

TEXAS SUPREME COURT RACES

REPUBLICAN PRIMARY- 2016

In the Texas Supreme Court, all three Republican incumbents are standing for re-election and have drawn Republican Primary opponents. Justice Eva Guzman is being challenged by perennial losing candidate Joe Pool, Jr. Justice Debra Lehrman is being challenged by 14th Court of Appeals Justice Michael Massengale and Justice Paul Green is being challenged by former State Representative Rick Green who lost his first run for this Court six years ago.

PLACE 3



MICHAEL MASSENGALE

Voters are urged to vote for Michael Massengale. Justice Massengale, a Fort Worth native, attended Dartmouth University and the University of Texas School of Law where he graduated with honors. He then served a two year clerkship at the Fifth Circuit Court of Appeals for Judge Harold R. DeMoss, Jr.

He then joined the Baker Botts law firm in Houston and became a partner in 2006. He is Board Certified in Civil Appellate Law. He was appointed to the 1st Court of Appeals in 2009 by Governor Perry and was elected to the unexpired two years of the term in 2010 and to a full six year term in 2012. He was rated Outstanding or Above Average in the Houston Bar Association Judicial Evaluation poll in 2015 by 63% of the respondents. His opinions reflect a conservative philosophy and an adherence to the law as it is written.

His candidacy is endorsed by the political committees of the Texas Medical Association, Texans for Lawsuit Reform, Texas Association of Business, multiple Tea Party groups, the Texas Bipartisan Justice Committee, Texas Right to Life and many others. While former Supreme Court Justices routinely endorse the incumbent in these races, former Supreme Court Justice Scott Brister is backing Massengale.



DEBRA LEHRMANN

We supported Justice Lehrmann in her runoff against Rick Green six years ago. She had judicial experience, albeit primarily in the area of family law. Green had none. She is not board certified in any area of the law and received the second lowest ranking of any of the nine current members of the Texas Supreme Court in the 2015 Houston Bar Association evaluation poll. More than half of the respondents rated her "poor", "below average" or "average". We are reluctant to oppose an incumbent unless there are good reasons to do so and in this case we think those reasons exist.

Since joining the court, Justice Lehrmann has dissented from the majority on more cases than any other judge. And her dissents usually favor the civil plaintiff. Since this is a very conservative court, her dissents define her as its most liberal member.

She seems to have particular disdain for the tort reforms enacted by the passage of Proposition 12 a few years ago. She is getting contributions from some of the personal injury lawyers who tried to defeat Chief Justice Nathan Hecht and Justices Phil Johnson and Jeff Brown two years ago.

A list of some of the cases that are examples can be found below. A full summary of each case can be viewed at <http://VoteSmartTexas.com>. In many of these cases, Justice Lehrmann was the sole dissenting vote.)

Health care liability cases:

Tenet Hospitals Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014)

Molinet v. Kimbrell, 356 S.W.3d 407 (Tex. 2011)

Franka v. Velasquez, 332 S.W.3d 367, 389 (Tex. 2011)

Omaha Healthcare Ctr., LLC v. Johnson, 344 S.W.3d 392 (Tex. 2011)

Texas W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171 (Tex. 2012)

Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658 (Tex. 2010)

Loaisiga v. Cerda, 379 S.W.3d 248 (Tex. 2012)

Jelinek v. Casas, 328 S.W.3d 526 (Tex. 2010)

Rusk State Hosp. v. Black, 392 S.W.3d 88 (Tex. 2012)

Other personal injury cases:

Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2011)
U-Haul Intern., Inc. v. Waldrip, 380 S.W.3d 118 (Tex. 2012)
Bostic v. Georgia-Pac. Corp., 439 S.W.3d 332 (Tex. 2014)
Union Carbide Corp. v. Synatzske, 438 S.W.3d 39 (Tex. 2014)
Weeks Marine, Inc. v. Garza, 371 S.W.3d 157 (Tex. 2012)

PLACE 5



[+] PAUL GREEN

We recommend a vote for Paul Green. The Place 5 incumbent, Justice Paul W. Green, age 63, has served on the court for 11 years. He was elected in 2004 without an opponent in the general election, and was reelected in 2010 without a primary opponent. He is an experienced jurist, having served on the Fourth Court of Appeals in San Antonio for 10 years before moving up to the Supreme Court. Paul Green practiced law for 17 years before joining the bench.

He is a well-respected judge with a conservative record who has garnered endorsements from the political committees of Texans for Lawsuit Reform, the Texas Civil Justice League, the Texas Medical Association, the Texas Association of Business, the Texas Association of Realtors and many other business groups. Other endorsements include Senator John Cornyn, Former Governor Rick Perry, Former U.S. Attorney General Al Gonzales, Former Texas Supreme Court Chief Justices Tom Phillips and Wallace Jefferson, Former Texas Supreme Court Justices Scott Brister, Craig Enoch, Harriet O'Neill, David Medina, Dale Wainwright and Raul Gonzalez. He is also endorsed by the Texas Patriots Tea Party PAC, Texas Conservative View PAC and the Texas Attorney General Peace Officers Association among others.

