

ADVOCATE

TEXANS FOR LAWSUIT REFORM: MAKING TEXAS A BEACON FOR CIVIL JUSTICE IN AMERICA

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IN THIS ISSUE

You Have the Power to Make a Lasting Impact 1

A Warning Signal to Texas: When Tort Reform Fails 3

Attracting the Best and Brightest Judges in Texas 4

A Tribute to Texas Congressman Ted Poe 5

The Good News and Bad News About Climate Change Lawsuits 6

Storm-Chasing Lawyer Gets Jail Time for Fraud 7

Tort Reform Continues to Move Texans 8

OUR MISSION

Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action, legal, academic and market research, and grassroots initiatives. The common goal of our more than 18,000 supporters is to make Texas the Beacon State for Civil Justice in America.

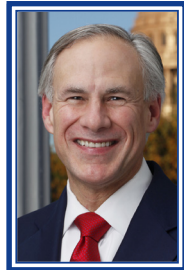
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You Have the Power to Make a Lasting Impact

By Gov. Greg Abbott

Texas is blessed with a vibrant economy that continues to gain national attention. Just this summer, CNBC named Texas the Top State for Business in 2018. Earlier this year, *Site Selection Magazine* awarded Texas its Governor’s Cup for new and expanded corporate facilities for a record-breaking 14th time and for the sixth year in a row.

One in seven jobs created in the U.S. in the past year was created in Texas. Our population is booming. We are home to many of the largest employers in the country.

None of this has happened by accident. It is the result of years spent focusing on creating an economic environment that allows job creators to thrive. And they have thrived, investing in our communities and creating tremendous opportunities for Texas families.

When I speak to CEOs around the country, our strong legal system and the common-sense lawsuit reforms we have enacted over the past two decades are hailed as critical assets that set Texas apart from the other states. When paired with our low taxes, smart regulations and world-class workforce, the Lone Star State’s economy is nearly unstoppable. We have come a long way from the days when Texas’ legal system was a burden on economic growth.

But just like athletes at the top of their games, we can’t let up on our efforts to be better, to improve on the progress we’ve made and to work through the challenges we face.

For example, in its rankings, CNBC critiqued Texas for our “sometimes difficult legal system.” And the U.S. Chamber of Commerce Institute for Legal Reform’s *2017 Lawsuit Climate Survey* ranked Texas near the bottom on trial judge impartiality and competence.

I know we can do better. And that power rests with you.

Improving our legal system starts with ensuring we elect competent and impartial judges to apply our laws and Constitution *as written*, without legislating from the bench.

Judicial philosophy matters. Voters know what I know—that an activist judge can cause serious consequences for our entire state, undoing decades of good reforms and injuring our economy. A recent poll conducted by TLR found that 74 percent of Texans were more likely to vote for a candidate who would strictly apply the words of the Constitution and our laws as written.

Of equal importance, in my opinion, is selecting judges who have substantial, meaningful experience as a judge or attorney. We must select and retain judges who know what they are doing because experienced judges make better and faster decisions, thus reducing litigation costs and increasing certainty for Texans who find themselves in court.

There are a number of critical judicial races on the ballot in November. These include three seats on the Texas Supreme Court, as well as 32 contested intermediate appellate court races. These appeals court races in Houston, Austin, San Antonio, Dallas, Fort Worth and Corpus Christi (and their neighboring counties) may not receive as much attention as other races on the ballot, but that doesn't make them any less important.

Because the Texas Supreme Court only reviews about 100 cases each year, our regional appeals court judges make the final decision in many of the most consequential cases that come before Texas courts. These judges are critical to ensuring that the laws passed by the Texas Legislature are upheld and implemented, including the common-sense tort reforms we have worked hard to enact to shut down job-killing lawsuit abuse.

We speak often about judicial selection being one of the most important responsibilities assigned to a

U.S. president. With the recent departures of two U.S. Supreme Court justices, we are seeing the complexion of our nation's highest court shift in favor of those who

believe in applying the plain words of the law as written. The selection of these judges will favorably impact generations of Americans to come.

