THE WOMEN'S ADVOCATE
A CATALYST FOR 2011 – 2012

Women and the Law Section Newsletter **March 2012** **Vol. 32, No. 2**
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A MESSAGE FROM YOUR CHAIR

REVISIT THOSE RESOLUTIONS!

by Patricia Blackshear

Raise your hand if you have broken, forgotten, or set aside some of your New Year's resolutions already. (My hand is raised.) It may seem odd to discuss this topic with spring just around the corner, but that is the problem with resolutions at the beginning of the year. They often are tossed aside and not revisited until next January when we resolve to make the very same behavior changes.

Have we given up because we did not set attainable and realistic goals? Because we work too much and can't get to the gym, to the yoga studio, to date night with our husbands? It is because we have children, and parents, and careers that require more than a mere 40 hours per week? Did you then tell yourself, "It doesn't matter…."?

It does matter! It matters because you matter. Most resolutions are either directly or indirectly linked to your health and wellness. Earlier this year, Time Magazine listed "Top 10 Commonly Broken New Year's Resolutions" on its website (**www.time.com**) They are:

- Lose Weight and Get Fit
- Quit Smoking
- Learn Something New
- Eat Healthier and Diet
- Get Out of Debt and Save Money
- Spend More Time with Family
- Travel to New Places
- Be Less Stressed
- Volunteer
- Drink Less

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I am sure that some of these ring true with a number of us. Instead of becoming fodder for the next article on broken resolutions, I want to challenge Women and the Law Section Members to revisit their 2012 resolutions and get back on track.

Take some small steps that add only a few minutes to your long day. For example, make that doctor's appointment that has been on your to-do list for several months, pull up the website of the yoga studio you pass on the way home, email your vacation request to the boss. Those small steps you take can give new life to your resolutions. I resolve to do a few things just as soon as I finish typing this article. And then I will get on with my day. I resolve to do another thing tomorrow and tomorrow and then have a plan for the long run that will carry me into June. The halfway point will be a good time to assess progress!

June will also bring us to the State Bar Annual Meeting in Houston. Mark your calendars for June 21-22, 2012. The Women and the Law Section will again be holding our meeting and a CLE course on the afternoon of June 21st. This year's program will focus on practicing law in a tough economy, with some varied insights from panel members. Stay tuned for more info!

Please feel free to contact us anytime with your questions, comments, and insights. The Women and the Law Section is comprised of its members, and the Council welcomes any feedback you may have! Our website address is **http://www.txwomenlawsection.org** and you can find us on Facebook at **https://www.facebook.com/womenlaw**.

MEN CAN BE GOOD CAREGIVERS

by Carolyn F. Moore, Newsletter Editor

A number of men join women today in providing caregiving activities for other people. These males were taught by women that it is important to be an active part of someone else's life. As we observe men assisting in caregiving activities, we should compliment them and remember all those mothers, grandmothers, sisters, aunts, and cousins who encouraged men not to hesitate in helping others.

This weekend, I observed two men who willingly assumed the role of helping take care of someone else. The first is a brand new father who is totally committed to being a part of his baby's life. The young man decided to change jobs when he learned that he and his wife were expecting a baby. He said that he realized the job he had for the last several years would require travel that would interfere with his ability to be with his family in the evenings and on weekends. He also became acquainted with his wife's doctor and made sure he was with his wife at doctor's appointments, including the one where they both learned that her physical condition, after a difficult birth, was back to normal.

The young father is not only proud of his son, but also knows how to bathe, feed, dress, and soothe his hurt feelings. While he becomes a loving father to his son, he continues to be a good husband to his wife and beloved by his extended family.

The second man drove with this wife for three and one half hours to pick up his mother from other family members who had also driven a great distance for the meeting. He had asked that his mother move in with him, his wife, his two children, four pets (two dogs and two cats), plus his sister-in-law. Before his mother actually agreed to her son's invitation, he completed building a new house in which he designated one room and bathroom specifically for his mother. He made certain that the doors into the rooms were wide enough for a wheelchair or walker and equipped the bathroom with hand rails and a walk-in shower with just an inch on the floor to step over.