Paul Green is a former President of the San Antonio Bar Association and a member of the American Law Institute. His judicial service has been marked by integrity, decorum, and dignity. He exudes gravitas. By any estimation, he is highly qualified to serve another term on the Texas Supreme Court. Paul Green's main weakness is that he has kept a low profile while serving on the court, rarely attending political events and maintaining no social

media presence. Unlike his opponent, Paul Green is not a self-promoting media figure. While being inconspicuous would be considered “judicious” in many states, it can be a vulnerability in Texas, where judges stand for election.



RICK GREEN

Rick Green’s lack of *any* prior judicial experience and meager legal experience are not his only liabilities. His well-documented injudicious background should also give voters pause.

While serving in the Texas legislature, Rick Green was a paid lobbyist for an ephedra-based dietary supplement called Metabolife, which the FDA banned in 2004 due to thousands of “serious adverse events,” including numerous deaths. Metabolife, whose namesake product was sometimes referred to as “legal speed” (because it contained compounds chemically related to methamphetamine), was founded by two former methamphetamine dealers. Run as a multi-level marketing company, and during its heyday generating hundreds of millions of dollars in sales, Metabolife and its owner ultimately pled guilty to federal income tax evasion. Metabolife’s outside CPA, implicated in criminal tax fraud, committed suicide after an affidavit for a search warrant was unsealed in federal court. One of the founders was convicted of lying to the FDA and concealing evidence of ephedra’s dangers. Amidst the criminal charges, product bans, and more than \$1 billion in personal injury claims, Metabolife ended in disgrace, filing for bankruptcy in 2005. Metabolife was, by any estimation, a sordid enterprise that tainted all those who associated with it.*

A criminal investigation of Green's lobbying efforts for Metabolife was begun by Travis County Attorney Ken Oden after a formal complaint had been filed. The grand jury looking at the case issued subpoenas. Although Green has insisted that no grand jury was involved, the record proves otherwise. He was certainly aware of it since he hired high profile criminal defense lawyer Roy Minton to represent him. Green received \$7500 in

campaign contributions from ephedrine interests. But Green never reported the income he received for his lobbying efforts on behalf of Metabolife, and his lawyer Roy Minton could not give a reason why the company was absent from Green's disclosures.*

Minton brokered a deferred prosecution deal for Green in which his law firm would forfeit Metabolife related fees. In Feb. 2003, Oden decided to leave the public office and enter private practice. He was concerned that there was a conflict of interest between the criminal case and his new law firm. Oden therefore withdrew the offer and referred the case to the Travis County District Attorney's office. Green then lost his bid for reelection and the law itself was changed to clearly outlaw that kind of lobbying altogether. In 2005, the San Antonio Express News reported that the case was still "under scrutiny" but the case was not a priority since the office was busy with the indictments of Tom Delay. Ken Oden still contended the investigation was justified. Apparently the DA's office lost interest in the case and the file was closed in 2006.*

While in the legislature, Rick Green also generated controversy by filming an infomercial in his Capitol office, for dietary supplement Focus Factor, a product developed by a friend and business associate of Green, whom Green also represented as an attorney. The FTC later filed a complaint against the maker of Focus Factor for deceptive advertising, for which the maker of Focus Factor paid a \$1 million fine to settle in 2004. The Focus Factor episode was cited by *Texas Monthly* magazine as grounds for Green to be named one of Texas's ten "Worst Legislators" in 2001. *

The nadir of Rick Green's legislative record, however, was his successful advocacy of early parole for Melvin Cox, a convicted swindler who bilked victims — some of whom were members of his own church — out of over \$30 million in a Ponzi scheme. Cox was a longtime business associate of Green's father (and Green himself), and due to Green's unusual efforts Cox served less than three years of a 16-year prison sentence. Prior to getting caught, Cox loaned \$400,000 to a company owned and controlled by Rick Green- a loan that was never repayed. (Green maintains it was repayed with stock in his company but that stock was worthless.) *

With these unsavory actions, Rick Green brought disrepute to himself and the entire Legislature.

Rick Green's injudicious actions continued *after* he lost his legislative seat to Democrat Patrick Rose. In 2006, four years after he lost his bid for re-election, Green punched Rose at a polling place on Election Day, leading to a warrant being issued for Green's arrest.

Green turned himself in, was charged with assault with bodily injury, served six months' probation, and paid a fine (in return, he received a "deferred adjudication").