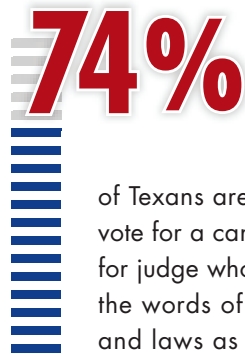
In Texas, *you the voters* have the power to select our judges.

You have the power to make a decision in the voting booth that can set our state on course for continued economic success. You have the power to

help Texas continue to be America's job creation engine and a beacon of opportunity by ensuring we have competent judges and a fair and predictable legal system.

Let's all work to spread the word that Texas judges matter. ■

“We speak often about judicial selection being one of the most important responsibilities assigned to a U.S. president... In Texas, you the voters have the power to select our judges.”



Source: Baselice and Associates

Texas needs experienced judges who will not legislate from the bench.

Help us spread the word about critical judicial races in your area by hosting a TLR speaker at your organization's next meeting or event this fall.

Volunteer speakers are available across the state.

Visit www.tortreform.com/speakersbureau
for more information about the TLR Speaker's Bureau.



A Warning Signal to Texas: When Tort Reform Fails

By Dick Trabulsi, TLR Chairman

Over the past two decades, Texas has successfully reformed our civil justice laws to make them more fair, balanced and predictable. Several other state legislatures have followed our lead in enacting tort reforms, only to be frustrated by activist state appellate judges who have weakened or overturned those reforms, thwarting the will of the people as expressed through their elected representatives. Activist judges use the law to impose their own policy views, even when it means ignoring the clear meaning and intent of legislative enactments.

The keystones of a conservative court are respect for the separation of powers between the executive, legislative and judicial branches of government and a recognition that judges should apply the words of a constitution or statute and not twist those words to accomplish the judges' desired result. The role of a judge is to apply the law objectively and impartially, not to use the law to impose the judge's own view of good public policy. Nor should a judge spin a tangled legal web in order to snare a sympathetic outcome for a particular party in a lawsuit. The law is the law, and the outcome of applying the law is the outcome. That is why Lady Justice, the symbol of the law, is blindfolded. She is blind to whether a litigant is weak or powerful, poor or rich. She sees only the law and applies it.

In Texas, where our Supreme Court and most of our intermediate courts of appeals are comprised of capable and conservative judges, the will of the voters as expressed through the Legislature is respected. These judges interpret and apply statutes according to the plain words of the statute. They do not legislate from the bench.

Contrary to our experience in Texas, activist courts in Arizona, Arkansas, Florida, Georgia, Illinois, Missouri, Ohio, Oklahoma, Oregon, Utah, Washington and Wisconsin have declared important civil justice reforms invalid in recent years. We must not be complacent and assume that this cannot happen in Texas. Every two

years, Texans go to the polls to elect hundreds of judges throughout our state. This year, there are an exceptional number of important judicial races on the ballot, including three positions on the Texas Supreme Court and 32 contested positions on the 14 intermediate appellate courts. Importantly, a *majority* of positions on the appellate courts based in Austin, Corpus Christi, Dallas, Houston and San Antonio are contested. Appellate judges are elected for six-year terms, so control of these courts in our major population centers will be fixed until the election of 2024. If activist judges form the majority on those courts, tremendous damage can be done to the law and the Texas economy over that six-year span.

The current Texas Supreme Court is one of the most respected high courts in our nation. But it decides only about 100 cases per year. That leaves the intermediate appellate courts as the arbiter of the vast majority of cases that are appealed from trial court judgments, so those courts issue many of the most consequential decisions in our state. Collectively, they hear about 5,400 civil matters and 5,800 criminal cases per year. While their case loads are about equal between civil and criminal, their work load is predominantly on the civil side because many civil cases have extensive trial

records and involve complex legal issues.

If these courts of appeals—which decide many cases every year interpreting and implementing the reforms that have been advocated by TLR—become dominated by activist judges, then all of our achievements in moving Texas from the “Wild West of Litigation” to a model tort reform state will be at serious risk.

When you go to the polls this November, please vote for judicial candidates who are honest, experienced, competent and fair, and who will uphold the rule of law. Lots of attention is given to President Trump's excellent appointments to the federal courts. In Texas, it is *each of us*, the voters, who choose our state judges. That is an awesome responsibility. Much is at stake when exercising it. ■

“The role of a judge is to apply the law objectively and impartially, not to use the law to impose the judge's own view of good public policy. Nor should a judge spin a tangled legal web in order to snare a sympathetic outcome for a particular party in a lawsuit.”



