COMPUTER AND TECHNOLOGY SECTION

Circuits

e-Journal of the Computer & Technology Section
of the State Bar of Texas
April 2023

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Stay tuned for our FREE CLE each quarter!

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Letter from the Chair

By Pierre Grosdidier

Dear Section members. The Computer & Technology Section continues to deliver quality CLE programs. On February 24, 2023, Quentin Brogdon, Partner at Crain Brogdon, gave us a fascinating talk on autonomous vehicles and their litigation risks. The take-away: if you think autonomous vehicles are a thing of the future, think again. They are already "on the road," and it is safe to assume that some of the trucks you pass on the freeway are automated, at least in part, despite the presence of a driver in the cab seemingly behind the wheel. Next, on April 28, Charles Mudd of Mudd Law will talk about Space law: the next legal frontier. A digital invitation will timely precede the webinar. Thank you, Quentin and Charles, for your contributions to the Section's CLE program!

Separately, on February 17, 2023, I attended a Council of Chairs where we heard presentations from Bar leaders on various topics.

Trey Apffel, Executive Director, updated us on the Bar's partnership with *Fastcase*. Bar members can now sign-up for free daily email summaries of Texas cases at go.fastcase.com/texascasealerts. Also, the January 27 Board of Directors approved the conceptual building design for the new Lavaca Street extension. The Board also approved additional planning for the three-story building with theater, conference rooms, board room, workspaces, and an outdoor rooftop hosting room with a view on the Capitol. The building is expected to cost $14.2 million, including contingency. It will be funded via a voluntary donation campaign (no bar dues will be used). Finally, the Board voted to join the Texas Supreme Court and the Texas Court of Criminal Appeal in designating April 14 as Texas Day in Civility and the Law.

Laura Gibson, President, updated us on the three main initiatives of her tenure: attorney wellness, succession planning, and education regarding the grievance system. You can watch three free one-hour on-line CLEs on these topics. These CLEs address real life and work issues for all attorneys. You can access the CLEs on the TexasBarCLE web site (select "Free Online Classes / mp3." The classes are:

1. Attorney wellness: "Just Ask: How We Must Stop Minding Our Own Business in the Legal World (Suicide & Depression Prevention Essentials)" (MCLE No: 174156520; Credit: 1 hr, including 1 hr ethics). Accreditation for this course expires on 4/30/2023.

2. Grievance system: "2022 What Every Lawyer Should Know About the Attorney Grievance System" (MCLE No: 174177728; Credit: 1.25 hrs, including 1.25 hrs ethics). Accreditation for this course expires on 10/31/2023.
3. Succession planning: "Don't Wait, Designate" (MCLE No: 174182491; Credit: 1 hr, including 1 hr ethics). Accreditation for this course expires on 12/31/2023.

You must complete the courses and report your MCLE hours prior to the deadlines to receive credit.

I have watched all three CLEs and they were well worth it (and they each count for 100% ethics credits). The first one, dealing with suicide and depression prevention, is particularly poignant. Kudos to Laura Gibson for her initiatives.

I now leave you to this latest edition of *Circuits*. The Section leadership joins me in thanking its Editor Sally Pretorius for her commitment and all its contributors for their hard work. If you have been keeping a technology and the law article in you for years, now is the time to put pen to paper and submit your prose to Sally for the fourth and final issue of the 2022–23 year.

Pierre Grosdidier
Section Chair, 2022–23
Computer & Technology Section
State Bar of Texas

COMPUTER AND TECHNOLOGY SECTION

FEATURE ARTICLES:-

If You Start to Write a Book

By Nick Guinn

As I look back over the last year and consider my journey as a lawyer-author, I cannot help but think of the popular children's book, If You Give a Mouse a Cookie.

I stumbled across a book on Amazon (as I often do) entitled The 100-Page Book (#ad). I was intrigued and decided to read it. The book is efficient. Its author, Mike Capuzzi, demystifies the process of writing a book and explaining how professionals and entrepreneurs can use short helpful books to engage clients and customers by establishing the author as an expert in his or her field. Following one hundred pages of great content, Capuzzi leaves the reader with three options:

1. Do nothing
2. Try to write a book on your own
3. Contact Mike Capuzzi and see if the two of you would work well together

The book gives you more than enough information to pursue option 2. I know from prior failed attempts with option 2, however, that enlisting the help of an expert might make the difference between merely starting and finishing. I ultimately hired Mike to assist me with my book, which was eventually titled Everything You Always Wanted to Know About Trademarks. Specifically, Mike helped me with organizing the book, editing, and designing it. Writing the book was the easy part: the chapters are organized by topics that clients regularly ask about and my content is the answers that I provide. For me, things became challenging (albeit interesting and fun) from there. Mike regularly reminded me that completing your book is only the start of the journey. It is one tool in your marketing arsenal. If you do not promote it, it does not serve you.

With that in mind, I started thinking about other ways that I could build my personal brand with helpful content for existing and prospective clients, as well as fellow lawyers. I consulted with an old friend, Mauricio Sanchez a.k.a. Gurupresario. Mauricio articulated a vision, which included a personal website, social media, and newsletter. Working with Mike Capuzzi made me realize that I can accomplish more goals when I enlist the help of others.

Knowing that I would add more tools to my marketing arsenal—and keeping in mind branding considerations from my trademark practice—I knew that decisions I made early in the process would have consequences down the line. It would be a shame to adopt branding and be forced to change due to alleged infringement or other poor planning. I carefully considered the name of my publishing imprint: CORAL REEF IP. Not only did I choose a name that resonated with me (I am a diver and marine enthusiast), I made sure that it passed my trademark clearance search, and that available domains and social media handles were available. I also chose color schemes that would stand out and distinguish my book from others on a bookshelf. By that point, the book was nearly complete, and as I alluded to above, my journey was about to begin.

