congress had not dealt with the issue of federally mandated busing programs more to his satisfaction. Nor was the passage of Title IX remarked upon by the news media; there were no more than one or two sentences about it in the Washington newspapers. It was not until two years later, during the process of drafting regulations for implementation of Title IX, that the effect of

[1] It was common practice in 1972 to use exclusively male pronouns unless one were referring specifically to a woman or to women, so we can't read too much into Nixon's references to students as exclusively male.

the amendment on women's athletics began to gain attention. An article in *Ms.* magazine in 1972 alerted readers that the regulations should cover athletics. That article was followed by resources on equity in athletics published by Ruth Bader Ginsburg**.** As it became apparent that the status quo of athletics, particularly high school and college sports, could not remain unaffected by Title IX, implementation of regulations met with delay and controversy. Early controversy focused on whether physical education classes would be co-educational and whether women would be allowed to play contact sports. The draft regulations published in 1974 allowed for separate athletic opportunities for men and women but required affirmative efforts "to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes…." But the regulations also specifically provided that Title IX would not require "equal aggregate expenditures for athletics for members of each sex."[2]


Ruth Bader Ginsburg

By the time the Department of Health, Education, and Welfare, the department charged with administering Title IX until that role was taken over by the Department of Education, began circulating regulations to clarify how Title IX would apply to schools, it was clear that the effect on sports had overtaken other concerns about the law's effect. Out of nearly 10,000 comments received by the department, 90% addressed concerns about Title IX's impact on athletics. In his testimony before a US House education subcommittee in 1975, Department Secretary Casper Weinberger joked that he had not realized until the comment period "that athletics is the single most important thing in the United States." To his credit, he also noted the characterization that Title IX would "bankrupt" college athletic departments was simply wrong.


Casper Weinberger

After revision, the regulations issued in 1975 maintained the concept that sports could be segregated by gender and that women should not compete with men in contact sports. And the regulations specifically noted that unequal expenditures on men's and women's sports would not constitute noncompliance with Title IX. However, the regulations also included a laundry list of areas that should be considered when offering athletics opportunities to women, such as equipment and supplies, playing time, coaching, facilities, and medical care, to name a few.[3]

After passage of the regulations, set to take effect on a staggered timetable starting with elementary schools and applying to high schools and colleges after three years, it seems to have dawned on those who had ignored Title IX before that this was going to have an impact on sports, and, specifically, on men's sports. Much of the activity focused on challenges to Title IX and efforts to narrow its applicability. The justification for these efforts primarily focused on economic arguments. In short, many lawmakers, coaches, and pundits expressed alarm that increasing athletic opportunities for women would threaten men's sports generally and football, and the revenues from it, specifically.

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2 *Federal Register*, Volume 39, Number 120 (June 20, 1974), 22236.

3 *Federal Register*, Volume 40, Number 108 (June 4, 1975), 24142-43.

And this is where Texas steps into the arena. As the implications of Title IX for athletics became apparent, the National Collegiate Athletic Association (the NCAA) lobbied for athletics to be exempted from the reach of Title IX.[4] At this point, Texas Senator John Tower stepped forward with an amendment that would remove athletics entirely from Title IX's application. When that amendment failed, Tower introduced Senate Bill 2106, which came to be known as the "Tower Amendment," aimed at curtailing the reach of Title IX. The amendment would have exempted revenue producing sports such as football and basketball from the law's coverage. Senator Tower's bill received support from Senator Roman Hruska of Nebraska who prophesied that enforcement of Title IX would bring college football "to the brink of disaster." After invoking the image of hardworking Nebraska farmers who, "in the wake of the busy harvest and on the threshold of our severe winter" are united on Saturday to watch their beloved Cornhuskers play football, he asked "What will happen as the quality of the football program declines and revenues inevitably fall? Is the football program to be run into the ground to sustain other sports as long as it produces revenues, and then simply relegated to the minor sport category or abandoned? . . . . Why should an activity that carries the pride of the state be jeopardized and possibly sacrificed to achieve the good purposes which common sense suggests could be achieved in other more direct ways."[5] He didn't elaborate on what other methods could be employed to achieve the purposes of Title IX.


Sen. John Tower


Sen. Roman Hruska

In the same month, Nancy D. Kruh, an undergraduate student at Southern Methodist University in Dallas, sent a letter to members of the Labor and Public Welfare Committee, advocating for defeat of the Tower Amendment. In her letter she described inequities in the tennis and swimming programs at SMU. The tennis team was allowed to practice only on the intramural courts which Kruh described as "slick and dangerous," and the women were barred from the newer more expensive men's varsity courts. During intramural season the women were obliged to forfeit practice time to non-intercollegiate teams. Lack of funding prevented the women's tennis team from participating in important meets, and much of their equipment was purchased by the team members themselves.


