Amicus Brief: A Lawyer's Use of a Push Poll During Litigation Violated the Integrity of the Seventh Amendment

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Editor's Note:
The following pages contain a consolidated amici curiae brief filed on behalf of the American Board of Trial Advocates, the Texas Association of Defense Counsel, the Texas Trial Lawyers Association, and the Texas Chapters of the American Board of Trial Advocates in support of the Appellees and Judge Reyes' order in the appeal.

Introduction

A. "Push Polls" are neither a survey nor a poll at all, but an attempt to sway the person receiving the call; a practice that has been denounced by the authentic polling associations.

A "push poll" — "which are not really polls at all — are often criticized as a particularly sleazy form of negative political campaigning." *See* Marjorie Connelly, *The New York Times* (June 18, 2014). "[T]here is no effort to collect information, which a legitimate poll does." *Id.* "The questions are skewed to one side of an issue or candidate, the goal being to sway large numbers of voters under the guise of survey research." *Id.* "Push polling is so incompatible with authentic polling that the American Association for Public Opinion Research (AAPOR), the American Association of Political Consultants (AAPC), the Council for Marketing and Opinion Research (CMOR) and the National Council on Public Polls have all denounced the practice." *Id.*

B. Appellant's conduct undermined the Parties' Right to a Fair and Impartial Jury Trial, a Right that is at the Foundation of both our Judicial System and our Democratic Government, and compels ABOTA's rare involvement in an intermediate state court appellate matter.

The American Board of Trial Advocates rarely seeks to intervene in an intermediate state court appeal. The issues involved in this case, however, go to the core of ABOTA's mission and the foundation of our judicial system. All litigants have a right to a fair and impartial jury, untainted from efforts by any litigant or advocate to stack the deck before the case is even called. The right to a civil jury trial, enshrined in both the Seventh Amendment to the United States Constitution and Article I of the Texas Constitution, means a trial by a fair and impartial jury. *Babcock v. Northwest Memorial Hosp.*, 767

S.W.2d 705, 709 (Tex. 1989) (citing *Texas & Pac. Ry. V. Van Zandt*, 317 S.W.2d 528, 531 (Tex. 1958)).

Equally as important, society at large has both a right and an expectation that its juries will be impartial arbiters of the facts presented, and will make decisions based upon the facts presented at trial and the law as given to the jurors by the trial judge — not based upon the efforts of anyone to influence potential jurors before they are even impaneled. Nothing could be more central to the jury system — and ABOTA can imagine nothing that could be more poisonous to this ancient ideal than the behavior found by Judge Reyes below.

After a lengthy hearing consuming five full days resulting in 14 volumes of transcript, and extensive briefing by all interested parties, Judge Reyes left no doubt about what he had in front of him: a "win at all cost" approach that included deliberate attempts to force-feed the venire with false information about the case on an *ex-parte* basis nearly on the eve of the trial setting. In plain, unvarnished language, Judge Reyes set forth his findings that form the crux of the case now on appeal. Judge Reyes specifically found that attorney, William A. Brewer, III ("appellant" or "Mr. Brewer"), was justifiably subject to sanctions because, in Judge Reyes's words:

- "Mr. Brewer's conduct, taken in its entirety, is an abusive litigation practice that harms the integrity of the justice system and the jury trial process;
- Mr. Brewer's conduct was designed to improperly influence a jury pool and [/] or venire panel via the dissemination of information without regard to it[s] truthfulness or accuracy;
- The net effect of Mr. Brewer's conduct was to impact the rights of the parties to a trial by an impartial jury of their peers."

CR 1023.

Appellant's conduct, as found by Judge Reyes following extensive hearings and briefing, undermines the adversarial process, threatens the right of all parties to a fair and impartial jury, and damages the community's confidence in a system where all parties have equal access to a fair hearing. The rights at risk are guaranteed by both the Seventh Amendment and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by Article I, §15 and §17 of the Texas Constitution, which guarantees to all citizens "due course of the law of the land." [1]

Understandably, trial lawyers — on both sides of the docket — and judges nationwide are following this case with the confidence that this Court will do two things: (i) rule on the issues presented in this appeal and address the described misconduct head on without avoiding the obligation to do so; and (ii) refuse to condone a gross violation of the parties' fundamental right to a fair and impartial jury, and take this opportunity to remind all advocates and citizens of the right of all to a fair civil jury trial to resolve disputes, a right that the Texas Constitution declares to be "inviolate." TEX. CONST. ART. 1, § 15. Judge Reyes, who entertained lengthy and exhaustive evidentiary hearings on this issue, took a measured approach and got it right. ABOTA asks this Court to follow suit.