Mauricio and I have spent more than a year developing the website, social media, and other content. I am particular and I want to make sure that none of these efforts compromise my professionalism and the reputation I have built. Doing otherwise would be counterproductive. I regularly seek input from my wife and parents, as well as friends and colleagues. A lot goes into this process: photo shoots, monthly content meetings to schedule social media posts and blogs, and content creation. At this point, I have not figured out how to outsource my blog writing or social media posts: they rely heavily on my personal experiences. That said, Mauricio and my assistant, Gabriella Hernandez, are immensely helpful with "finishing" and design the deliverables. For those interested in social media, I encourage you to consider using ContentStudio or a similar platform. It helps you organize your posting schedule, collaborate with others, and minimize redundancy if you want to deliver the same or similar posts across multiple platforms.

I am still in the early stages of this project and sometimes it is tempting to feel discouraged: no one is buying the book, or you wonder why a video only has three views. But these things take time. Momentum builds. Regardless, and I told myself this at the beginning, it needs to be fun. In the event that no one reads or watches any of my content, at least I will have had fun creating it. I was also reluctant to embark on this project because of the vulnerability associated with it. I was afraid what other people would think. Maybe some people do not like it, but they have not said anything (except for an isolated, single-star review on Amazon). I am pleased by the warm reception my friends and colleagues have shared. It was also a blast hosting a big party last December (i.e., book release party).

I hope you found this article helpful. I am sharing links to my several pages below. Please reach out if I can answer any questions or comments you might have.

If you are interested in hosting a podcast or appearing on podcasts, consider using a platform such as PodMatch (#ad) to efficiently find hosts and guests to work with. I learned about PodMatch from Mike Capuzzi and that platform has proven to be another excellent tool. Interestingly, Mike helped the owner of PodMatch write a short helpful book (#ad), as well.

https://www.nickguinn.com/

https://www.facebook.com/NickGuinnIPAttorney

https://www.instagram.com/nickguinnipattorney/?fbclid=IwAR1zi-qcHA0ziD8SD-bf0EctJTPIsEX7_N8tKGKQ9cLJD8IV1EfEwAE4DC0

https://www.youtube.com/channel/UCIV3U-pYiZDf9NqCvgG1zqA

About the Author

Nick Guinn is a Trademark and Patent Attorney at Gunn, Lee & Cave.

Telephone Consumer Protection Act

By Allison Dunn

Finding courts in the First Circuit have yet to address the framework for determining whether online terms were sufficiently disclosed to provide a consent defense to a Telephone Consumer Protection Act, the U.S. District Court for the District of Massachusetts relied on recent Ninth Circuit case law in allowing a putative class action to proceed.

In Gaker v. Citizens Disability, Heather Gaker, a Florida resident, alleges that Citizen's Disability LLC violated the TCPA by placing telemarking calls to her without her consent. However, Citizen's, a Massachusetts for-profit corporation which helps individuals with disabilities in claiming benefits from the Social Security Administration, that Gaker had consented to receive such calls from when she entered her personal information into a sweepstakes-type website that disclosed potential calls or text messages from companies, like Citizen's, according to the district court's order filed this week.

Citizen's maintained that Gaker entered information onto a website that offered a chance to win $50,000. After the boxes to enter the personal data, there was a box to "confirm your entry," as well as a disclaimer that read, in part: "By clicking confirm your entry I consent to be contacted by any of our Marketing Partners, which may include artificial or prerecorded calls or text messages, delivered via automated technology to the phone number(s) that I have provided including wireless number(s) that I have provided."

Citizen's relies on "leads" generated through a marketing vendor, Digital Media Solutions. The marketing vendor provided Gaker's information to the defendant in January 2020, and Citizen's placed seven calls to Gaker's cellphone regarding its disability services in April 2020.

Both parties filed instant cross-motions for summary judgment, and the court heard oral argument on Jan. 23. Judge Angel Kelley of the U.S. District Court for the District of Massachusetts filed a ruling Feb. 6, relying on the general Massachusetts and First Circuit standard for assent to online terms, as well as on out-of-circuit review. She ultimately sided with Gaker, ordering Citizen's to pay the $500 statutory maximum for each violation, totaling $3,500.

> "This is a positive ruling and a win for consumer privacy. It is less about technical distinctions between 'clickwrap' or 'browsewrap' agreements than it is about prohibiting telemarketers from claiming they have consent to call do-not-call subscribers, when the

> 'consent' is obtained deceptively," said one of the attorneys representing Gaker, Jacob U. Ginsburg, of Kimmel & Silverman in Ambler, Pennsylvania.

Both the U.S. Court of Appeals for the First Circuit in Emmanuel v. Handy Technologies (2021) and the Massachusetts Supreme Judicial Court in Kauders v. Uber Techs. (2021) recognized a distinction between the forms in which a website may present to the user, including: "clickwrap," in which a user clicks or checks a box to acknowledge that he or she has read and agrees to the terms; "browsewrap," does not require a user to check a box, but rather the terms and conditions are merely posted on the website, typically as a hyperlink at the bottom of the screen; and "hybridwrap" provides greater notice of the terms and conditions than a browsewrap agreement, but do not require the affirmative manifestation of intent that a clickwrap agreement, according to the court's order.

> "Here, an online advertisement for a sweepstakes suggested consumers could win money by submitting a form. However, underneath the bold and conspicuous advertisements for a sweepstakes entry, the website buried in camouflaged fine print, language indicating the consumer gives permission to hundreds of telemarketers to call the consumer by submitting. That's not consent, it's deception," Ginsburg added.

Finding that the courts in the circuit have yet to establish a framework determining whether online terms were sufficiently disclosed to provide a consent defense to a TCPA claim, Kelley looked to U.S. Court of Appeals for the Ninth Circuit's April 2022 opinion in Berman v. Freedom Financial Network.

> "The [Berman] court synthesized earlier precedent on the clickwrap-browsewrap distinction into a two-part test for determining whether terms and conditions presented on websites constitute 'reasonably conspicuous notice.' To be binding on a plaintiff, a notice first 'must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it.' ... Secondly, if the website provided the challenged terms via hyperlink rather than on the webpage itself, 'the fact that a hyperlink is present must be readily apparent,'" Kelley summarized.

Kelley also looked to a similarly instructive case in Sullivan v. All Web Leads, Inc. by the Northern District of Illinois in 2017, in which a telemarketer placed consent language in small print at the bottom of a page collecting personal information. The plaintiff in that case alleged that he had not seen the language before submitting his information, and he had not realized that he was consenting to telemarketing calls.

