

2004

Legal Perspective

Texas Supreme Court Changes

TEXAS SUPREME COURT CHANGES

BY KENT RUTTER

A 16-year chapter in the history of the Texas Supreme Court came to a close in September with the departure of Chief Justice Thomas R. Phillips. Phillips, who was appointed to the district bench at the age of 31, became the youngest chief justice in Texas history at the age of 38. He served longer than all but two of the 25 chief justices in the court's history.



Retired Chief Justice Thomas Phillips

One of the first new lawyers to be sworn in by Chief Justice Phillips after he joined the court was a recent graduate of the University of Texas School of Law, Wallace Jefferson. Like Chief Justice Phillips, Jefferson achieved renown early in his career. At the age of 33 he successfully argued his first case before the U.S. Supreme Court, an accomplishment he soon repeated. By 35, he was president of the San Antonio Bar Association. At 37, he joined Chief Justice Phillips on the Texas Supreme Court. And this past September, at the age of 41, he was appointed by Gov. Rick Perry to succeed Phillips as chief justice.

Chief Justice Jefferson succeeds a jurist who contributed greatly to the court and Texas law. In addition to authoring more than 250 opinions, Chief Justice Phillips presided over extensive changes to the procedural rules, including the adoption of the new Texas Rules of Appellate Procedure in 1997, the new Texas Rules of Evidence in 1998, and new discovery rules in 1999. During his tenure, the court also adopted the nation's first mandatory IOLTA program to fund legal services for the poor, an initiative upheld by the U.S. Supreme Court in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

Chief Justice Phillips will also be remembered as a pioneer of judicial campaign reform. In his first re-election campaign, after some justices were criticized for accepting large campaign contributions from lawyers with pending cases, Chief Justice Phillips placed a voluntary limit on the size of donations to his campaign, leading to the enactment of mandatory contribution limits in 1995. During his last re-election campaign in 2002, he accepted no campaign contributions at all. He remained a

vocal critic of the state's system of partisan judicial elections throughout his service on the court.

The departure of Chief Justice Phillips brought a new face to the court in 2004. In November, Gov. Perry appointed David Medina, his general counsel and a former district judge from Houston, to serve as the newest member of the court.

Amidst these changes, the court remained hard at work. In addition to its usual caseload, the court continued to revise the Texas Rules of Civil Procedure as mandated by the legislature in House Bill 4. In October, the court amended Rule 226a to require that juries be instructed that they must unanimously agree on at least one liability question before considering exemplary damages, "except in an extraordinary circumstance when the conditioning instruction would be erroneous." The court also revised Rule 173 to limit a guardian ad litem's responsibilities and prevent excessive ad litem fees.

In addition, the court continued to weigh the controversial issues of referral fees and attorney advertising. In late 2003, the court proposed Rule 8a, which would cap referral fees at \$50,000 or 15 percent of the total attorney's fees assessed in a case, whichever is lower. However, the court delayed the effective date of the proposed rule to give the State Bar of Texas time to develop an alternative approach. The court set a referendum on the State Bar proposal for November and December and is now considering comments to the proposal, which would ban the payment of "pure forwarding fees" to referring lawyers who have no responsibility in the case. The State Bar proposal also would impose new restrictions on attorney advertising, and the court has invited briefing on the issue of whether the restrictions are constitutional.

More changes lie ahead during Chief Justice Jefferson's first year at the helm. Following two new arrivals in 2002 and two in 2003, Justice Medina was the only new member to join the court in 2004. Three new justices are expected in 2005. Justice Paul W. Green of San Antonio's Fourth Court of Appeals joins the court on Jan. 1, having defeated Justice Steven Wayne Smith in the Republican primary. Gov. Perry has promised to name a replacement soon for Justice Michael H. Schneider, who left the court in September after the U.S. Senate confirmed his appointment to the U.S. District Court for the Eastern District of Texas. As one chapter closes, a new one begins.

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