Nancy D. Kruh

The situation for the women's swim team was no better. The men's coach refused to give the team time to practice in the pool, and the team was required to enroll in a swimming class to gain pool time. As a result, the team received only a little more than two hours practice time a week, and, in effect, had to pay for the right to be on the team with their tuition money. Kruh pointed out the contrast between the experience of men and women athletes at SMU this way: "while these women struggle to enjoy the competition and physical fitness they desire, the men have been given the best of luxuries. They have their own athletic dorm, training table, coaches

[4] It's worth noting that at the time the NCAA did not have a role in women's collegiate sport and was essentially an all-male institution.

[5] *Hearings before the Subcommittee on Education of the Committee on Labor and Public Welfare*, Senate, 94th Cong., 1st sess. (September 16 and 18, 1975).

and ample expenses for out-of-town games and tournaments."

> Kruh concluded with an impassioned appeal to defeat the Tower Amendment:
>
> I personally would never hope to have the same benefits for the women that the men have now. Instead, I would like to see a merging of these two extremes—the wealth and the poverty—into a reasonable and equitable solution satisfying all.
>
> I believe the present Title IX regulations begin to find such a solution. Any attempt to weaken these regulations in the area of athletics will only inflict further struggle and hardship on women—such as those at SMU—who sincerely want to participate in sports.
>
> If passed, the Tower bill will be a signal to all potential and active women athletes that this country's elected representatives are opposed to equal opportunity in athletics.[6]

Amidst legislative challenges to Title IX, regulations implementing the law put pressure on schools to comply and opened the door for complaints about inequality between men's and women's programs.

In October, 1975, Nancy Kruh, the same SMU student who sent an impassioned letter to the Labor and Public Welfare Committee concerning the Tower Amendment, filed an in-house complaint alleging that women athletes at Southern Methodist University were discriminated against in violation of Title IX.[7] The complaint named three sports: tennis, swimming, and basketball. Kruh's complaint was submitted to the university's affirmative action commission, the group responsible for investigating discrimination allegations. Just as in her letter to Congress, Kruh again cited inequity in the facilities used by the men's and women's tennis teams, alleged that the women's team was responsible for providing all their own equipment except tennis balls, and that injured women athletes had limited access to trainers. Kruh also blamed the disbanding of the women's basketball team on inferior coaching and facilities.[8] Kruh was quoted as saying that she would file a formal complaint with the civil rights office of the Department of Health, Education, and Welfare (the HEW) if the university failed to react to her complaint. That never became necessary. Kruh's complaint was the first to be considered by SMU's Affirmative Action Commission, which had existed for nearly a year before receiving Kruh's complaint.[9]

Many student organizations publicly supported Kruh's petition, including the student senate, the editorial board of the student newspaper *The Daily Campus*, and the Women's Interest Coalition.[10] In an editorial in the *Daily Campus,* the editors called the treatment of women athletes

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6 A copy of Kruh's letter can be found in *Title IX: A Brief History with Documents*, Susan Ware, 2007.

7 Dru Marsahll, "Discrimination Claim Filed Against SMU," *The Daily Campus*, October 21, 1975, 1, 5.

8 At the same time that Kruh filed her in-house complaint, a group of eighteen women signed a petition submitted to the university's equal opportunities director asking that the university form a women's basketball team. The team had a losing record the previous year and lost all but seven players over the course of the season, but the team lacked coaching.

9 Mary Sprague, "AAC to Entertain First Formal Charge," *The Daily Campus*, October 23, 1975, 1.

10 Bob Lund, "Senate Vote Favors Discrimination Filing," *The Daily Campus,* October 29, 1975, 1. Mary Sprague, "WIC

"a matter of equal treatment of equal human beings" and the university's decision in the matter "an opportunity for the university to champion human rights."[11] But the petition was not without controversy. The women's tennis team submitted a letter to *The Daily Campus* disassociating the team from the petition and causing Kruh to remove the tennis team from the complaint. And SMU Athletic Director Dick Davis was quoted as saying that the petition would harm the athletic department and the progress being made on women's sports.[12] Davis called allegations that women athletes received inadequate facilities and poor promotion "ridiculous" and noted that "long range plans" to better the situation of women athletes at SMU were underway. "The girls in the athletic department are very proud of the progress we're making."