The telemarketer in Sullivan moved to dismiss, arguing, in part, that it had adequately procured the plaintiff's express consent, the order cited.

> "On the more deferential posture of a motion to dismiss, the court concluded that the plaintiff had plausibly stated a claim that he had not expressly given consent. ... It declined to hold that, as a matter of law, the notice the telemarketer had given on the website was 'clear and conspicuous.' In doing so, the court evaluated seven cases—all outside of the TCPA context which had considered various terms and conditions presented to consumers who had purportedly given some sort of consent via an internet form," Kelley wrote.
>
> "From these cases, the court divined a general synthesis that a consumer is less likely to be bound to terms agreed to on the internet where the terms were located below the 'accept' or 'submit' button or were otherwise hidden or difficult to access, and were more likely to be bound where the website gave the consumer clear notice of the terms."

As for the present case, Kelley concluded that the terms on the sweepstakes website "do not meet any court's definition of a 'clickwrap agreement', which would carry a degree of presumption of validity," as Gaker was not required to check a box to indicate that she had read the terms and conditions prior to submitting her information, the judge held.

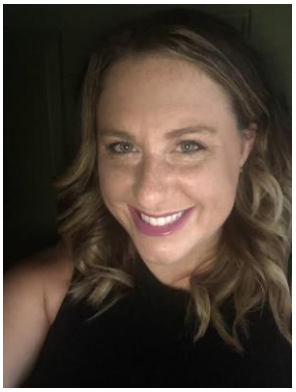
> "The court could reasonably characterize these terms as either a 'browsewrap' or 'hybridwrap'; the latter term is not in use in all jurisdictions, and because neither classification carries a presumption of validity, it is not necessary to draw this distinction in order to conclude that Citizen's has not met its burden to prove that the disclosure was clear and conspicuous," Kelley wrote.

Furthermore, Kelley said, the disclosure would fail the two-part test that the Ninth Circuit outlined in Berman.

> "Each of these factors the Berman court relied on is present here, and the court reaches the same conclusion: the Super-Sweepstakes website from which Citizens obtained Ms. Gaker's information is a textbook example of a webpage that attempts to hide its consent language from its users," Kelley wrote.

Liam C. Floyd and Richard E. Levine of Stanzler Levine represented Citizen's Disability. A message seeking comment from the attorneys was not immediately returned.

About the Author



Allison Dunn is a reporter on ALM's Rapid Response desk based in Ohio, covering impactful litigation filings and rulings, emerging legal trends, controversies in the industry, and everything in between. Contact her at aldunn@alm.com. On Twitter: @AllisonDWrites.

E-Scooter Location Tracking does not Violate the Fourth Amendment

By Pierre Grosdidier

Electric scooters (e-scooters), which are rentable anywhere and anytime via smartphone applications, have increasingly peppered urban landscapes. In 2018, faced with cluttered sidewalks and impaired street access, the City of Los Angeles started to require e-scooter companies to track each of their wheeled devices in real-time via their smartphone applications by recording the start and end point of each ride, its duration, and the route taken.[1] Importantly, the program does not collect rider-related information. Justin Sanchez, an e-scooter rider, sued the Los Angeles Department of Transportation (LADOT) alleging, *inter alia*, that the location tracking violated the Fourth Amendment. Sanchez alleged that the LADOT could easily deanonymize the location data with the help of other data sets and retrace riders' past whereabouts with preserved historical data. The district court dismissed Sanchez's complaint without leave to amend and the Ninth Circuit affirmed, holding that the third-party doctrine applied and foreclosed his reasonable expectation of privacy in his location data.[2]

The Court whittled down Sanchez's claim to whether the collection of e-scooter location data violated Justice Harlan's *Katz*'s test, under which a search requires a Fourth Amendment warrant when a person "exhibit[s] an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable'."[3] The Court addressed this issue by considering the tension between a person's expectation of privacy in their whereabouts and the third-party doctrine, which holds that a person has no such expectation in information that the person voluntarily makes public. As to a person's whereabouts, the United States Supreme Court narrowly held in *Carpenter v. United States* that collecting a person's historical cell site location information (CSLI) for 127 days required a warrant because it "achieve[d] near perfect surveillance" and violated the person's reasonable expectation of privacy.[4] But *Carpenter* did not disturb the third-party doctrine.[5] In *United States v. Miller*, the Supreme Court held that Miller had no expectation of privacy in cancelled check and other transactional information

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1 *Sanchez v. Los Angeles Dep't. of Transp.*, 39 F.4th 548, 552 and n.3 (9th Cir. 2022) (the three-judge panel included Rosenthal, C.J. S.D. Tex., sitting by designation).

2 *Id.* at 553, 559.

3 *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

4 *Sanchez*, 39 F.4th at 556 (citing and quoting *Carpenter v. United*, --- U.S. ---, 138 S. Ct. 2206, 2217-18 (2018)).

5 *Id.* (citing and quoting *Carpenter*, 138 S. Ct. at 2220 ("We do not disturb the application of *Smith* and *Miller*")).

held by his bank and sought by the government.[6] Likewise, in *Smith v. Maryland*, it held that Smith had no expectation of privacy in the phone numbers he dialed and that a police pen surreptitiously recorded.[7] In both cases, Miller and Smith had voluntarily communicated the information to third parties (the bank and the phone company, respectively), thus diminishing their privacy interests. Importantly, in *Carpenter*, the Supreme Court held that CSLI is "not truly" voluntarily shared with the phone companies because phones generate CSLI automatically in the background, and because carrying a cell phone is "indispensable to participation in modern society."[8]

In this case, the Ninth Circuit Court of Appeals held that the third-party doctrine applied because Sanchez knowingly and voluntarily disclosed his location data each time he rented an e-scooter. He agreed each time to the operator's privacy policies, which stated explicitly that location data would be collected and shared with authorities in compliance with applicable regulations. Moreover, in a significant departure from the facts in *Carpenter*, the location data concerned e-scooters, not their riders. A particular rider could not expect to use the same device multiple successive times as riders grabbed e-scooters willy-nilly on the street and operators rotated them for recharge. The location data, therefore, did not track any individual rider "virtually continuously" as did CSLI. Finally, in another departure from *Carpenter*, e-scooters are not indispensable to function in today's society as cell phones are. E-scooters are merely one short-distance transportation solution among others. Concluding that the third-party doctrine applied, the Court held that, in this case, the location data collection was not a Fourth Amendment search. The Court stressed the narrowness of its decision, leaving the door open to other outcomes if the location data was used by law enforcement or to infer riders' identities and whereabouts.[9]

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6 *Id*. at 557 (citing *United States v. Miller*, 425 U.S. 435, 438–39 (1976)).