C. This Court cannot condone conduct designed, even assuming the best of intentions, to unfairly influence the venire ex-parte based on false information without threatening every litigant's right to a fair trial.

"The law is exceedingly jealous of the purity of the jury box, and always has been. It seeks to shut up every avenue through which corruption … or any other improper influence, could possibly make an approach to it." See *Pierson v. State*, 18 Tex. App. 524, 559 (1885) (emphasis added). Indeed, "[i]t recognizes the fact that impartiality is the cornerstone of the fairness, security and advantages of trial by jury." *Id.* at 559. At minimum, this means that both the litigants and society at large are entitled to a fair trial before a jury that is as impartial as the human condition permits.

Attempts to poison the potential jurors before a trial even begins is an assault on the rights of the litigants to a particular case and the community's expectation in the fundamental fairness of the system that forms the cornerstone of the judicial system.

If lawyers and the parties they represent are given unchecked power to conduct widespread *ex-parte* "push polls" using false information calculated to steer the venire toward their theory of a pending case on the eve of trial, the jury system is tainted, the very fabric of our democracy is corrupted, and disputes cannot be fairly resolved. Lawyers from coast to coast are following this appeal: This Court must make a resounding statement that this conduct, even if pursued under the auspices of zealous advocacy, cannot be tolerated.

D. A Database of 20,000 Potential Jurors was used to Generate 300 completed surveys using False Information Designed to Influence the Venire.

Appellant leaves the false impression that the survey was innocuous and limited to just 300 people. Not true. 6 RR (91:21-92:7). The push polling company hired by appellant used 20,000 names of potential jurors in Lubbock to generate completed information from 300 people. 6 RR (51:17-52:7; 91:7-14).

As the evidence below established, and Judge Reyes found, it takes far more than 300 "cold calls" to generate a completed survey from 300 people. 6 RR (91:21-92:7; 110:23-111:1).

While only 300 people may have completed the survey, thousands of future jurors were force-fed false information about the case that the trial court found, as a factual matter, was intended to influence the future jurors before they were even called into the courtroom.

It is unknown how many thousands of calls had to be made

in order to generate 300 completed surveys. 6 RR (91:7-14; 204:25-205:3); 10 RR (106). But Professor Cummins testified that between 3,000 and 10,000 cold calls would need to be made to obtain 300 completed surveys. 10 RR (197-198). Indeed, the witnesses who testified at the hearing are not included in the list of 300 because they did not complete the survey. *See infra* (fn. 3).

Contrary to appellant's assertions, the Court below found that the survey was packaged with untruths and misinformation that was clearly inaccurate. 6 RR (173:9-173:16); 10 RR (20-24). There is nothing in the record that would justify revisiting Judge Reyes' findings in that regard. Rather, the record amply supports the trial court's ruling. A few examples suffice to make the point:

In part of the survey, the caller reads to the potential juror, *inter alia*, nine reasons why the appellant's client could not be at fault in the pending lawsuit. PX 1 (p. 19, ¶¶ 17-25). One of those statements is this:

> The homebuilder did a sloppy job of supervising the contractor he hired to install the electrical wiring and the electrician did not allow for a reasonable amount of space between the electrical wiring and the CSST. The manufacturer cannot be held responsible for this type of sloppy and careless oversight.

See id. (at ¶ 20) (emphasis added)

Another statement in the push poll was designed to inject a causation defense into the potential juror's thought process by blaming other defendants, as well as the plaintiffs themselves — and this is all occurred just three weeks before the trial setting. For example, question 25 states:

> **There were many other things that contributed to this tragic incident.** The foam insulation in the attic was not properly treated, the people who were present did not heed the warnings of the smoke alarm, and electrical wiring was laying right on top of the CSST, which is in violation of the safety warnings and installation guidelines.