Dick Davis

Kruh's petition was considered in a closed session by the president's committee on equal opportunity, and by January, 1976, the university had committed additional funding and facilities to all three teams included in Kruh's complaint.[13] All of Kruh's requests, along with additional initiatives, were recommended by the committee and implemented by SMU's president. Members of the basketball, tennis, and swim teams attributed progress in women's athletics at SMU to Kruh's complaint; however, Athletic Director Dick Davis maintained that the complaint had "nothing to do with it." Davis's refusal to credit the student-led complaint with any role in improving women's sports at SMU lacks credibility. As basketball player Cathy Dale pointed out "[t]here were plans to cut basketball because they said there was no interest," but by 1977, SMU had formed a women's basketball team, hired a coach, and offered three women's basketball scholarships.

This incident early in the implementation of Title IX is a notable example of a student initiating a complaint with the university and receiving a hearing by the university, followed by implementation of corrective measures. Although there are examples of similar initiatives at schools such as Southwestern University and Rice University where an examination of Title IX compliance was initiated by students or by the university's administration, the example of how this played out at SMU is notable. That the SMU student body rallied behind Kruh and her complaint is a stark contrast to the situation at other universities in Texas.

But despite isolated examples such as the program at SMU, when the 1978 deadline for college and university compliance with Title IX passed, the majority of colleges were still not in compliance with the law. The Office for Civil Rights, charged with investigating civil rights complaints including those under Title IX, received more than 100 complaints against more than fifty colleges and universities alleging sex discrimination in athletics.[14] Many athletic departments used the three-year window between passage of the regulations and their deadline for compliance in 1978 to delay change and make excuses. Some athletic administrators claimed that the regulations weren't specific enough for them to determine

Office for Civil Rights

Backs Charge," *The Daily Campus,* October 24, 1975, 2.

[11] "Editorial," *The Daily Campus,* November 21, 1975, 4.

[12] Martha Whyte, "Davis Calls Kruh Petition Harmful," *The Daily Campus*, October 30, 1975, 1.

[13] Jill D'Angelo, "Results of Complaint Bring Bright Outlook," *The Daily Campus*, January 27, 1976, 1, 5.

[14] "A Policy Interpretation: Title IX and Intercollegiate Athletics," *Federal Register* 44, no. 239 (December 1979), at 71413.

how to comply. In response, the OCR proposed a draft Policy Interpretation on December 11, 1978. Under the Policy Interpretation, if the share of funding for men's and women's athletics matched the proportions of the genders in the student body, the school would be considered compliant. If not, the OCR would examine the school for compliance. In response to an organized campaign by higher education officials and athletic directors, the OCR revised the draft Policy Interpretation. The new guidelines provided that schools would comply with Title IX by accomplishing any one part of a three-prong test:

- Provide athletic opportunities that are "substantially proportionate" to the sex ratio of the student body,
- Show a "history and continuing practice" of improving athletics for the underrepresented sex, or
- Show that the athletics program meets the interests and abilities of the underrepresented sex.

Although the first prong immediately came under fire when women's enrollment in college overtook that of men, nationally the number of girls participating in high school sports and women's share of intercollegiate sports budgets grew to double digit figures.[15] At the same time, the Supreme Court held that individuals had a right to sue under Title IX.[16] As schools proved slow in providing athletic opportunities to women, students across the country, including Texas students, resorted to the courts to enforce Title IX, often with unsatisfactory results.

In 1980, six female students at West Texas State University in Canyon, Texas, who participated in the University's intercollegiate athletics program filed suit against the university alleging that the university's policies and practices discriminated against women on the basis of sex and denied women equal opportunity in the University's intercollegiate athletics program. The situation at WTSU started along similar lines as the complaint at SMU. In January of 1980, twelve women athletes at WTSU filed a complaint with the athletic department alleging that women athletes at WTSU were being denied their rights under Title IX. Among the allegations in the complaint, the women noted that women athletes comprised 20 percent of the athletes at WTSU and should receive 20 percent of the available funds. However, the men's athletic programs received nearly $94,000 in scholarship money while the women's programs received only $15,000. Similar disparities in travel budgets and coaching salaries were also noted in the complaint.[17] At the time the athletes filed their complaint, they were already represented by Amarillo attorney Betty Wheeler, who was planning to file suit on behalf of her clients by May if the university did not take action.[18] The university immediately forwarded the complaint to its legal counsel, and a group of six athletes filed a class action lawsuit in April.

In July of 1981, Judge Robert Porter granted summary judgment to the university on the basis that Title IX applies only to a program or activity that receives "direct" federal financial assistance, and

[15] In the decade from 1972 to 1982, participation by girls in high school sports increased from 7 to 35 percent, and women's share of intercollegiate sports budgets grew from 2 percent to 16 percent.