Attracting the Best and Brightest Judges in Texas

By Lee Parsley, TLR General Counsel

It is an oft-repeated truism that the laws passed by the Legislature are only as good as the judges who apply them. It follows, therefore, that honest and capable state court judges are critical to TLR's 25-year effort to support a balanced and efficient civil justice system in Texas.

A good argument can be made that Texas judges are underpaid and understaffed. Some are underqualified. The question for TLR, then, is how can we help Texas establish and maintain a stronger judiciary?

The state court system in Texas has 1,887 judges, all of whom are elected by the voters. In most instances, judicial qualifications are set by the Texas Constitution. A state district judge, for example, must be a U.S. and Texas citizen, a two-year resident of the district, at least 25 years old and have been a judge or practicing lawyer for four years. To say that these are *minimal* qualifications for a person who may preside over a death penalty case one month and a \$100 billion lawsuit the next is an understatement.

In June 2017, the Texas Judicial Council established the Civil Justice Committee to recommend reforms to improve access to the Texas civil justice system. The committee has recommended increasing the qualifications to serve as a judge at all levels of the Texas judiciary. For example, the committee suggests that a person should have practiced law for at least eight years before being eligible to run for district judge.

Once a new judge assumes office, she will work with a staff that is required to keep order in the courtroom and efficiently handle the mountain of documents that are the heartbeat of any justice system. With a few exceptions, only the courts at the top of the pyramid—the appellate courts—employ staff attorneys to assist the judges. Trial-level judges, for the most part, must learn the law and facts and make good decisions on the fly, without the help of an attorney.

To make matters more difficult, many of Texas' trial judges still "ride a circuit," meaning they hold office in a district comprised of multiple counties they regularly visit.

For their work, Texas judges are paid a salary that many Texans would probably regard as generous. But many good lawyers simply cannot afford to serve, or serve for very long, as a judge in Texas.

Compared to lawyers and judges in other states, judicial salaries in Texas are insufficient to attract a top-quality judiciary. The salary of a Texas Supreme Court justice, for example, ranks 25th in the nation com-

pared to the salaries of other high-court judges. Brand new lawyers start as associates at large law firms making more money than the chief justice of the Texas Supreme Court.

The Texas Legislature created a Judicial Compensation Commission in 2007 to recommend the proper salaries to be paid to Texas judges. The commission is required to take several factors into consideration, the most important being the level

of compensation adequate to attract the most highly qualified individuals in the state "to serve in the judiciary without unreasonable economic hardship and with judicial independence unaffected by financial concerns." In virtually every legislative session, the commission recommends salary increases for judges. The last salary increase given to Texas judges occurred in 2013.

Further still, those who choose to serve are subject to a selection system in which they may be swept out of office in the next election for reasons completely unrelated to their job performance. Again, the prospect of setting aside a profitable law practice to serve on a court for a short time dissuades many qualified men and women from seeking judicial office.

TLR has consistently supported proposals to increase judicial compensation in the past, and we will advocate for increased pay for judges in the 2019 legislative session. We are also interested in reasonable proposals to increase qualifications to serve in the judiciary.

These relatively minor items are a step in the right direction to help attract the high-quality judiciary that is critical to the fair and efficient civil justice system TLR has worked to establish in Texas. ■

"Compared to lawyers and judges in other states, judicial salaries in Texas are insufficient to attract a top-quality judiciary. Brand new lawyers start as associates at large law firms making more money than the chief justice of the Texas Supreme Court."



A Tribute to Texas Congressman Ted Poe

By Lilyanne McClean, TLR President

In a few months, the U.S. House of Representatives will lose one of the great ones, Rep. Ted Poe of Texas. After almost 14 years in Congress, Rep. Poe is not seeking reelection. Texans know him well because before being elected to Congress, he served for 22 years as a criminal judge and eight years as an undefeated criminal prosecutor for Harris County. As a judge, he was an exemplar for other men and women who served in the Texas judiciary.