See id. (at ¶ 25) (emphasis added)

As Judge Reyes found, these statements contain untrue assumptions asking the potential juror to accept the argument as true. These and other examples highlighted by Judge Reyes demonstrate the obvious: the push poll was laden with statements that were not designed to illicit "open-ended" attitudes, opinions and beliefs in the community.

Only one reasonable conclusion can be drawn, and it is the one Judge Reyes drew. The push poll was designed to poison the potential jury venire, essentially stacking the deck before the parties even arrived in court. Left unchecked, nothing could be more lethal to the jury system.

Appellant goes to great lengths to explain away the fact that thousands of potential jurors were approached with this push poll and that the poll contained statements about the case that were demonstrably false. *See* Appellant Brief (p. 21-26, § I, ¶ B). However, Judge Reyes, as the fact finder, found that the push poll was ubiquitous and was deliberately calculated to mislead potential jurors and the evidence is replete with examples to sustain that finding. *See* CR 10203 (¶ 2).

Appellant also goes to remarkable lengths to spin the misleading statements as mere attempts to determine general public sentiment rather than deliberate attempts to poison the potential venire with misinformation. *See* Appellant Brief (p. 16-20, § I, ¶ A). However, Judge Reyes rejected these arguments, and appellant offers nothing new here that Judge Reyes did not already consider after days of hearing testimony, assessing the credibility of witnesses, and reviewing an extensive record.

The record shows that the Court exercised its discretion carefully and appropriately. Further, contrary to appellant's brief, lawyers have an ethical obligation to be truthful in statements made to others. TEX. R. PROF. RESP. 4.01. That includes polls like the one fashioned and approved by appellant. And the record establishes, as Judge Reyes found, that appellant was intimately involved in crafting the poll. 6 RR (20-23); PX 5; 9 RR (109-110); 7 RR (27); 7 RR (61).

The witnesses who testified at the hearing left no doubt what they thought of the push poll: it was an attempt to influence them, not to gather unbiased information.[2] 6 RR (241:1-242:3). The push poll was effective in changing people's minds in a negative way toward the home builder and its potential liability. 10 RR (126). It was Professor Cummins' expert opinion that the push poll worked in changing the recipient's attitude toward the builder's liability. 10 RR (206-208). The intent of the push poll was to persuade the potential juror to embrace appellant's theory of the case. 10 RR (185-186).

In sum, these facts, found by Judge Reyes, remain uncontested on appeal:

- Appellant made no attempt to remove the names of parties, witnesses, court staff and experts from the database of people who should not be contacted (9 RR (35:4-9));
- Witnesses, parties and experts were contacted *ex-parte* through appellant's push poll on the core issues a jury would later be asked to decide (9 RR (68-70));
- The push poll was done *ex-parte* without any disclosure to the parties who would be adversely impacted therefrom (10 RR (101-102)); and,
- The push poll was conducted less than three weeks before the June 8, 2014, trial setting. 10 RR (103).

Coupled with the fact that the push poll was infused with misleading statements designed to improperly influence potential jurors, there is no doubt that Judge Reyes' decision was correct. CR 1023.

Further, it is clear that what happened here begs for a plain and forceful statement from the Amarillo court of appeals that this conduct cannot be tolerated. Nothing less than the community's faith in a fair hearing before an impartial jury is at stake.

E. Appellant Authorized, Approved and Ratified the ex-parte Push Poll, Which Violated the Appellees' Right to Trial Before an Impartial Jury of the Community.

There is no dispute that appellant authorized the push poll and approved the final list of questions. 6 RR (20-23); PX 5; 9 RR (109-110). Appellant even made his own revisions to the poll before he approved the final draft. 7 RR (27:2-6). It was appellant who gave the "go ahead" to proceed with the poll. 7 RR (61:12-15). Appellant has engaged in this behavior "many times." 6 RR (67:11-13).

F. *Bottom Line:* This is not a Plaintiff or Defendant issue. This is a Constitutional Issue that goes to the Core of a Litigant's Right to a Fair and Impartial Jury, and Society's Faith in an Impartial Judicial System.

As a bipartisan organization, ABOTA does not pit plaintiffs against defendants. On the contrary, and consistent with ABOTA's purpose, this appeal is neither a plaintiff nor a defendant issue. The proof in this case is in the pleadings: Judge Reyes found that appellant's attempt to poison the venire impacted the right to a fair trial for both the plaintiff and the other defendants, who join in supporting the lower Court's ruling.