The man's wife was a willing partner in the venture to care for her mother-in-law. She accompanied her husband on the trip to pick up her mother-in-law and wanted to learn as much as she could from other family members before she and her husband made the long drive home. She listened intently when told about her mother-in-law's prescriptions and explained that she and her husband had found a doctor to take over the medical care of her mother-in-law. She and her husband responded kindly to each question or comment from the elderly woman. There was no doubt that both the man and his wife were committed to caring for the man's mother.

Both these men are part of the new world of men who accept responsibilities that were often relegated to women in past decades. These men appreciate what other people have done for them and are willing to carry it forward to helping other. The two were lucky to have women who taught them that they, too, could be caregivers. The rest of us are fortunate to have men like this around.

TEXAS JURY ORDERS KELSEY-SEYBOLD TO PAY $1.9 MILLION FOR BOTCHED SURGERY

On Friday, January 20, 2012, a Harris County jury ordered Kelsey-Seybold Medical Clinic, PLLC, and its employee, Jim Patrick Benge, MD, to pay $1.9 million for permanently injuring Lauren Williams for her past and future damages, including a lifetime of colostomy care and medications.

In August 2008, Ms. Williams had a hysterectomy understanding that Dr. Benge would be her surgeon. After she went under anesthesia, a resident came in and performed at least 50 percent of the surgery without the patient's knowledge. This was the first time the resident had performed the procedure. "The jury rejected Kelsey Seybold's position that an unknown resident can perform surgery on a patient without full disclosure to the patient," said Williams' attorney Randall O. Sorrels.

During that August 2008 surgery, two of Ms. Williams' organs, including her bowel, were perforated. The injuries were not discovered until three days later at which point Ms. Williams was septic and her injuries were irreversible. Ms. Williams spent three weeks in a coma as a result, and thereafter spent months re-learning to walk, talk and care for herself. Ms. Williams now lives with a permanent colostomy and testimony was presented that she will be an intestinal cripple as she grows older, due to the dense internal adhesions resulting from gastrointestinal damage. She has undergone five major surgeries following the August 26, 2008 procedure.

Dr. Benge, his colleague Dr. Thornton (a co-defendant who was not found liable for her role in Ms. Williams' post-operative care), and the experts for Kelsey-Seybold offered testimony that a patient does not have the right to know when a resident would be operating on them or cutting inside their bodies. By virtue of this medical malpractice verdict, a Harris County jury has rejected this as the standard of care. "When a doctor agrees to perform surgery on a patient, it should be that surgeon who operates, unless the patient agrees otherwise," said Williams' lawyer Chelsie King Garza.

Attorneys Chelsie King Garza and Randall O. Sorrels are attorneys at the Houston law firm of Abraham, Watkins, Nichols, Sorrels, Agosto & Friend. Since 1951, the firm has advocated for the rights of thousands of catastrophically injured clients in cases involving car and truck accidents, work-related injuries, medical malpractice, defective products, aviation accidents and other types of personal injury matters. For more information on the firm, visit their website at **www.abrahamwatkins.com**.

U.S.'S PLACE IN THE WORLD OF WOMEN

by Darlene Prescott, Attorney in Pasadena, Texas

American women today have more opportunities than many women around the world. We hear this all the time. Then comes the "but."

American women continue to make less money than men, and wives and mothers are overly burdened with childrearing and domestic chores. The so-called "glass ceiling" is still firmly in place, particularly in the political arena. Those few female political candidates, who are able to garner the required vast sums of money to run for office in this country, also must face sexist remarks from their male counterparts and the influential media. Women's right to make medical decisions surrounding reproduction is becoming more restricted, even to the point of putting women at risk. And it is well entrenched in American jurisprudence that women can be prevented from taking leadership jobs in religious institutions.

In the United States, women are not stripped and beaten in the streets, or given virginity tests, by state authorities for protesting, as recently occurred in Egypt. But American women were roughed up decades ago when they began demanding the right to vote, which they finally obtained in 1920 with the ratification of the Nineteenth Amendment.

While women were able to finally obtain the basic right to vote, other attempts to attain full equality have not been successful. And equality should include, for example, resources for women who choose to bear the future citizens. Reflecting the realities of modern society is not asking more for women. The fact is that men's concerns have been the focus of human culture, and equality demands that women's needs be lifted out of secondary status.

Those other attempts at equality included the Equal Rights Amendment (ERA), which would have given women more rights. The ERA was declared "dead" in 1982 when the amendment failed to pass. Only 35 of the required 38 states ratified the amendment.