I was introduced to Rep. Poe long before we actually met. I had been working in Washington, D.C., for about 10 years when my new boss asked me to spend the first part of my day closely watching the House floor. She indicated there were going to be several contentious items discussed and that I should watch and listen closely for them. And I did.

One of the most notable members on the floor that day was a newly-elected Congressman from Texas named Ted Poe. He was spectacular—passionate, concise and persuasive. Knowing now that he had been a conservative judge and skilled prosecutor in Houston for many years prior to being elected to Congress, it all makes sense. But in that moment, I instantly became a fan. In honor of his impending retirement, here's what I have learned from being a student of Ted Poe:

Put your district first: It sounds like a simple truism, but Congressman Poe never lost sight of who he represented. He understands his district and has never been afraid to consider how a changing or new trend might impact his constituents. Even though he is well known for his expertise in international affairs and many other areas, his focus has always been the people of the Second Congressional District. During my career, I have worked with U.S. senators and representatives from almost every state, and the good ones—like Congressman Poe—never lose sight of their constituents.

Command the subject or stay out of it:

Anyone who has worked with Ted will tell you that if he plans to work on a subject, he first masters the subject, which I believe is one of the reasons he has been such a successful representative. During my first year in Washington, a colleague remarked that “politics can be very tricky, but public policy is just hard.” When you look at the policy work that Ted has done in areas like border security, human trafficking and criminal justice, it's clear he reaches his conclusions and recommendations after understanding the topic inside and out. In his view, an uninformed position is no position at all. Maybe this is due to his previous career as an attorney and judge. But Congressman Poe also distinguished himself by embracing one of the basic rules of policy development: always understand the core of the policy debate and resist the temptation to go too far afield because if you do, the end result will be “bad law.”

It's Texas, stupid:

One of the most important lessons I learned from Congressman Poe is that Texas lawmakers are all individually stronger when they are strong as a whole. Long before I became a Texan, this was an attribute of the Texas Delegation that many others—including New York, Ohio and Florida—admired. Put differently, it was widely known that if the Texas Delegation was unified, it was unstoppable, and representatives like Ted Poe, Bill Archer and Tom DeLay did their part to make sure this was the case. It has long been a point of pride for the state and remains so today.

My father told me to always take note of great men. He believed that America is a country that “builds leaders,” men and women who make a difference—every day—and who never stop in their pursuits. There is no doubt that we can all learn from watching perfectionists like Congressman Ted Poe, and there is no doubt that Texas is a much better place because of him. ■



Congressman Ted Poe



The Good News and Bad News About Climate Change Lawsuits

By Hugh Rice Kelly, TLR Senior General Counsel

Activist attorneys general in states like New York and California consistently team up with mass tort lawyers to wreak havoc on American businesses. Fortunately, Texas has had **John Cornyn** (1999-2002), **Greg Abbott** (2002-2015) and **Ken Paxton** (2015-present) serving as state attorney general in recent decades. They have vigorously protected Texas consumers against fraud and malfeasance and have consistently asserted our state's Tenth Amendment rights from encroachment by the federal government. They have also avoided engaging in the kinds of ridiculous lawsuits against businesses pursued by activist attorneys general in other states.

For example, activist attorneys general, mayors and other public officials have been filing lawsuits against oil and gas companies, alleging the companies are responsible for the cost of environmental damage caused by climate change. In the last issue of *The Advocate*, I detailed TLR's concern that these lawsuits are an inappropriate use of the legal system—a weaponization of the courts to achieve a public policy outcome that should be the subject of the legislative process. In the following weeks, TLR joined with the lawsuit reform organizations in California, New York, Florida and Louisiana to publicly raise our concerns about these lawsuits in an opinion piece published in *Investor's Business Daily* (in case you missed it, you can read the piece on our website, www.tortreform.com).

At issue in the lawsuits against the oil and gas companies is the public nuisance theory alleged by the plaintiffs, which stretched the law far beyond its intentions, ignored critical facts and involved private lawyers in a space meant for democratically elected decision makers. Further, the plaintiffs sought to impose responsibility only on oil and gas producers, when the responsibility for consumption of oil and gas rests with countless families, businesses and nations worldwide who depend on those products in their everyday activities.