The issues presented in this case go far beyond the outcome of a trial for a single litigant in a discreet case. The facts, as Judge Reyes found them, and the law he applied, go to the core of a litigant's right to a fair and impartial jury as guaranteed by the Texas and United States Constitutions. Compare TEX. CONST. ART. 1, § 15, *with*, U.S. CONST. VII, AMEND.

For the reasons articulated herein below, Judge Reyes' ruling should be affirmed *in toto*.

Argument & Authorities

A. The Differential Standard of Review Is Dispositive in This Appeal

As the Dallas court of appeals recently held in an opinion affirming a trial court's order granting death penalty sanctions, Judge Reyes's order is reviewed under a deferential, "abuse of discretion" standard. *See Imagine Automotive Group, Inc. v. Boardwalk Motor Cars Ltd.*, 430 S.W.3d 620, 631 (Tex. App.—Dallas 2014, pet. denied) ("We review a trial court's imposition of sanctions for an abuse of discretion.") [citations omitted]. The court of appeals "review[s] the entire record, including the evidence, arguments of counsel, written discovery on file, and the circumstances surrounding the party's discovery abuse." *Id.* at 631 [citations omitted].

After multiple days of hearings, 14 volumes of testimony and prolific briefing on the merits, it is plain that Judge Reyes did nothing of the kind. To the contrary, the trial court showed remarkable patience but equally remarkable determination to uphold the impartiality and, consequently, the credibility of the jury panel. Far from an abuse of discretion, Judge Reyes's approach here was a model for how a hearing on a motion for sanctions should be conducted and ultimately decided.

Each of Judge Reyes's factual findings enjoys substantial support in the record. The court held extensive hearings and accepted detailed briefing from all parties. The court set forth the basis for its conclusions in detail that included both an accurate summary of the evidence in the sanctions hearing and the trial court's findings about the credibility of the witnesses based upon his patient participation in the hearings — including appellant's behavior on the stand and appellant's refusal to answer clear questions in a forthright manner, despite repeated instructions from the court. Far from being an abuse of his discretion, Judge Reyes could come to no other conclusions than the ones he set forth.

Because Judge Reyes is the factfinder and the sole judge of the credibility of the witnesses who testified at the hearing, and because the weight to be afforded their testimony is a matter for the trial judge who conducted the hearings, the standard of review is dispositive in this appeal and the trial court's order should be affirmed.

B. Plaintiffs and Defendants Have a Fundamental Constitutional Right to a Fair and Impartial Jury

"The tradition of trial by an impartial jury drawn from a cross-section of the community applies to both civil and criminal proceedings." *See Timmel v. Phillips, M.D.*, 799 F.2d 1083, 1086 f.n. 5 (5th Cir. 1986) (emphasis added) (citing *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.")) [citations omitted].

The Founding Fathers understood the critical role played by citizen juries in the fair administration of justice, because they saw what happened when juries were taken from them. To ensure convictions for alleged violations of the STAMP ACT (1765), Parliament had ordered that jurisdiction for cases brought under those acts would rest exclusively in Admiralty Courts — where judges appointed and paid for by the Crown — decided all cases without juries. The colonists recognized this to be a dangerous assault on their freedom and deprivation of rights guaranteed to them by Magna Carta. *See generally* Honorable Judge Jennifer Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASH. & LEE LAW REV. Vol. 3, p. 7 (2011).

These early Americans left no doubt about the feeling for the jury and its central role in protecting a free people. Decrying London's attempt to deprive Americans of the right to a fair and impartial jury, The Stamp Act Congress issued Resolutions which declared:

"Trial by jury is the inherent and invaluable right of every ... subject." (RESOLUTIONS OF THE STAMP ACT CONGRESS, Article VII, October 19, 1765).

In a poignant letter to the citizens of his hometown of Braintree, Massachusetts, John Adams wrote of the inequity of the tax as an assault on the right to a fair and impartial jury:

"*We shall confine ourselves, however, chiefly to the act of Parliament, commonly called the Stamp Act, by which a very burthensome, and, in our opinion, unconstitutional tax, is to be laid upon us all; and we subjected to numerous and enormous penalties, to be prosecuted, sued for, and recovered, at the option of an informer, in a court of admiralty, without a jury."*

Having been deprived of the right to trial by jury, which colonists considered a birthright of free people, the Founders were determined to preserve the jury for future generations of Americans.