7 *Id*. (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

8 *Id*. at 559 (citing and quoting *Carpenter*, 138 S. Ct. at 2220).

9 *Id*. at 559–61.

About the Author

Pierre Grosdidier is a litigation attorney in Houston. He is board certified in construction law by the Texas Board of Legal Specialization. Pierre's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, Pierre worked in the process control industry. He holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a Fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section Chair for 2022–23. He was elected Medium Section Representative to the State Bar of Texas for the 2023–26 term.

ABA TECHSHOW 2023 Highlights (part I)

By Mark Unger

It's been 3 years since I last had the physical ability to last see the many techie lawyers, consultants, entrepreneurs and vendors at ABA TECHSHOW in Chicago and drink in the elixirs of TECHSHOW.

It's been a long three years. That drought came to an end this past March 1-4, 2023

and the water did not disappoint the thirsty.

The presentations were very fluid, so much so that it was difficult to spend any significant time in the Expo Hall. The fast and furious meetups with the vendors of legal tech that we could get to highlight the many acquisitions and mergers that occurred in the legal tech space over the last several years.

Several announcements preceded TECHSHOW, the majority of which appeared to come from Bob Ambrogi, the veteran impresario who was presented at the opening startup pitch competition with the very deserving award for a lifetime of achievement and promotion of the legal tech industry and TECHSHOW..

This trend of acquisition is somewhat ironic as compared to the pre-2008 crash period in legal tech; during which economic depression gave way to a super-infusion of startups in the practice management space (Clio, Rocket Matter, MyCase, etc.). Much of what seems to be occurring is the buy-up of players in sub-markets, which was a part of the pre-2008 'big-law-vendors' playbook, where the two biggest law vendors would buy up software companies for their market share. However, to counter this irony, the new buyouts tend to be more in line with folding the tech into existing platforms.

Several of the biggest splashes over the last three to four years came after massive cash infusions of VC money into the existing Practice Management System coffers.

In addition, the infusions now appear to be two-fold-with companies being bought not just for their tech but also for the re-branding of some to create umbrella companies and the buy-up

of brands within those brands. Thus, there are now several companies that own and/or are positioned to own different Apps within the penumbra of their 'rights,' so to speak.

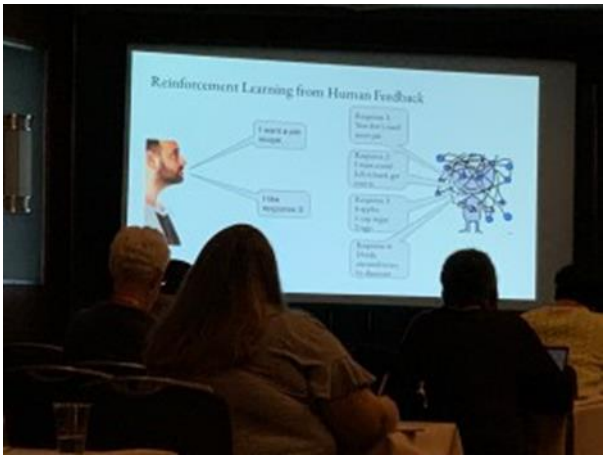
If this trend holds, look for the top 4 or 5 (in my opinion at least) in the startup pitch competition to possibly come into play, something that is not lost on those seeking the winning ticket. In another twist of irony, the winner of the startup pitch competition was Universal Migrator, which claims to be able to move a law firm's data from any of approximately 60 different case and practice management systems to any other system.

If these companies and vendors represent the process, the large number of speakers certainly stepped up with the substance. While there were many I didn't get to see but have certainly followed, including Regina Edwards of Facebook's Lawyer On The Beach (LOTB) fame, there were many others that competed in sometimes overlapping manners for our attention. This is perhaps a problem that TECHSHOW organizers faced in the past and that had subsided but seemed to make a reappearance, along with the continued problem of materials being relatively unavailable 'en masse.' This for me is perhaps like dancing on the head of a needle as TS continues to be a re-education of both my right and left brains.

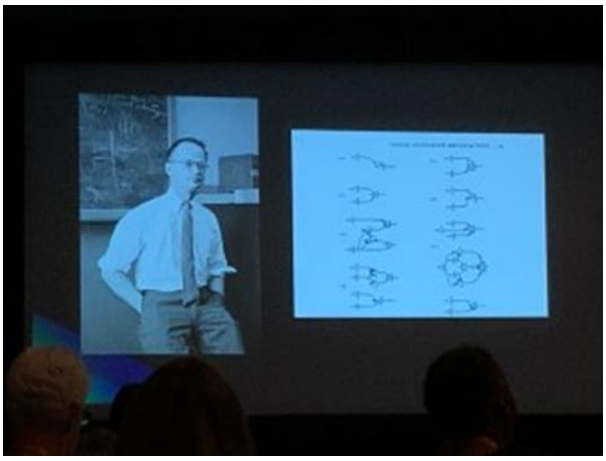
The first keynote featured Jack Newton (celebrating 15 years of Clio's launch) doing a Q and A with a number of very visible startup leaders in the recent three years. Those included several startup pitch competitors of past years, all of whom have dynamic personalities with a very high degree of integrity with regard to their products. Erin Levine (a prior James Keane award winner) launched Hello Divorce several years ago and was one of the first to really propel DIY divorce forward. There are now numerous competitors in the space and I'd expect more, if not hybrids of some lawyers seeking to optimize their efficiency. This optimization is no more apparent that with Kimberly Bennett, who co-founded Fidu, one of my top 4 in the startup alley/pitch competition this year and the third-place winner in the competition. Fidu is a platform created to allow attorneys to focus on flat fee arrangements by taking advantage of automation within the practice of law.