[16] *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[17] "Fem WTSU Athletes File Complaint," *Lamar University Press,* January 18, 1980.

[18] Wheeler was quoted as saying "I would think that if by May things have not changed, these parties might very well take the matter to court then." *Ibid.*

characterized the federal funding received by the WTSU athletics program as "indirect."[19] At the time of the decision, courts were split between an interpretation of Title IX that required a specific program to receive federal funding before it would be subject to Title IX's requirements versus an interpretation that only required the institution to receive federal funding to come under the law's purview. Judge Porter adopted the "programmatic approach" and dismissed the case. On appeal to the 5th Circuit, the case was remanded to give the plaintiffs the opportunity to "develop the record on the receipt of federal financial assistance by the athletics department." [20] On remand, the case was again dismissed, holding that the athletics program did not receive federal assistance under the definition in *Grove City College v. Bell*, which had been decided in the interim.[21]


Judge Robert Porter

On appeal, the students argued that the WTSU student financial aid office, which was clearly a recipient of federal funds, had at least partial responsibility for the administration of athletic scholarships. Therefore, the athletic scholarships themselves must be administered in a nondiscriminatory manner. The Supreme Court's decision in *Grove City v. Bell* supported this argument. In that case, the Supreme Court held that all students who are participants in the college's financial aid program, even those who do not themselves receive federal assistance, are protected by Title IX.[22] However, Grove City did not involve claims by student athletes or athletic scholarships.

The question in *Bennett v. WTSU* came down to whether or not athletic scholarships were part of WTSU's financial aid program. Appellants' counsel conceded at oral argument that an athletic scholarship award was determined solely by the athletic department and that the financial aid office played no role in determining the recipient of the award. On that basis, the court decided that the factual issue of whether athletic scholarships were part of the financial aid program was resolved and that there was merely a ministerial relationship between the two programs, insufficient to bring athletic scholarships under Title IX coverage.

In 1988, Congress superseded the *Grove City* decision with The Civil Rights Restoration Act which reinstated institution-wide Title IX compliance. But this failed effort by Tina Bennett and the other athletes at West Texas state is worth examining.

Not only did the outcome of *Bennett v. WTSU* fail in terms of increasing women's athletic opportunities at West Texas State University, the lawsuit also took six years from the time it was filed to the final, unsuccessful, disposition of the case. Even if the case had come out favorably for Tina Bennett and the other five women athletes who originally filed suit, their own opportunities at the university would have long since been over.

In contrast to the events at SMU, the lawsuit filed by Tina Bennett and the other five athletes

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[19] *Bennett, et al. v. West Texas State University,* 525 F.Supp. 77, 80 (N.D.Tex.1981).

[20] 698 F.2d 1215 (5th Cir. 1983), cert. denied, 466 U.S. 903, 104 S.Ct. 1677, 80 L.Ed2d 152 (1984).

[21] *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984).

[22] 465 U.S. at 571 n. 21, 104 S.Ct. at 1221 n. 21.

at WTSU received very little media attention. While Nancy Kruh's complaint at SMU was the subject of daily reporting in *The Daily Campus* until its resolution, details of the WTSU lawsuit and the events that led up to it are difficult to find. The complaint filed by Tina Bennett seems to have had very little impact on the WTSU student body or on its athletic programs. A decade later, it was a very different story for the University of Texas.

For seventeen years Donna Lopiano served as director of Intercollegiate Athletics for Women at the University of Texas, during which time she constructed what many believed to be the premiere women's athletics program in the country. When Lopiano took over the department in 1975, her first budget was about $57,000 for nine sports; at the time, the men's athletic department had a budget of $2.2 million.


Donna Lopiano

Lopiano developed her department from a $57,000 budget in 1975 to $4.4 million by 1992. Under Lopiano's leadership, the University of Texas was seen as one of the nation's most successful and respected women's athletic programs. But Lopiano felt that the university still wasn't doing enough to provide opportunities for women athletes. Before leaving the university in 1992 to run the non-profit Women's Sports Foundation, Lopiano connected the women's rowing coach with Austin attorney Diane Henson.


Diane Henson

On July 1, 1992 a class action Title IX lawsuit was filed by seven women athletes on behalf of all female athletes in both varsity and intramural programs. Their lawsuit stated that the University of Texas at Austin failed to provide adequate participation opportunities as required under Title IX. They wanted an additional four women's varsity programs: crew, softball, gymnastics, and soccer.

On July 16, 1993, in an out-of-court settlement, the university agreed to double the number of women participating in varsity sports. This action has increased the number of female athletes from 23 percent to 44 percent. The university also decided to increase the number of female athletic scholarships over a five-year period from 32 percent to 42 percent of the total number of athletic scholarships offered. Three varsity women's sports were added—rowing, soccer, and softball.