In the ***Declaration of Independence***, Thomas Jefferson listed the deprivation of trial by jury as one of the reasons compelling the colonies to separate from Great Britain. When John Adams drafted the Massachusetts Constitution of 1780, the progenitor of the United States Constitution, he included provisions guaranteeing the right to trial by jury in both criminal (Article XII) and civil (Article XV) cases.

The failure of the Philadelphia Convention to include a guarantee of a right to a civil jury trial in the Constitution as signed in September of 1787 was one of the key objections to the proposed constitution raised by the Anti-Federalists during the ratification debates. Ratification could only be assured if supporters agreed to amend the Constitution to correct this omission. The result, the Seventh Amendment was adopted in 1791. U.S. CONST. VII amend.

In short, the Founding Fathers were committed to securing juries to all future generations of citizens, and this necessarily meant assemblies of impartial citizens to make reasoned and fair decisions based on evidence presented in court. It is a right not to be toyed with. "The inestimable privilege of trial by jury in civil cases is conceded by all to be essential to political and civil liberty." Joseph Story, COMMENTARIES ON THE CONSTITUTION, § 1762 (1833).

"The right of trial by jury in civil cases at common law … is so fundamental and sacred to the citizen … [that it] should be jealously guarded by the courts." *Jacob v. City of New York*, 315 U.S. 752, 753 (1942) (Murphy, J.). "The Supreme Court has emphasized, in no uncertain terms, the importance of the right to a civil jury trial and the need for the courts to be vigilant in guarding against the erosion of that right." *Armster v. United States District Court for the Central District of California*, 792 F.3d 1423, 1428 (9th Cir. 1986).

Citizens of Texas value the jury system no less than did the Founding Fathers and stated it plainly in the Texas Constitution. Since 1876, Article 1, Section 15 of the Texas Constitution has been clear: the right to trial by jury "*shall* remain inviolate."[3]

As John Adams declared more than two centuries ago: *"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."* Hon. John Adams (1774).

The right to a jury trial means more than just putting people in a box. It means taking action to make sure that those impaneled are fair and impartial and can decide the facts based solely on the evidence presented at trial.

In *Smith v. Phillips*, 455 U.S. 209, 217 (1982), Chief Justice Rehnquist explained that, "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." As Justice Murphy declared in *Jacob*, the right to a fair civil jury must be "jealously guarded." *See* 315 U.S. at 752 (Murphy, J.). Judge Reyes took these prescriptions to heart in evaluating appellant's conduct and issuing his sanctions decision.

Based on the extensive evidence and the trial court's inherent authority to police any violation of a litigant's right to a fair and impartial jury, Judge Reyes properly found and held, *inter alia*:

- That appellant's "conduct taken in its entirety is an abusive litigation practice that harms the integrity of the justice system and the jury trial process";
- That appellant's "conduct was designed to improperly influence a jury pool and or venire panel via the dissemination of information without regard to its truthfulness or accuracy";
- That appellant's "conduct was to impact the rights of parties to a trial by an impartial jury of their peers"; and
- That appellant's "conduct negatively affected the due process and Seventh Amendment protection due to the litigants in the case before the Court"; and
- That appellant's conduct was intentional and in bad faith and abusive of the legal system and the judicial process specifically."

CR 1023 (¶¶ 1-4, 10).

These findings cannot be reversed absent a finding that Judge Reyes abused his discretion. *See Imagine Automotive Group*, 430 S.W.3d at 631. Because there is ample evidence in the appellate record to support Judge Reyes' findings, and because appellant's conduct violated the parties' constitutional rights to a fair and impartial jury, the trial court's order should be affirmed *in toto*.

C. Appellant Cannot Delegate to a Third Party Polling Company Authority to Perform an Unethical Act That the Attorney Could Not Do Himself Under the Rules of Court

In Texas, "it is improper to ask prospective jurors what their verdict would be if certain facts were proved." *See Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 751 (Tex. 2006) [citations omitted]. Indeed, a question that attempts to commit a potential juror to a particular outcome or a determination of the weight given the evidence is improper. *See Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd). *But* that is exactly what the appellant did, through an independent contractor, on an *ex-parte* basis here.