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) came into force in 1981, but the United States, along with several other countries, has not ratified this comprehensive convention on women's rights. The convention has been languishing in the Senate Foreign Relations Committee for some thirty years. A vote has never been taken in the Senate, even with the amendments that have been added – some of which would ensure that women would not be paid mandatory maternity leave or be paid wages using comparable worth adjustments. Conservative groups also worry that ratification would result in fewer restrictions on women to control their reproduction.

In July of 2010, the United Nations established the UN Entity for Gender Equality and the Empowerment of Women (UN Women), replacing four UN underfunded offices devoted to gender equality. This new office was created to give women around the world a stronger voice for gender equality. The funding for the new office has not come close to the $1 billion needed for the startup phase. The United States, which lobbied for the establishment of the new office, gave a mere $6 million in 2011. State Department officials claim they are doing the best they can given the current economic and political realities.

In other words, gender equality not a priority in the United States congress – where only a few women participate in lawmaking.

This is ironic, considering that women outnumber men in the United States. The fact is that women do not vote as a bloc. And some women do not vote at all.

Women, however, who believe gender equality should be the enforced law of the land in every country, must work harder and smarter. It is argued that eliminating restrictions on women and providing equal opportunities would result in more progress. While superior societies would be the happy outcome, full equal rights for women is reason enough.

HELP WANTED: UNHAPPY WORKER
SINGLE FEMALE PROFESSIONALS ONLY NEED APPLY

by Kim Cagle, Attorney in Houston, Texas

The unhappiest white collar worker is a 42 year old single, professional female with no children, according to a Captivate Office Pulse Survey released in September 2011.[1] As a 40-something single lawyer with no children (unless you count fur children), I found this rather surprising.

Who is the happiest worker? I incorrectly assumed that it would be someone with fewer responsibilities, such as a young, single professional male with no children. Instead, per the report it is a 39 year old married male in senior management with a wife that works part-time and one young child. While the difference in income was noted in the study (with the unhappy woman earning less than $100,00 and the happy male having a household income of $150,000-$200,000), work-life balance appears to be at the root of the disparity in happiness.

The study indicates that 75% of men are happy with their work-life balance versus 70% of women. At work men are 25% happier and at home they are 8% happier than women. One reason women are less happy at home may be because they continue to take the lead in household responsibilities. Women take the lead in laundry (62%), grocery shopping (61%), cooking (56%) and cleaning (53%), while 35% or less of men take the lead in these chores. This would partly explain why the married man with a wife who handles these duties is reportedly happier than his single female co-worker.

Although men are not taking the lead in household chores, they are taking more breaks during the work day than women. They are 35% more likely than women to take breaks "just to relax" and 25% more likely to take breaks for personal activities. Personal activities outside the office include lunch (men scored 5% higher), walking (7% higher), exercising (8% higher), smoking (11% higher) and sex (also 11% higher).

The lack of work-life balance takes its toll on everyone's health, but more so on women. Almost 87% of men and women reported that work-life balance negatively affects their health, but women report having more stress (67% of women vs. 58% of men), headaches (54% vs. 43%), muscle tension (44% vs. 34%), weight gain (44% vs. 37%) and depression (29% vs. 28%). "Wellness programs" at work do not appear to be that helpful, since employees at companies without such programs reported being 23% happier.

What do the "happy" workers do to help maintain a healthy work-life balance? According to the survey 93% take vacations, 66% have a weekly to-do list, 89% leave work at a reasonable hour and 68% take breaks during the work day.

As a transactional lawyer, I have struggled with work-life balance, especially as it relates to leaving work at a "reasonable" hour. If we have a lot of deals that need to close by a certain date, particularly by quarter-end or year-end, then working late is required to meet the deadlines. Similarly, my colleagues have to put in long days and weeks preparing for trial or an arbitration proceeding. Other times, such as the beginning of the year, the dust has settled from the flurry of closings and work can be very slow. I then stress about not having a "work-life balance" (either too much or not enough work), thereby exacerbating the situation.

How then to achieve the elusive "work-life balance"? In a weekly e-newsletter last September, Jon Gordon, a motivational author and speaker[2], wrote that he doesn't believe that it really exists and, like most of us, he has not been able to achieve a work-life balance on a day-to-day basis.[3] Rather, "there is a rhythm to life and there is a season for everything."[4] He advises looking at your life on a weekly, monthly and yearly basis. Work hard when you need to, but also schedule time to play, recharge and renew and to spend quality time with friends and family. I found this to be an innovative and, for me liberating, way to look at the work-life balance concept.