In addition, Jazz Hampton completed the trifecta of keynote panelists, having also come from a law practice background and also with very personal reasons for doing what he does. He created Turn Signal, which is an app that anyone can have on their phone, and if pulled over in a traffic stop, with the click of a button call up an attorney for advice on what to say and do or more importantly what not to say and do. The price point is approximately $60.00 per year but they will not charge anyone making less than $40k and have marketed to companies as an employee benefit.

While the call for speakers and decisions on the same are typically finalized in the summer for the following spring, the unexpected and massive infusion of Chat GPT, reignited the AI in legal discussion but this time in a way that could be obtained by the masses (intermittently unless you're on a paid account). There are probably several hundred integrations not the least of which is Google's Bard and Microsoft (into Bing), though many of these are just really smart people trying to figure out how to add automation into their own products by the AI within 'chat' (Open AI).



One of the speakers was Pablo Arredondo, Co-Founder and Chief Innovation Officer at Casetext, which I believe could be positioned with their new product CoCounsel to counter what I expect to be a massive amount of Chat GPT generated legal work product, either by attorneys simply sending a query and then dumping the output into their documents; or by pro se/self-represented litigants doing something similar. The ability of Judges and even attorneys attempting to counter this will be significantly tested. I write this, one word at a time while on my first of two flights to get home but I intend to run a query in 'Paul Bunyan' fashion and see which indicates a better woodchopper. Arredondo was shepherded into this role and presentation by Steve Embry, Chair of the LPM Section of the ABA, who humbly lauded his efforts and highlighted Arredondo's theoretical jump. Arredondo spoke in historical terms of Walter Pitts of the1940s and early theories of neuron mapping, at one point analogizing "if you want to be smart, do what the smart thing does."



When transitioning the argument to lawyers' space he mused "ours is a castle built with language." By several analogies, he brilliantly wove a pathway (neurons and all) to show us that contextual search will perhaps be everything down the road. When explaining that perhaps Chat GPT shouldn't be used for anything important right now, he offered "I'm from northern California so there's a place for hallucinations but it's not really for litigation".

One of my favorite people (and perhaps the most knowledgeable legal tech presenter I know), Chelsea Lambert, reappeared this year again and presented on a very hot topic as demographics change— that being a guide to succession planning, alongside the very knowledgeable Texas family lawyer, Jordan Turk. This topic is incredibly relevant right now and is the focus of our Texas State Bar President and LPM committee, planning multiple presentations for the State Bar Annual Meeting coming up in June. Their presentation was a great mix of rules, laws (mostly California and Texas, though applicability could cut a wide swath), and practicality, touching on the four C's of client management and three options for planned transitions and exits from practice. Hit up one of them or me for materials, if desired. I'm sure it would be obliged.

In the vein of seeing presenters close to home, I was thrilled to be able to attend "No Code, No Problem, with Austin, Texas attorney Alex Shahrestani and Tulsa, Oklahoma attorney Trevor Riddle.

In what I previously termed a 'mind-bending creation' of spreadsheet backups while pulling via keywords from Gmail using Chat GPT, Alex and Trevor walked the entire audience through a how-to workshop; they combined the use of Zapier with Gmail and Chat GPT to create a Zap in this fashion. While much was above some of our heads, the concept was analogous to all kinds of use-case workflows, and its practicality after the front-end work was illuminating. While Alex focused on the Google steps, Trevor complimented the same workflow on the Microsoft side.

In a heartwarming twist, Nefra Macdonald, ***expanded*** the "Client Centered Law Firm" approach by adding some additional more human-centric accents, citing Julia Cameron's book "The Artist's Way, A Spiritual Path to Higher Creativity," something that I think ought to be more widely implemented in our business space.

She went on to talk about first order thinking (a more knee jerk reaction) and second order thinking (where one would consider a more deliberate range of options and ask us about the longer-term cause and effect of decisions). She referenced getting to the root cause of problems as they come up and how flexibility is not a luxury. She then continues on with the extension that flexibility and sustainability might also be in conflict; where being too rigid

might prevent you from solving problems and being too flexible might result in too many single points of failure.

She rests on the philosophy that one should diversify to eliminate single points of failure (i.e. one place in your law firm that could end you). She goes on to liken anti-fragile law firms as being ones that think about creating good environments, where fewer people would leave for the work-life balance that has recently become more significant in the last several years.

All of these enlightened points are clarity waiting to happen in our minds. While I question whether this is an actual extension of the original client-centered theory or more of a self-fulfilling and holistic approach of her own, the effect is a warm wrap in an ever-increasing cool business world where too rigid decisions increasingly appear to be in potential conflict with the bottom line. Either way, I'm grateful she stands apart among the crowd.

Please note that there were approximately 80 sessions/talks and the few referenced above are not even a smattering of the knowledge that was presented. But, if you are interested in what else was covered, see www.techshow.com for the complete schedule.

And remember, ABA TECHSHOW will be back again next year, starting on February 14th. You might even be able to make it a valentine's weekend, replete with legal tech presents for your significant other if you're like some of us and legal tech makes your heart throb.

About the Author

Mark Unger is a family lawyer, mediator and consultant in San Antonio, Texas. He has been practicing family law almost exclusively since 1996. He has been highly involved with technology and the integration of technology and law since approximately 1998. He has spoken, written and participated in numerous technology law and family law seminars, having been on the board of the State Bar of Texas Computer & Technology Council since 2001 and the San Antonio Bar Association's Technology committee since 1999.

Personal Cloud Storage Account Warrantless Search Breached The Fourth Amendment

By Pierre Grosdidier

In *State v. Bowers*, the Wisconsin Court of Appeals held that a person had a reasonable expectation of privacy in the contents of a cloud-storage account that the person personally paid for but created using the person's county-owned email address.[1] Detective Sergeant Steven Bowers created such an account with a third-party service provider. He allegedly used the account to share a confidential murder investigative file with television show producers without the Sheriff's Department's permission. Made aware of the breach, the Department's IT director unsuccessfully approached the cloud service provider to secure access to the account. She then activated an account password reset that sent a hyperlink to the email account, to which she had access in her capacity as IT Director. Bowers was criminally charged based on the evidence found in the account. The trial court eventually granted his motion to suppress, which challenged the warrantless search on Fourth Amendment grounds.[2] The State appealed and the Court of Appeals affirmed.