Luckily, two federal judges in California and New York saw through the plaintiffs' arguments, pumping the brakes on the lawsuits brought by the cities of Oakland, San Francisco and New York. While both judges agreed that climate change is a serious global issue, they disagreed that the courts were an appropriate venue to provide a solution.

In the first ruling, Judge William Alsup of the U.S. District Court for the Northern District of California called the scope of the plaintiffs' legal theory "breath-taking," and ruled that alleged damage is too far in the future to justify awarding monetary damages now, that fossil fuels provide enormous benefits to society, and that the alleged nuisance is caused by the *consumers* of oil and gas products, not by the producers themselves.

Importantly, the judge also ruled that it was not the place of the courts to make public policy decisions related to climate change.

"[Q]uestions of how to appropriately balance these worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate. Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus."

"The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case."

Then in July, Judge John F. Keenan of the U.S. District Court for the Southern District of New York issued a similar ruling, saying, "[T]he serious problems caused thereby are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government."

Judge Keenan found that the federal Clean Air Act displaced the city's claim, saying, "Given the interstate nature of these claims, it would thus be illogical to allow the City to bring state law claims when courts have found that these matters are areas of federal concern that have been delegated to the Executive Branch as they require a uniform, national solution."

That is the good news. Judge Alsup and Judge Keenan—who were appointed by Presidents Clinton and Reagan, respectively—saw clearly that in matters of such national and international importance, the courts were not the appropriate venue to set public policy.

The bad news is that even as these rulings were being issued, additional lawsuits alleging similar claims have been filed in Rhode Island and Baltimore, joining an outstanding lawsuit filed by the city of Boulder, Colorado. Let's be grateful that Texas officeholders have better sense. ■



Storm-Chasing Lawyer Gets Jail Time for Fraud

By Mary Tipps, TLR Executive Director

TLR spent the 2015 and 2017 legislative sessions working to fix the problems storm-chasing lawyers were creating for Texas property owners. Fortunately, the Texas Legislature passed a common-sense solution in 2017 (HB 1774) to make it harder for these lawyers to file unnecessary lawsuits, while maintaining the strongest insurance consumer protections in the U.S. for Texas property owners.

We had heard credible stories since late 2013 of lawyers trolling for clients following hail and wind storms. In many places, lawyers were ignoring criminal laws and ethical rules by paying roofing contractors and public insurance adjusters to go door to door to solicit clients. We had also seen lawyers setting up booths in front of grocery stores and at flea markets to recruit clients.

Regardless of whether the property owner had already filed and resolved an insurance claim, the solicitors were promising homeowners they could get more money from their insurance companies if they would just “sign here.” In many cases, they never disclosed that they were working on behalf of an attorney or that a lawsuit would be filed on the property owner’s behalf.

Then the lawyers would step in—sometimes filing 20 or more lawsuits at a time—claiming all kinds of nefarious actions by the insurance companies. In many instances, the insurance companies had paid the homeowners’ claims months before, and having heard nothing more from the homeowners, closed the file.

Even worse, we were informed that many homeowners were surprised to learn they had hired a lawyer or filed a lawsuit against their insurance company. *In other words, they were signed up for legal services without their knowledge or informed consent.*

For several years, Kent Livesay was one of the most prolific of these storm-chasing lawyers. He filed literally hundreds of dubious storm-related cases, mostly in South Texas. But not without consequences.

In August 2016, the State Bar of Texas suspended Livesay’s law license for misconduct related to several weather-related lawsuits he had pursued. He was barred from practicing law in Texas throughout 2017.

Then about a year later, in June 2017, Livesay was indicted by a Tarrant County grand jury for fraud related to lawsuits filed from 2014 to 2016 against insurance companies without the homeowners’ knowledge or consent.

In January 2018, the State Bar of Texas suspended Livesay’s license for *another year* for ambulance chasing in El Paso and North Carolina.

Finally, in June 2018, Livesay pleaded guilty in Tarrant County to insurance fraud and barratry (ambulance chasing). The fraud aspect of his wrongdoing included filing lawsuits on behalf of homeowners who had not retained him as their attorney. He was sentenced to five years in prison.

The charges against Livesay were brought after an investigation by the Texas Department of Insurance (TDI) Fraud Unit. Tarrant County is one of six locations around the state where TDI has embedded prosecutors and investigators in district attorneys’ offices focused on fighting insurance fraud.