The University of Texas touted the settlement as proof of their commitment to women's athletics and compliance with Title IX and an indication that even an enormous state university with a successful football program can meet the law's requirements. However, university officials also pointed out that the progress came with a price in terms of conflict between men's and women's programs and the perception that the strain on the university jeopardized the competitive advantage of UT's sports teams. Many questioned the loyalty of Donna Lopiano—a woman widely regarded as the most influential woman in the history of UT sports.

Lopiano said she saw no conflict in giving the rowing club coach the lawyer's telephone number while employed by the university.

> "I never saw the incongruence of it," she said. "I loved Texas. [But] you were living a schizophrenic position as a women's athletic director. . . . I have never in my life not encouraged people to do the right thing. I have never not been straight with people about what's wrong."[23]


Connie Clark

In 2018, twenty-five years after the settlement in *Sanders v. University of Texas*, Austin American Statesman sportswriter Jason Jarrett questioned whether the University of Texas' reputation as a "shining light" for Title IX was still deserved. Jarrett pointed to reorganization and reshuffling of the athletic department, which included the official folding in of the UT women's department into one headed by new athletic director Chris Del Conte with two new lieutenants, both male. He also pointed to the replacement of the only softball coach UT had ever had, Connie Clark, with a male coach and the assignment of the women's track team to the same head coach as the men.[24] Jarrett's question is a valid one—what is the current status of women's sports in Texas? Has Title IX lived up to its promise?

There are certainly positive signs for women's sports in Texas. For example, the 2023 NCAA Division I Women's Volleyball Championship in which the University of Texas defeated Nebraska broke the all-time collegiate volleyball attendance record for an indoor venue. The championship match between Texas and Nebraska — the first NCAA volleyball championship to be broadcast on ABC — set a TV viewership record for the sport, averaging 1.7 million viewers opposite Sunday NFL games. This represented a 115 percent increase from the 2022 championship match viewership of 786,000. The 2023 semifinal matches were also the most watched ever, averaging 1.1 million viewers.

Although women's sports in Texas are undeniably gaining a higher profile than ever before, it is also hard to argue that women's opportunities in sport are equal to those of men. According to the Women's Sports Foundation, high school girls still do not have the participation opportunities provided to high school boys.

And women's overall participation in college athletics also lags behind men's. This trend is particularly concerning because women make up more of the college population than men. Specifically, while women make up 56 percent of college students, they only represent 42 percent of college athletes.

This disparity could widen as revenue from name, image, and likeness licensing agreements is unequally divided between men and women's sports. On December 1, 2023, thirty-two female athletes at the University of Oregon filed a Title IX lawsuit against the school. It is the first Title IX complaint that specifically asserts that a university provides greater opportunities to male athletes to maximize their NIL (name, image, and likeness) rights. This is likely a fertile arena for continuing litigation over Title IX as the tremendous amount of money flooding into college sports through NIL deals could either level the playing field if allocated equitably or widen the gap between men's and women's sports.

[23] "Playing Field Levels at Texas," *The Washington Post*, July 5, 1997.

[24] Jason Jarrett, "Twenty-five Years Later, Is Texas Still a 'Shining Light' for Title IX, Women's Athletics?" *Austin American Statesman*, July 15, 2018.

Discussion of Title IX so often devolves into a consideration of money, and perhaps that's not surprising. But it's also worth remembering the higher philosophical goals of Title IX. In the words of Senator Birch Bayh, one of the authors of Title IX,

> "What we were really looking for was equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn't really be a controversial subject in a nation that now for 200 years has prided itself in equal justice."
>
> — Birch Bayh, former United States Senator and author of Title IX


Sen. Birch Bayh

(The author would like to thank Keeley Drummond from the State Bar Archives department for her help researching the *Bennett v. WTSU* case.)

SHARON SANDLE *is director of the Law Practice Resources Division of the State Bar of Texas and serves as the Executive Director of the Texas Supreme Court Historical Society. This article is drawn from her well received talk at the 2025 TSCHS Panel Discussion at the TSHA Annual Meeting.*

At the upcoming 2026 TSHA Annual meeting in Irving on Thursday March 5, she will present at the Women in Texas History Luncheon. Her talk will be about pioneering Texas attorney Mary Joe Durning Carroll. She will also serve as commentator at the Society's Panel Discussion on Friday March 6. More information about the 2026 TSHA Annual Meeting can be found here: https://am.tsha.events/

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Journal Editor-in-Chief Wins Justice for Seneca Chieftain – 176 Years Later