Wisconsin courts require a criminal defendant challenging a Fourth Amendment search "to establish, by a preponderance of the evidence: '(1) that he or she had an actual, subjective expectation of privacy in the area searched . . . and (2) that society is willing to recognize . . . as reasonable.'"[3] On appeal, the State argued only the second element, which the Court analyzed under Wisconsin's applicable six-factor test.[4] The State conceded the first two factors, that Bowers had a property interest in the account and that he maintained it lawfully. The Court rejected the State's argument that Bowers did not have "complete dominion and control" over the account (third factor) because he allegedly shared it with others. In fact,

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1 No. 2021AP1767-CR, 2022 WL 17984985, --- N.W.2d ---, at *1 (Wis. Ct. App. Dec. 29, 2022).

2 *Id*. and n.2.

3 *Id*. at *5 (citing *State v. Tentoni*, 871 N.W.2d 285, 288 (Wis. Ct. App. 2015)); *see also Katz v. United States*, 389 U.S. 347, 361 (1967) (Fourth Amendment search requires a warrant when person "exhibit[s] an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable'") (Harlan, J., concurring).

4 *State v. Bowers*, 2022 WL 17984985, at *5 (citing *State v. Dumstrey*, 873 N.W.2d 502, 515 (Wis. 2016)).

Bowers never shared his account password with anyone and selectively shared files with third parties. The Court also rejected the State's argument that Bowers' use of his county email address diminished his control over the account because the IT Director was able to reset the password and gain access. This argument, the Court held, is tantamount to arguing that a person's expectation of privacy diminishes when the location or thing is vulnerable to a privacy breach, an argument that other courts have rejected in part because it would make privacy vulnerable to advancing technology.[5] The same reasoning led the Court to reject the State's argument that Bowers did not take precautions to protect his account (fourth factor). Bowers password-protected his account, and the county never gave him notice that he enjoyed no privacy in his cloud account, stored on non-county property, just because he used his county email address.[6]

The Court was more ambivalent as to whether Bowers put his account to private use (fifth factor) given that he used it to share county files. It merely assumed that Bowers must also have used the account for personal storage. Finally, the Court rejected the State's argument that "Bower's claim of privacy [wa]s not 'consistent with historical notions of privacy'" (sixth factor) because, the State claimed, Bowers shared his account with others. But Bowers shared certain files, not his account and not his password. In summary, the Court compared Bowers' password-protected cloud account stored on non-county property to a locked "container used to store personal documents and effects," and in which persons have well-established reasonable expectations of privacy.[7]

The Court also rejected the State's third-party doctrine argument, which provides that a person can have no expectation of privacy in information that the person voluntarily communicates to third parties. Here, Bowers asserted no privacy right for the county files he shared with third parties. He claimed instead that the government could not force itself into his personal cloud storage account without a warrant.[8] The Court likewise dispatched the State's exigent circumstances argument even as it agreed that it had probable cause to search the cloud storage account. The fact that the IT Director first reached out to the cloud service provider undercut the exigency claim. The State would have had time to secure a search warrant during

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5 *Id*. at *6 (citing *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010); *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001)).

6 *Id*. at **5-6.

7 *Id*. at *7 (citing, *inter alia*, *Riley v. California*, 573 U.S. 373 (2014)).

8 *Id*. at **8-10.

that time. Likewise, the fact that the service provider retained deleted files for 30 days undercut the State's fear that Bowers might purge his records.[9]

Concluding under the totality of the circumstances, as one must in a Fourth Amendment analysis, the Court agreed Bowers had a reasonable expectation of privacy in his cloud account and that the State's warrantless search violated his Fourth Amendment rights.

Separately, in *Long Lake Township v. Maxon*, the Court of Appeals of Michigan reversed itself after initially finding that flying a drone over a person's property without a warrant in a zoning action violated the person's Fourth Amendment rights and warranted suppression of the evidence.[10] On remand from the Michigan Supreme Court,[11] the Court concluded that the exclusionary rule, which aims to deter police misconduct and bars the products of an unlawful search from admission into evidence, did not apply in this civil zoning matter. Therefore, suppression was unwarranted even if the drone overflight amounted to a warrantless and impermissible Fourth Amendment search.[12]

About the Author

Pierre Grosdidier is a litigation attorney in Houston. He is board certified in construction law by the Texas Board of Legal Specialization. Pierre's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, Pierre worked in the process control industry. He holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a Fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section Chair for 2022–23. He was elected Medium Section Representative to the State Bar of Texas for the 2023–26 term.

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9 *Id.* at **12–14.

10 No. 349230, 2022 WL 42811509, --- N.W.2d --- (Mich. Ct. App. Sept. 15, 2022); *see also* Pierre Grosdidier, *Drone Surveillance Requires a Warrant*, Circuits, June 2021, p. 35.

11 *Long Lake Township v. Maxon*, 973 N.W.2d 615 (Mich. 2022) (vacating the judgment of the Court of Appeals and remanding to address whether the exclusionary rule applied in this case).

12 *Maxon*, 2022 WL 42811509, at **1–3.

Can ChatGPT Replace a Texas Lawyer?

By Robert Ray

Much talk has been about ChatGPT lately, and how well it did on bar exams. But does that mean that it will replace Texas lawyers anytime soon? This article will examine a recent encounter with ChatGPT and how well it did on a Texas legal question.

Background

Many states have "Slayer Statutes." Those statutes prohibit a murderer from inheriting from the person they murdered. Except in the insurance area, Texas does not have a slayer statute. In fact, Texas has a section in the Constitution that prohibits a slayer statute. Article 1, Sec. 21 provides:

> *No conviction shall work corruption of blood, or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death.*

The Texas Estates Code follows this language in §201.058 (formerly §41(d) of the Probate Code.)

Texas courts have gotten around the constitutional prohibition by imposing a constructive trust on the murderer's inheritance. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977). This only happens when someone asks the court to impose a constructive trust and proves their case. If no one asks, then no constructive trust is imposed.