The experience of Colleen O'Neal, one of the 20,000 citizens included in the database who was contacted by the polling firm appellant hired, was typical. She was contacted by the push poll company and asked this highly charged and completely misleading question: If there is a problem with your home — is it the fault of the manufacturer of a product, the builder or the building inspection department? 5 RR (28:4-28:24). Moreover, appellant's push poll asked Neal and others "commitment questions" demanding the potential juror to take a position on what weight he or she would afford those findings, if made. PX 1 (p. 19, ¶¶ 17-25).

These types of questions would be completely out of bounds in a supervised voir dire. See *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005) ("the purpose for prohibiting improper commitment questions … is to ensure that the jury will listen to the evidence with an open mind — a mind that is impartial and without bias or prejudice — and render a verdict based upon that evidence.")

All the more reason that misleading statements to potential jurors out of view of the trial judge or opposing counsel cannot be tolerated with undermining the entire adversarial process. Putting poll questions to Mrs. O'Neal was especially egregious.

Colleen's husband, Steven, is the Chief Building Inspector for the City of Lubbock who was deposed in the lawsuit shortly before the cold call was made. 5 RR (27:5-13). The fault, if any, of the building inspector was a hotly disputed issue in the lawsuit. Contacting the O'Neal family *ex-parte* regardless of what was asked over the telephone is a violation of the Texas Rules of Professional Conduct. TEX. R. PROF. RESP. 4.02(a). Prior to this contact, appellant was told by the city attorney, John Grace, all contact was to be communicated through the city attorney who represented all city personnel in the case.

As Judge Reyes correctly found, appellant cannot use the polling company he retained as a shield to deflect the findings that this poll was improper and the appellant knew it.

Lewis Sifford, an ethics expert who has practiced law for more than 40 years, and a veteran of more than 100 civil jury trials, explained on the stand what should be self-evident: a lawyer cannot use a third party to perform an unethical act that the attorney could not do himself. 10 RR (93-95; 111-112). The law cannot allow a trial lawyer to avert responsibility for unethical conduct by deftly handing it off to a non-lawyer contractor.

This Court must not accept appellant's attempt at plausible deniability. Otherwise, litigation, especially where the stakes are high, will become a game in which the outcome is decided before the jury is even impaneled, dictated by the interested party who spends the most money. Nothing could be more injurious to the right of all citizens to equal protection of the law, and nothing could be more damaging to the community's faith in a fair judicial process.

Because appellant used a third party to engage in behavior calculated to manipulate the venire, and because appellant is precluded from doing so under the Texas Constitution, this Court should, and indeed must, affirm the trial court's order.

D. "Willful Blindness" That Thwarts the Administration of Justice Is No Defense to Attorney Misconduct

Contrary to appellant's argument, his claimed willful blindness to his own unethical conduct that thwarted the administration of justice and sought to taint the venire is no defense to a sanction. Indeed, "willful blindness" is sufficient to prove "knowing" misconduct. *See Devaney v. Continental American Ins. Co.*, 989 F.2d 1154, 1161-1162 (11th Cir. 1993) ("The phrase "attorney advising such conduct" does not, however, exclude either an attorney's willful blindness or his acquiescence to the misfeasance of his client; to the contrary, the phrase instructs that when an attorney advises a client in discovery matters, he assumes a responsibility for the professional disposition of that portion of a lawsuit and may be held accountable for positions taken or responses filed during that process. Sanctions exist, in part, to remind attorneys that service to their clients must coexist with their responsibilities toward the court, toward the law and toward their brethren at the bar.") [citations omitted]; *United States v. Thomas*, 484 F.2d 909, 913 (6th Cir. 1973) ("Construing 'knowingly' in a criminal statute to include willful blindness to the existence of a fact is no radical concept in the law.") [citations omitted]; *United States v. Mapelli*, 286 F.2d 284, 286 (9th Cir. 1997) ("willful blindness, where a person suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended.") [citations omitted]. The result is no different here.

Appellant's dubious claim that "he did not know" he was engaging in misconduct when he authorized and approved the push poll does nothing to alter the analysis in this appeal. Judge Reyes rejected that assertion after a lengthy hearing and carefully itemized his findings of fact and the support for them. Given his findings, the court reached the only legal conclusion that was possible. There is more than sufficient evidence to support Judge Reyes' findings that appellant's behavior was intentional and in bad faith. CR (p 10203, ¶ 10).