As part of his plea, Livesay agreed to divulge the details of the entire fraud and barratry scheme he participated in. He has implicated other attorneys, roofing contractors and public insurance adjusters in a web of solicitation that flies in the face of ethical and legal standards for lawyer conduct.

The wheels of justice turn slowly. Livesay started down this path in 2012, ensnaring Texas families in a web of fraud that had nothing to do with helping them recover after a natural disaster. Thanks to the diligence of the TDI Fraud Unit, his scheme to cheat consumers and defraud insurance companies is finally coming to an inglorious end.

Unfortunately, Kent Livesay is just one of a host of bad actors. We hope that this outcome, coupled with the Legislature’s actions, augers the end of the era of storm-chasing lawsuit abuse. ■

“As part of his plea, Livesay agreed to divulge the details of the entire fraud and barratry scheme he participated in. He has implicated other attorneys, roofing contractors and public insurance adjusters in a web of solicitation that flies in the face of ethical and legal standards for lawyer conduct.”

Tort Reform Continues to Move Texans

By Lucy Nashed, TLR Communications Director

New poll shows Texans of all backgrounds support common-sense tort reforms

After nearly 25 years of work to improve Texas' legal system, a poll conducted by Baselice and Associates in May shows that Texans continue to see the value of these smart reforms, and highlights areas where we can continue to improve.

Personal Injury Trial Lawyers Have a Bad Reputation with Texans

67 percent of Texans believe that personal injury trial lawyers exploit people injured by accidents and illness for their own gain. 66 percent believe that personal injury trial lawyers are filing too many frivolous lawsuits. Additionally, 67 percent say they are less likely to vote for a political candidate who accepts contributions from personal injury trial lawyers.



67% OF TEXANS BELIEVE THAT PERSONAL INJURY TRIAL LAWYERS EXPLOIT PEOPLE INJURED BY ACCIDENTS AND ILLNESS FOR THEIR OWN GAIN.

Reform to Stop Storm-Chasing Lawyers Widely Supported Across the State

More than a year after the Texas Legislature passed a common-sense lawsuit reform (with the strong support of Gov. Greg Abbott and Lt. Gov. Dan Patrick and overwhelming majorities in the Texas House and Senate) to keep storm-chasing lawyers from hijacking property insurance claims and making insurance coverage more expensive for us all, polling shows that Texans overwhelmingly support the measure.



65% OF TEXANS STATEWIDE FAVOR REQUIRING ATTORNEYS WHO REPRESENT POLICYHOLDERS TO GIVE INSURANCE COMPANIES NOTICE OF A DISPUTED CLAIM AND 60 DAYS TO RESOLVE THE DISPUTE BEFORE A LAWSUIT IS FILED.

65 percent of Texans statewide favor requiring attorneys who represent policyholders to give insurance companies notice of a disputed claim and 60 days to resolve the dispute before a lawsuit is filed. Support was strong across the board, regardless of political affiliation. Of those surveyed, 66 percent of Democrats, 65 percent of Republicans and 62 percent of Independents supported the measure.

Attorney Advertising Raises Questions

Texans are savvy when it comes to personal injury trial lawyer advertising, with 87 percent of poll respondents stating they do not believe the lawyer who advertises on TV would be the attorney handling their case.



87% OF POLL RESPONDENTS DO NOT BELIEVE THE LAWYER WHO ADVERTISES ON TV WOULD BE THE ATTORNEY HANDLING THEIR CASE.

What many Texans may not realize, however, is that the law firm in the ad might not actually be the firm to handle your case at all. Many advertising lawyers are merely client harvesters who generate clients through advertising and then farm out the actual work to other firms for a share of the fees generated by the cases.

In the Baselice poll, 82 percent of Texans surveyed believed that an attorney who advertises for your case should be required to clearly state upfront whether he or she will personally handle your case. ■



82% OF TEXANS SURVEYED BELIEVE THAT AN ATTORNEY WHO ADVERTISES FOR YOUR CASE SHOULD BE REQUIRED TO CLEARLY STATE UPFRONT WHETHER HE OR SHE WILL PERSONALLY HANDLE YOUR CASE.

TLR

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