ChatGPT-3

I wanted to see how ChatGPT would handle a question that a layperson may ask trying to get information about a legal issue. So, I asked ChatGPT-3 to write a blog post of around 500 words about the slayer rule in Texas. It said:

> "In Texas, the slayer rule is codified in the Texas Estates Code section 253.002. This provision provides that a person who "feloniously and intentionally kills" another person forfeits any property interest they may have had in the victim's estate."

Section 253.002 is entitled "Revocation of Will" and does not contain any of the words mentioned by ChatGPT-3.

I told ChatGPT-3, "Your reference to the Texas Estates Code is wrong, rewrite this."

I was then told, “I apologize for the error in my previous response. The “slayer rule” in Texas is actually codified in Section 253.002 of the Texas Estates Code, which provides that a person who intentionally and feloniously causes the death of another person forfeits any interest they may have had in the victim’s estate.”

I then told ChatGPT-3, “Section 253.002 deals with revocation of will, not the slayer rule. Rewrite. “

In this rewrite, ChatGPT-3 stated, “I apologize for my previous mistake. The correct section of the Texas Estates Code that codifies the slayer rule is Section 253.005. This provision states that a person who intentionally and unlawfully causes the death of another person forfeits any right to receive property or other benefits as a result of the death.”

Unfortunately, the Texas Estates Code does not have a §253.005.

ChatGPT-4

I wanted to try this experiment with ChatGPT-4, the latest version. When I asked ChatGPT-4 to write the same blog post, it did not give me a citation to the Estates Code or claim the statute existed. Still, it did say, “The slayer rule is a common law doctrine that is recognized in various jurisdictions across the United States, including Texas.”

I then told ChatGPT-4 the truth and asked it to rewrite. I said, “Texas does not recognize the slayer rule. Instead, an interested party can impose a constructive trust on the slayer’s benefits. Re-write this article with this in mind.”

The final response was more correct about the issue than the initial responses. Still, it gave me more information about constructive trust than it did about any slayer rule, which was supposed to be the blog post’s subject.

Why is this bad?

Suppose a layperson uses this example to represent themselves. In that case, you can see how they may quickly find themselves out of court through summary judgment or a motion to dismiss, not knowing that all the knowledge they learned about the slayer statute had no application in Texas.

ChatGPT says that it “May occasionally generate incorrect information.” As lawyers, we need to pay attention to the warning.

About the Author

Robert A. Ray litigates throughout Texas from his DFW area base and limits his practice to inheritance disputes. Robert is a past chair of the State Bar of Texas Computer & Technology Section. He is Board Certified in Personal Injury Trial Law.

Say What you Meme – Memes as Evidence in Court

By Hon. John G. Browning

Memes—you've undoubtedly seen them, or even used them yourself in online discourse. Defined by Merriam-Webster Dictionary as "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online, especially through social media," memes have become an integral part of online communication. From the "crying Michael Jordan" to the "condescending Willy Wonka," and from "distracted boyfriend" to "success kid" or "Kermit the Frog drinking tea," memes—much like emojis—have become a kind of cultural shorthand. As one scholar has described memes as communicative tools, they "may contain little to no text at times, yet they convey emotions, concerns, points of view, and even feelings that we are unable to be expressed by the longhand written word."[1] Described by others as "one of the newest and most significant forms of communication in the world,"[2] multiple researchers around the world have even concluded that viewing memes can increase positive emotions and reduce stress levels.[3] For lawyers, however, memes have taken on a different significance—as sources of evidence in court.

With increasing frequency, memes provide critical evidence of a criminal defendant's motive or intent. For example, in the high-profile trial of James Fields for the hate crime of driving his car into a group of counter-protesters at the August 12, 2017 "Unite the Right" rally in Charlottesville, Virginia—killing one and seriously injuring eight others—the prosecution introduced two memes that Fields had circulated to acquaintances and on Instagram. Both depicted "a motor vehicle violently driving into a group of pedestrians, running some over, and flinging others into the air, because the driver was 'late for work.'"[4] Fields' memes included the caption, "When I see protesters blocking" and "You have the right to protest, but I'm late for work."[5] Fields appealed his conviction, arguing (among other grounds) that any probative value

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1 Catherine Dvorak, Digital Discursive Spaces: Exploring How Internet Memes Function as Communicative Tools to Produce and Process Multiple Layers of Meaning (unpublished honors thesis, Rutgers University, Mar. 25, 2019).

2 Steven Dwyer, *Memes, Community and the Evolution of Communication*, HANSON, INC. (2021), https://blog.hansoninc.com/memes-community-and-the-evolution-of-communication/.

3 Jonathan F. McVerry, *Viewing Memes Online Increases Positive Emotions, Helps Cope With Pandemic*, PENN ST. U. (Oct. 18, 2021), https://www.psu.edu/news/research/story/viewing-memes-online-increases-positive-emotions-helps-cope-pandemic/.

4 Fields v. Commonwealth, 73 Va. App. 652, 662 (2021).

5 *Id.*

of the memes was outweighed by their danger for unfair prejudice. The appellate court disagreed, holding that "Memes depicting a car driving destructively into a crowd of protesters constituted relevant circumstantial evidence that was probative of Fields' intent due to the memes' striking similarity to the act Fields committed."[6] As the court observed, the fact that Fields sent or posted two images involving the same type of violence that he later acted out demonstrated that the trial judge had a basis for believing that the memes had significant probative value.