The appellant's misplaced reliance on *Foust v. Hefner*, 2014 WL 3928781, *3 (Tex. App.—Amarillo 2014, no pet.), is telling.

Rather than support appellant's request to reverse the trial court's order, *Foust* instead provides a dramatic contrast to the situation presented in the instant appeal. In *Foust*, there was no evidentiary hearing to validate the attorney's alleged devious mental state when he filed an allegedly groundless pleading. *Id.* at *3.

In stark contrast, Judge Reyes conducted five full days of hearings, accepted hundreds of pages of briefs from all interested parties, and, most importantly, had the opportunity to evaluate appellant's credibility and other witnesses as they testified about the salient issues. *See id.* at *3 ("In addressing the accuracy of the trial court's findings and decision, we initially note that it did not conduct a separate evidentiary hearing on the motion for sanctions before levying them. So, we do not have before us sworn testimony from Foust's legal counsel describing the extent of his investigation, if any, into the factual or legal basis underlying the defamation claim or what he believed with regard to the components encompassed within section 10.001 of the Civil Practice and Remedies Code.").

Unlike the fact pattern in *Foust*, appellees have brought this appellate court an extensive record of sworn testimony that cannot be ignored. Judge Reyes generously gave the appellant a full, fair and impartial evidentiary hearing – the very right he sought to steal from the appellees prior to the trial; the fact that appellant's testimony sunk his own ship is no reason to revisit the trial court's well-reasoned analysis. Nothing presented in this appeal justifies a result contrary to the trial court's decision.

Conclusion

Appellant's misconduct crosses well-defined constitutional lines and ethical boundaries. If such conduct is condoned, our civil justice system will be irreparably undermined and the trust the citizens have in the jury system will unnecessarily be eroded. This Court should affirm the trial court's order. ■

Bar Groups Urge Upholding of Sanctions for Attorney's Use of 'Push Poll' to Sway Jury Pool

John Council, Texas Lawyer
August 15, 2016

Four bar groups have asked a Texas appellate court to uphold sanctions leveled against a prominent Dallas attorney who was disciplined for attempting to use a telephone survey to influence a jury pool.

The professional organizations submitted the amicus brief in the sanctions appeal of William Brewer III that argues upholding Brewer's discipline for using a so-called "push poll" during litigation is so important that the integrity of the Seventh Amendment right to a trial by jury in civil cases depends on it.

Brewer, of Dallas Brewer Attorneys & Counselors, was sanctioned by 72nd District Court Judge Ruben Reyes of Lubbock in January. Reyes ruled that Brewer was responsible for conducting a poll over issues in a case captioned Teel v. Titeflex. In that case Brewer was defending Titeflex, a company accused of manufacturing faulty flexible gas tubing that allegedly caused a deadly house fire.

Brewer approved of poll questions that were "designed to influence or alter their opinions or attitude of the person being polled," Reyes ruled. And the pollster Brewer hired to conduct the survey eventually contacted witnesses and parties involved in the Titeflex litigation to ask them the questions, according to Reyes' ruling.

Brewer argued that he did nothing wrong, his "jury focus exercise" was ethical and no state law, rule or court decision prevents lawyers from commissioning jury surveys. Brewer also "expressed sincere regret for the unforeseen, inadvertent contact made with certain people related to the case." But Reyes, who discovered his own name on the pollster's database call list, was unimpressed with Brewer's response and ordered him to pay $124,000 in attorney's fees to the plaintiffs in the case and complete 10 additional hours of ethics continuing legal education.

Brewer later appealed the sanction to Amarillo's Seventh Court of Appeals, arguing that the "public opinion survey" he and his firm commissioned was ethical. Brewer also contends in his lengthy appellate brief that surveys are not a bad-faith abuse of the judicial process as a matter of law and that Reyes abused his discretion by sanctioning him.

On August 12, the American Board of Trial Advocates, the Texas Chapter of the American Board of Trial Advocates, the Texas Trial Lawyers Association and the Texas Association of Defense Counsel all weighed in on Brewer's sanction by submitting a

consolidated amicus brief to the Seventh Court. The groups note in their brief that they are all committed to preserving the Seventh Amendment right to a jury trial — something they believe will be harmed if Brewer escapes punishment for utilizing what they describe as a "push poll".