Dr. Martin Luther King once famously said, "The time is always right to do what is right." Those words have a special meaning for TSCHS Journal editor-in-chief John G. Browning. He has made it his mission to deliver justice to aspiring minority lawyers from the 19th and early 20th centuries who were denied the right to practice based on the color of their skin. In 2020, he and retired Chief Justice Carolyn Wright successfully petitioned the Supreme Court of Texas to posthumously admit J.H. Williams, a Black man denied the chance to enter the legal profession in Dallas in 1881. In October 2023, Browning persuaded the Maryland Supreme Court to posthumously admit Edward Garrison Draper, a Black graduate of Dartmouth who, in 1857, was told by a Baltimore judge that he was "perfectly qualified to practice in Maryland – if only he were white." On November 14, 2025, Browning led yet another successful campaign, this time persuading New York's highest court to posthumously admit Seneca chieftain and Union General Ely S. Parker to the New York Bar.

Ely S. Parker

It was the culmination of a years-long effort by Browning, a former justice on Texas' Fifth District Court of Appeals who now serves as the Distinguished Jurist in Residence at Faulkner University's Thomas Goode Jones School of Law in Montgomery, Alabama. While watching a documentary in early 2020 about Ulysses S. Grant, Browning was surprised to learn that Grant's trusted friend and military adjutant, Ely Parker, had trained as a lawyer and put that legal skill to good use drafting the articles of surrender that Confederate General Robert E. Lee signed at Appomattox in 1865. The former appellate judge immediately began researching Parker's life, including his years apprenticing with an Ellicottville, New York law firm. Browning's exhaustive research took him through archives, museums, and collections of correspondence and diaries throughout the Northeast, culminating in the writing of his article, *Two Nations But No Justice: The Legal Dreams of Ely S. Parker and Maris Pierce*, which will be published in early 2026 in the *American Indian Law Review*.

Justice Browning's digging also led him to Parker's descendant, Al Parker – a Tonawanda Seneca activist in western New York who soon signed on to the campaign to right the historic

(Left to right:) Justice Mark Montour of the New York Supreme Court; Lee Redeye, Seneca Nation counsel; Justice (ret.) John Browning; and Melissa Parker Leonard, direct descendant of Ely S. Parker.

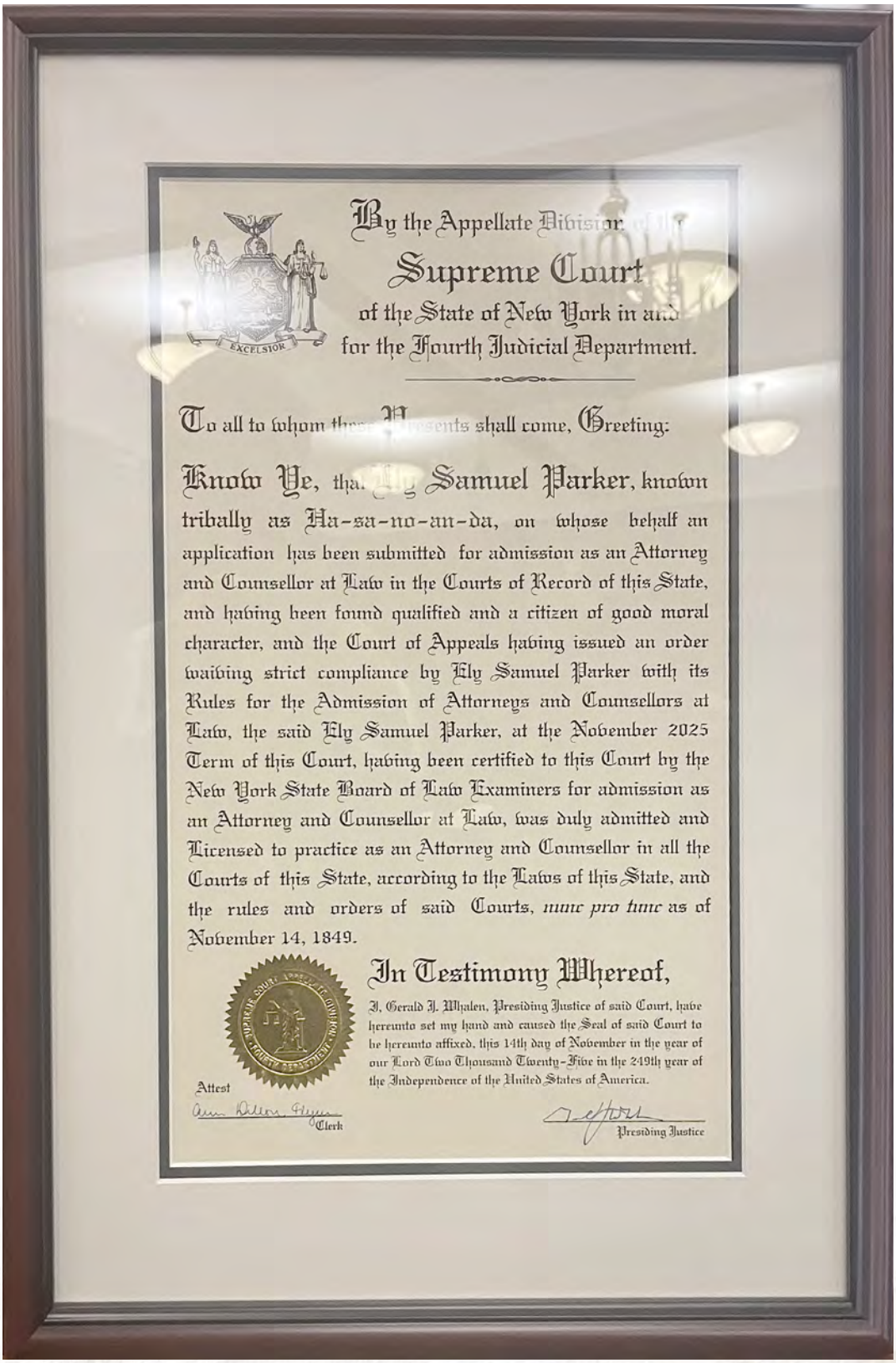
injustice. Gradually, the effort gained momentum as Browning gathered letters of support from the National Native American Bar Association, historians, the National Park Service, museums, and other minority bar associations. Sadly, though, Al Parker passed away and the campaign stalled. Thankfully, Al Parker's daughter, Melissa Parker Leonard, took up her father's cause. The team also gained a powerful ally in Justice Mark Montour, a member of the Mohawk Nation and the first Native American to serve on New York's highest appellate court. Joined by the Seneca Nation and its deputy general counsel, Lee Redeye, the team was now complete.