Similarly, in another murder and hate crime trial, racist memes stored on the defendant's cell phone were introduced as evidence of motive. Sean Urbanski, a member of a white supremacist group, was convicted of stabbing to death U.S. Army Lt. Richard Collins, a Black man, at a bus stop on the University of Maryland campus on May 20, 2017. Urbanski appealed his murder conviction (he was acquitted of the hate crime charge because the trial court could not find that Collins was murdered "solely because of" his race), claiming that the memes were protected First Amendment speech unrelated to any criminal act. The Maryland Court of Special Appeals disagreed, noting that the memes were "not just racially offensive," but also "encouraged and promoted violence against Black people."[7] The court concluded that "Memes depicting violence against Black people constituted relevant evidence that was probative of [Urbanski's] intent to violently harm Lt. Collins," and so was admissible to prove motive.[8]

In 2020, the Tenth Circuit weighed in on the admissibility of memes in the appeal of an individual, Melvin Alfred, convicted of federal charges of facilitating prostitution. Among the evidence admitted as intrinsic proof of the crimes charged were six memes (defined by the court as "pictures with text over them or pictures of text") posted by Alfred on social media. All the memes "contained laudatory references to pimping and pimping culture and also contained graphic depictions suggesting dire consequences of engaging in prostitution without a pimp."[9] Alfred appealed his conviction, claiming the memes were only "a historical record of things that he has thought and said and did and posted," and that the memes' admission violated Federal Rule of Evidence 403 because their probative value was outweighed by the risk of unfair prejudice. The Tenth Circuit disagreed with Alfred's contention that the memes were merely "riffs on oftentimes mundane social situations or cultural-specific wordplay"; instead, it found that "a jury could conclude from the memes that Mr. Alfred was branding himself as a pimp,"

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6 *Id.* at 674.

7 Urbanski v. State of Maryland, No. 1318 (Md. Ct. Spec. App., Dec. 7, 2022).

8 *Id.*

9 United States v. Alfred, 982 F.3d 1373, 1376 (2020).

and that the memes were probative of Alfred's attempt "to facilitate a pimping business by demonstrating to his potential recruits [on social media] the benefits of having a pimp."[10]

Texas courts have also been caught up in the trend of admitting memes as evidence, and not just in criminal cases. In one Beaumont Court of Appeals case, for example, a mother and father appealed the termination of their parental rights due to using drugs and engaging in domestic violence. The father in particular claimed that the trial court had erred in admitting "certain 'unseemly and potentially grotesque' Facebook memes and posts whose prejudicial nature exceeded any probative value they might have."[11] The appellate court dismissed this argument, ruling that the father's Facebook memes and posts were relevant to the trial court's best interests of the child determination, and consequently did not violate Texas Rule of Evidence 403.

In a 2020 case from the Waco Court of Appeals, a convicted methamphetamine dealer appealed his conviction, arguing that certain Facebook posts and memes had not been properly authenticated under Texas Rule of Evidence 901. One of the memes was of actor Gene Wilder with a caption referring to drugs, while the other was of actor Leonardo DiCaprio with the accompanying text "When the cops pull you over . . . and you don't have any outstanding warrants and there's no dope in the car."[12] Pointing out Rule 901's low bar for authentication of evidence, the court affirmed the conviction.

Not surprisingly, meme evidence has also played a part in cases involving defamation claims and Texas' anti-SLAPP law, the Texas Citizens Participation Act (TCPA). In one such case, the memes admitted suggested that women were incompetent, and the female plaintiff sued for defamation—only to be met by the defendant's successful TCPA assertion that his communications were protected by the statute because they were made in connection with a matter of public concern.[13] In another TCPA case, an anonymous blog (the Barker) was sued for defamation by the Iola Independent School District's director of technology (Monica Hurst) over

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[10] *Id.* at 1390.

[11] In the Interests of A.M., 2019 WL 4064579 (Tex. App.—Beaumont 2019, pet. denied).

[12] Abney v. State, 2020 WL 7866943 (Tex. App.—Waco 2020, no writ.). Photos of DiCaprio from multiple movies have inspired memes, from the "laughing Jordan Belfort" from *Wolf of Wall Street* to the "pointing Rick Dalton" from *Once Upon a Time in Hollywood*, to the "laughing Calvin Candie" from *Django Unchained*.

[13] David Martin Camp & Bargains for Millionaires, LLC v. Patterson, 2017 WL 3378904 (Tex. App.—Austin 2017, no writ).

the blog's post commenting about a meme Hurst had posted from the movie *Men in Black*.[14] It depicted Tommy Lee Jones' and Will Smith's characters holding up a "Neuralizer" device that wipes out witnesses' memories, with superimposed text stating "Come Form Your Own Opinion." The blog, which prevailed on its TCPA claim, had analogized the meme to school district administrators' letting community members form their own opinions, only to ignore them.

But perhaps the most interesting Texas case involving meme evidence is the most recent one, because it discusses the significance of these forms of communication in proving motive or in negating claims of self-defense. Like the *Fields* and *Urbanski* cases discussed earlier, *Land v. State* involved a convicted murderer (LaVonie Land) contesting his conviction on the grounds that meme evidence was admitted in violation of Texas Rule of Evidence 403.[15] Land, a Black man, had posted a number of memes on Facebook that contained negative depictions of white people, and the prosecution introduced them at trial. Land claimed that the allegedly racist memes were so inflammatory that they unfairly prejudiced the jury during the punishment phase. The appellate court disagreed, analogizing memes to drawings by a defendant that "can reflect his character and/or demonstrate a motive for his crime." "Memes," the court elaborated, "could very well be considered the modern-day equivalent of drawings that . . . had an inferential bearing on appellant's character for violence and were evidence of his hatred for non-African Americans."[16]

The environment of digital evidence in criminal and civil cases continues to grow, with memes now joining text messages, social media posts, and emoji as sources that attorneys on either side of a case need to take into account. Lawyers cannot dismiss memes as trivial or inconsequential to a case; instead, they must investigate and consider memes for what they are: yet another form of electronic communication.

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[14] Barker v. Hurst, 2018 WL 3059795 (Tex. App.—Houston [1st Dist.] 2018, no writ.). In what is believed to be a Texas first, the court's published opinion contains the actual meme.

[15] Land v. State, 2022 WL 10224790 (Tex. App.—Houston [14th Dist.] 2022, no writ.).

[16] *Id.*

About the Author

Hon. John G. Browning is a partner in the Plano office of Spencer Fane, and a former Justice on Texas' Fifth District Court of Appeals. He also serves as the Distinguished Jurist in Residence at Faulkner University's Thomas Goode Jones School of Law, and as the Chair of the Institute for Law & Technology at the Center for American and International Law. The author of 5 books and more than 50 law review articles, Justice Browning is a graduate of Rutgers University and the University of Texas School of Law.

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