Apparently Rick Green is rewriting history. About his assault of Patrick Rose he insists "the whole thing was dismissed, there was no adjudication of guilt, no conviction of assault, or any of these other things."

Not true. He was charged with assault, a charge that carries a maximum punishment of one year in jail and a \$4000 fine. His punishment was 6 months probation and he received deferred adjudication. As a matter of law (the understanding of which seems to be one of Rick Green's weak points), to receive deferred adjudication the defendant must enter a plea of guilty or no contest. The judge accepted Mr. Green's plea and sentenced him to 6 months probation. Seems to most folks that it was "adjudicated" and that he was deemed guilty. His parsing of words would make Bill Clinton proud.

And now it is being put out by some supporters that he punched Patrick Rose because Rose was saying bad things about Green's wife. That explanation has only recently surfaced. It appears to be an attempt to put "lipstick on a pig" and make the assault seem understandable and even appropriate and acceptable. After all defending a woman's good name is more noble than assaulting a man over a political squabble.

At the time Mr. Green stated to the press that he was upset about Rose linking him to another candidate's name. In an online book three years after the assault, Green himself wrote he was angry about a campaign mailer linking him to Rose's opponent when he struck his one-time rival outside the church on Election Day. No mention then about Rose saying anything about his wife.

In Green's race against Judge Debra Lehrmann in 2010, supporters of Lehrmann — including former Texas Supreme Court Chief Justice Tom Phillips--circulated a letter to GOP voters outlining some of the incidents described above. When he lost the election, Green sued Phillips and others for libel. After the defendants filed a First Amended Original Answer documenting all the incidents in detail the lawsuit was dismissed "with prejudice" (meaning it could not be re-filed) with no payment of money by the defendants.

Much more detailed information about these issues is contained in the First Amended Original Answer which can be accessed at:

* http://pdfserver.amlaw.com/tx/philips_answer.pdf

When asked why he chose to run against Paul Green, Rick Green cites the "gay divorce" case, *Texas v. Naylor*. In that case, the court dismissed, on purely technical grounds, an appeal by the State of Texas of a judgment of divorce involving a lesbian couple that had married in Massachusetts. In doing so they were agreeing with the trial court and the 3rd Court of Appeals which had previously ruled the same way based on the same reasoning. The rulings in both the 3rd Court of Appeals and the Supreme Court were procedural, not

substantive and concluded as a matter of law that the State of Texas did not have standing to appeal because the Texas Attorney General had not intervened in the underlying litigation in a timely manner and did not have standing in the case. It was hardly an endorsement of gay marriage as Rick Green would have folks believe. Former Texas Supreme Court Justices Scott Brister and Dale Wainwright (arguably two of the most conservative ever to serve on that court) have published a scholarly article addressing the Texas v. Naylor case and in their words:

"....every case is equally subject to certain iron rules — in particular, the rule that procedural and jurisdictional barriers often determine whether a court can decide the case at all. Failing to understand these threshold jurisdictional questions under the constitution can generate wildly misleading assessments of decisions that turn on jurisdiction rather than the merits of the question before the court. One current example is the Texas Supreme Court’s decision last June in State v. Naylor, a same-sex marriage case. Or at least, it would have been about same-sex marriage, if the court had had jurisdiction to decide the case."

"...The state was the only party that appealed, and the court’s majority held that the state lacked legal standing, a necessary component of jurisdiction, because under established rules of court procedure the state had sought to intervene in the case too late."

"....No one — certainly not the majority in Naylor — doubts the state’s right to intervene in a case to defend the integrity of state law. To the majority, the problem was that the state didn’t intervene in time. It held that, if the state wishes to intervene, it must do so before the trial court announces its judgment or, failing that, ask the trial court to exercise its discretion to reopen the case and allow the intervention. The state did neither, even though its lawyers were monitoring the litigation and physically present in the trial court. In other words, the majority explained, the state is bound by procedural rules just like everyone else."

"...One can reasonably argue about what the rules for intervention by the attorney general in private litigation are, or ought to be. But one cannot reasonably argue that one’s position on that question has anything whatsoever to do with same-sex marriage"

<http://www.nationalreview.com/bench-memos/430610/state-v-naylor-conservative-judges-jurisdiction>

(Justice Paul Green did not write the opinion, although he joined it. The decision was written by Justice Jeff Brown, another conservative stalwart. The U. S. Supreme Court ruling in *Obergefell* has since made this issue moot.)