In September 2025, Browning and Redeye submitted a detailed petition describing how Parker's education and legal training had satisfied the requirements for admission to the New York Bar in 1849. The petition also related how Parker's legal training had proven key to the Tonawanda Seneca's successful cases before the New York and United States Supreme Courts in the 1850s. These two victories before the highest court in the land proved instrumental in preventing the Seneca's removal like so many other tribes and in preserving their ancestral homelands.

The New York Supreme Court agreed that the historic wrong should be corrected. In a special ceremony at its Buffalo courtroom on November 14th – one which also commemorated National Native American Heritage Month – the Court posthumously admitted Ely Parker before an audience of dignitaries (including the president of the Seneca Nation), Parker's descendants,

and many others. Presiding Justice Gerald Whalen called the moment "the last steps on the long road to correcting a historic injustice." The event was covered by *CNN*, *The New York Times*, the *Associated Press*, and other members of the media.

Ely Parker's posthumous bar admission is only the eighth in U.S. legal history. It is also the first such admission involving a Native American; the other seven featured Black and Asian American candidates. Having led the last three efforts, Justice Browning has no plans to slow down. He points out that his research has already uncovered at least one other Native American who was wrongfully denied bar admission, along with a Black candidate in 19th century California. Browning intends to continue this work because, as he puts it, "justice has no expiration date."



By the Appellate Division of the
Supreme Court
of the State of New York in and
for the Fourth Judicial Department.

To all to whom these Presents shall come, Greeting:

Know Ye, that Ely Samuel Parker, known tribally as Ha-sa-no-an-da, on whose behalf an application has been submitted for admission as an Attorney and Counsellor at Law in the Courts of Record of this State, and having been found qualified and a citizen of good moral character, and the Court of Appeals having issued an order waiving strict compliance by Ely Samuel Parker with its Rules for the Admission of Attorneys and Counsellors at Law, the said Ely Samuel Parker, at the November 2025 Term of this Court, having been certified to this Court by the New York State Board of Law Examiners for admission as an Attorney and Counsellor at Law, was duly admitted and licensed to practice as an Attorney and Counsellor in all the Courts of this State, according to the Laws of this State, and the rules and orders of said Courts, *nunc pro tunc* as of November 14, 1849.

In Testimony Whereof,

I, Gerald J. Whalen, Presiding Justice of said Court, have hereunto set my hand and caused the Seal of said Court to be hereunto affixed, this 14th day of November in the year of our Lord Two Thousand Twenty-Five in the 249th year of the Independence of the United States of America.