The groups' brief defines a push poll as a series of skewed questions asked to a large number of people in order to sway them to one side of an issue.

"Brewer's conduct undermines the adversarial process, threatens the right of all parties to a fair and impartial jury, and damages the community's confidence in a system where all parties have equal access to a fair hearing," according to the group's brief, which notes there is great interest in Brewer's sanctions appeal from lawyers all across the country.

"Lawyers from coast to coast are following this appeal: This court must make a resounding statement that this conduct, even if pursued under the auspices of zealous advocacy, cannot be tolerated," according to the brief.

Brian Lauten, a Dallas attorney who submitted the amicus brief on behalf of the four attorney groups, believes the integrity of the jury selection process is at issue in Brewer's appeal. "If an appellate court in Texas were to condone this type of behavior, it would forever corrupt a party's constitutional right to a fair and impartial jury if people think they can get away with this type of conduct," said Lauten, a partner in Deans & Lyons.

Guy Choate, president of the Texas Chapter of the American Board of Trial Advocates, said all of the lawyer groups — which include plaintiffs and defense attorneys — are equally concerned with the effect Brewer's appeal could have on the right to a fair and impartial jury if his punishment is overturned.

"When you start polluting that process in any respect, the potential for mischief and damage is great. I don't know Mr. Brewer personally. But the conduct is disturbing," said Choate, a partner in Webb, Stokes & Sparks. "I practice in San Angelo and I can travel 15 miles and be in a county with 6,000 or 10,000 people. Infecting a jury is not difficult in a county that size and we can't have a court approving that kind of behavior."

George Kryder, a partner in the Dallas office of Vinson & Elkins who represents Brewer, said they have great respect for Judge Reyes but appealed the sanctions because they disagree him. "Mr. Brewer and his firm take seriously their professional responsibilities and ethical duties and the survey in question was fully consistent with Mr. Brewer's ethical obligations and his duty to zealously represent his client," Kryder said.

[1]This Court need not decide whether the Seventh Amendment to the U.S. Constitution, like each of the other first eight Amendments, is incorporated on the States through the concept of Liberty in the 14th Amendment. For the issues presented in this appeal, the right to a fair and impartial jury is secured to litigants by Article I, § 15 of the Texas Constitution. In this case, whether the right to a fair trial is grounded in the U.S. or Texas Constitution is not at issue. The concept of a fair trial, through "due course of the law of the land" is firmly grounded in both documents, whose origins date back to Chapter 39 of the Magna Carta. See Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America*, UNIV. OF VA. PRESS (1968) (outlining the origin the phrases "law of the land" and "due process of law").

[2]Steven O'Neal, the Chief Building Inspector for the City of Lubbock, was a witness with knowledge of relevant facts who was deposed in the underlying lawsuit. 5 RR (27:5-13). Steven's wife, Colleen O'Neal, testified at the sanctions hearing. Colleen testified that Steven's involvement in the Titeflex lawsuit had been very stressful on their family and that she feared that *Titeflex* may seek retribution against them. 5 RR (27:19-28:3).

Shortly after Steven was deposed, Colleen received a call. One of the questions Colleen was asked was, if there is a problem with your home – is it the fault of the manufacturer of a product, the builder or the building inspection department? 5 RR (28:4-28:24). Of course, Steven is in charge of the building inspection department. 5 RR (28:19-29:3). The followup question was whether Colleen was familiar with CSST, the very product at issue in the lawsuit. 5 RR (30:2-10). Colleen hung up. 5 RR (29:20-23).

Colleen was understandably angry that the caller was trying to influence her – an attempt to steer her toward blaming her husband's department for the liability question in the case. 5 RR (30:11-31:18). Colleen was infuriated that the caller was trying to sway public opinion in Titleflex's favor. 5 RR (37:12-19). Colleen's phone records, admitted into evidence, established that she had been contacted four times – twice before she answered, once when she answered, and once again after she hung up. 5 RR (31:19-32:5); PX 1.

Six days after Colleen hung up the phone, appellant's law firm filed an unfounded ethics complaint against Steven, which was published to the City Council. 5 RR (33:20-35:1). This occurred just weeks before the trial. 5 RR (34:17-35:1).

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