In Elmer Gantry-like fashion, Rick Green has carefully cultivated a pious image among evangelical voters as a patriot and “constitutional watchdog,” espousing a “Biblical worldview.” His radio show, website, and reality TV show tirelessly promote his upright public image, which is very appealing to religious conservatives. Actions, however, speak louder than words. His actions — with regard to Metabolife, FocusFactor, Melvin Cox,

Patrick Rose, and the vindictive libel suit — are (to be charitable) the caricature of an *injudicious* person, ill-suited to serve on *any* court, let alone Texas’s *highest* court. Rick Green has repeatedly exhibited bad judgment, associated with shady characters, and displayed a bad temper. One incident might be explained as a “youthful indiscretion” (although Rick Green was almost 30 when elected to the legislature and 34 years old when he assaulted Patrick Rose); a *series* of such incidents forms an unmistakable pattern.

In contrast, Justice Paul Green’s lengthy record is solid — and unblemished by scandal or impropriety. Indeed, Paul Green *epitomizes* the meaning of “judicious.”

(Many of the above comments directly excerpted from articles in The American Spectator and National Review Online by Mark Pulliam with the permission of the author)

<http://spectator.org/articles/65138/legitimate-judicial-candidates-must-be-%E2%80%98judicious%E2%80%99>

<http://www.nationalreview.com/bench-memos/428859/texas-judicial-elections-green-vs-green>

PLACE 9



EVA GUZMAN

We recommend a vote for Justice Eva Guzman. After her appointment to the Supreme Court in 2009 by Governor Perry, Justice Guzman hit the ground running and has proven to be a hard working conservative member of that court. She was elected to a full six year term in 2010. She is the first Latina to be elected to a statewide office in Texas. She is the second highest rated Supreme Court Justice in the 2015 Houston Bar Association judicial evaluation poll. Her husband is a retired police officer.

Pror to joining the Supreme Court she served on the 14th Court of Appeals in Houston for 9 years, ruling on over two thousand civil and criminal cases. She brought trial court

experience to the court as well, having been appointed by Gov. Bush to the 309th District Court in 1999.

Her endorsements include Gov. Greg Abbott, Former Gov. Rick Perry, Senator John Cornyn, former Supreme Court Justices and an incredible list of Republican leaders, law enforcement groups, associations, attorneys, newspapers and conservative groups and individuals. While too long to list here, the whole list can be viewed on her website <http://evaguzman.com>.

Her qualifications, credentials, experience and record are so much more impressive than that of her opponent. She should have no trouble defeating her challenger. But history suggests otherwise. The political landscape is littered with the casualties of incredibly well qualified Hispanic Republicans being defeated in the Republican Primary by poorly qualified challengers with Anglo-Saxon sounding names. A few examples include Justice Xavier Rodriguez being defeated by Steve Smith, Justice David Medina being defeated by John Devine, Victor Carillo losing to David Porter and Jaime Tijerina losing to Brad Condit.

Court observer and conservative Republican activist Mark Pulliam wrote about this race and it was published in National Review Online. You can access that article by going to:

<http://www.nationalreview.com/bench-memos/429207/texas-supreme-court-elections-eva-guzman-joe-pool>



JOE POOL

Perennial candidate Joe Pool, Jr. is making his third run for the Supreme Court. And this is the second time he has filed against an Hispanic incumbent. He did not make the runoff when he ran against David Medina in 2010. He lost to Justice Jeff Brown in 2012 despite heavy backing by many personal injury trial lawyers--most of whom are big Democratic donors, including three of the "Tobacco Five" lawyers who split a 3.4 Billion dollar fee in the tobacco suit.

He has no judicial experience, very limited legal experience and minimal appellate law experience. One of Pool's career highlights listed on his campaign website the last time he ran for office is that he served as General Counsel to the Dripping Springs Water Supply Corporation, hardly a qualification to serve on the highest court in the State.

Concerns about Pool are also exemplified by the fact that in 2011 he received a Public Reprimand from the State Bar of Texas for taking "positions that unnecessarily increased the costs and burdens of litigation."

In addition, he has had over \$100,000 worth of sanctions leveled against him by a Probate Court and a Court of Appeals. Those sanctions include:

- Sanctioned \$40,000 for groundless claims of lack of testamentary capacity and undue influence
- Sanctioned \$30,000 for filing a groundless acreage claim
- Sanctioned \$20,000 for filing groundless forgery and formalities claims
- Sanctioned \$5000 for the use of false and disavowed affidavits in support of a groundless forgery claim
- Sanctioned \$30,000 by a Court of Appeals for pursuing a groundless appeal (Pool vs. Diana, Cause No. 85,839, Probate Court No. 1 of Travis County, Texas and Pool vs. Diana, 2010 WL 1170234 (Tex. App.-Austin, Mar. 24, 2010))

It is to be seen if the personal injury lawyers embarrass themselves again by backing this obviously flawed candidate over someone with Justice Guzman's record.

And Republican Primary voters can also embarrass themselves if they repeat their predilection to vote for an anglo sounding name over an Hispanic one.