Attest
Clerk

Presiding Justice

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Texas Forever:
An Invitation to TSHA's 2026 Annual Meeting

By David A. Furlow

The Society will present its next panel-program—***Texas Forever: Law from the Villa de San Felipe 1836 Courthouse through Texas's 1876 Constitution***—at the Texas State Historical Association's 130th Annual Meeting in Irving on Friday, March 6, 2026 from 3:00 to 4:30 p.m. TSHA's annual meeting will be held March 4-7 at the Westin Irving DFW Hotel and Conference Center.

Our Society's President, Jasmine S. Wynton, will begin by discussing our society's unique role in chronicling and publicizing the history of the Texas Supreme Court, Texas's judiciary, and Texas law. She will highlight our publication of scholarly books, the 14-year story of the *Journal of the Texas Supreme Court Historical Society*, our Fellows' leadership of the *Taming Texas* 7th Grade Texas History project, and other activities.

Bryan McAuley, Curator of the Texas Historic Commission's San Felipe de Austin Historic Site, will discuss "Law in the Villa de San Felipe de Austin." He will examine the alcalde court system at San Felipe de Austin in the 1820s and 30s. His presentation will touch on some of the unique cases handled by the court, as well as the mundane nature of most litigation in Stephen F. Austin's colony. It will connect many prominent attorneys of the era to the town, including William Barrett Travis. The session will end with reflections on the preservation issues connected to a recreated court building as part of the San Felipe de Austin's outdoor exhibit, the Villa de Austin.

William J. Chriss, an attorney, scholar, and author of both *The Noble Lawyer* and *Six Constitutions over Texas* will present "The Constitution of 1876: Its Enduring 150 Year Legacy." He will discuss the adoption and unique characteristics of the Texas Constitution of 1876, the Texas constitution that still governs the Lone Star State today.

Sharon Sandle, the Society's Executive Director, will serve as the Commentator who fields questions from the audience. In addition her involvement with the Society's panel-program, she will also present at the TSHA's Women in Texas History Luncheon. Her talk will be about pioneering Texas attorney Mary Joe Durning Carroll.

Registering for a TSHA annual meeting is quick, easy, and affordable.[1] Please accept this invitation to see the Society fulfill its educational mission of sharing the history of the Texas Supreme Court, the Texas judiciary, and Texas law with the public.

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[1] *See* "TSHA's 130th Annual Meeting," *TSHA 130th Annual Meeting* website, https://am.tsha.events, accessed Sept. 25, 2025.

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THE TEXAS SUPREME COURT HISTORICAL SOCIETY

DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal*'s readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal*'s endorsement of the views expressed therein.

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2025-26 Membership Upgrades

The following Society members have moved to a higher Membership category since June 1, 2025.

HEMPHILL FELLOW

Hon. Nathan L. Hecht

TRUSTEE

Hon. Lawrence Doss

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2025-26 New Member List

The Society has added 31 new members since June 1, 2025. Among them are 21 Law Clerks for the Court (*) who will receive a complimentary one-year membership during their clerkship.

HEMPHILL FELLOW

Priscilla Richman

GREENHILL FELLOW

Alex Bell

TRUSTEE

David Campbell
Alison Battiste Clement
Audrey Vicknair

CONTRIBUTING

Laura Beth Bienhoff
Jason Bramow

REGULAR

Eric Ables*
Brandon Charnow*
Meagan Corser*
Alesondra Cruz*
Emmalyn Decker*
Wes Dodson*
Temi Fayiga*
Brendan Fugere*
Hunter Heck*
Ashley Little*
Eliza Martin*
Rebecca Moseley
Jackson Nichols*
Ben Prengler*
Veronica Rivas
Abigail Schultz*
Christian Shaffer*
Kavid Singh
Max Varela*
Martha Vazques*
Kali Venable*
Kirk Vonkreiser*
Alison Welch*
Hannah Young*

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Membership Benefits & Application

Hemphill Fellow $5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating & Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow $2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of All Society Publications
- Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- Recognition in All Issues of Quarterly *Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership $1,000

- Historic Court-related Photograph
- All Benefits of Patron Membership

Patron Membership $500

- Discount on Society Books and Publications
- All Benefits of Contributing Membership

Contributing Membership $100

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Regular Membership $50

- Receive Quarterly *Journal of the Texas Supreme Court Historical Society*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs

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Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

Join online at http://www.texascourthistory.org/Membership/.

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Please select an annual membership level:

- ☐ Trustee $1,000
- ☐ Patron $500
- ☐ Contributing $100
- ☐ Regular $50
- ☐ Hemphill Fellow $5,000
- ☐ Greenhill Fellow $2,500

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