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1. See http://officepulse.captivate.com/work-life-balance.
2. See http://jongordon.com.
3. See http://www.jongordon.com/newsletter-090511-work-life-balance-myth.html.
4. Id.

THE RULES HAVE CHANGED: IMPORTANT VENUE AND REMOVAL CONSIDERATIONS

by Melissa Dorman, Attorney in Dallas, Texas

When we rang in 2012, few of us realized that new venue and removal rules were going into effect. The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the "Act") became effective January 6, 2012, and makes important changes to our jurisdiction and venue rules.

Here are the key changes:

1. When removing a case to federal court, each defendant will have 30 days from its own date of service to seek removal. Before the Act, there was a split among the federal circuits regarding whether the deadline ran from the date the first defendant was served, in multi-defendant cases, or whether it began when the last defendant was served.

2. A defendant may remove a case outside of the 30-day period if new evidence shows that the case has become removable (e.g. amount in controversy). The 30-day period starts upon the receipt of such evidence.

3. All defendants must consent to removal.

4. For the amount in controversy, a defendant may assert the amount of controversy in its removal notice, and the amount in controversy must be shown by the preponderance of the evidence.

5. For venue purposes, residency is a natural person's state of domicile. The parties may stipulate to a transfer of venue.

The Act applies to all new state and federal lawsuits commenced on or after that date. The Act clarifies and changes the following statutes: 28 U.S.C. §§ 1332, 1391, 1392, 1404, 1441, 1445, and 1446. It also inserts a new statute at § 1390. Some of the Act's changes include the rules affecting the timing of removal in cases with multiple defendants, determination of amount in controversy, and venue. Overall, this Act is important because of its attempt to clarify and simplify many jurisdictional and venue rules. Its most important changes are discussed below.

Prior to the Act, there was a circuit split concerning the statutory 30-day period for a defendant to remove to federal court under 28 U.S.C. §1446(b). The split concerned cases with multiple defendants served at different times. The Fifth Circuit had a more stringent interpretation of the 30-day rule as applied to multiple defendants. In *Getty Oil Corp. v. Insurance Co. of North America*, the court stated that "since all served defendants must join in the petition, and since the petition must be submitted within 30 days of service on the first defendant, all served defendants must join in the petition no later than 30 days from the date on which the first defendant was served." Under *Bailey v. Janssen Pharms., Inc.*, the Eleventh Circuit followed the last-served defendant rule. The court held that each defendant, upon formal service of process, was permitted 30 days to file a notice of removal. The practical result was that the limitations period for removal was extended until 30 days from service on the last-served defendant. Contrast the Eighth Circuit interpretation, with *Marano v. Z-Teca Restaurants*: each defendant should be afforded "thirty days after receiving service within which to file a notice of removal, regardless of when—or if—previously served defendants had filed such notices."[3] The court considered the difficulties for a defendant "when the first-served defendant for whatever reason does *not* file a notice of removal within thirty days of service."[4]

In addressing the circuit split, the Act amends 28 U.S.C. § 1446 and makes it more defendant-friendly. Now, the 30-day period applies to each defendant's own date of service.[5] Furthermore, earlier-served defendants may consent to the removal initiated by a later-served defendant, even if it falls outside of 30 days from the earlier-served defendants' filing deadline.[6] The Act also codifies the "rule of unanimity" in § 1446, requiring that all defendants join in the same removal action.[7]

The Act also makes three major changes to the amount of controversy rules under § 1446. First, when a state pleading does not include specific allegations of an amount in controversy, the defendant had previously been unable to remove if new evidence emerged indicating that the amount in controversy was met. Under the Act, even if the 30-day removal deadline has passed, a defendant may file for removal if it receives documents—through service, discovery, or otherwise—indicating that the jurisdictional amount in controversy is satisfied.[8] The 30-day period will start to run upon the defendant's receipt of such documents.

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The Act also changes removal practice when the plaintiff is asking for: (1) nonmonetary relief; (2) monetary judgment, but the state practice does not permit demand for a specific sum; or (3) monetary judgment, but the state practice permits recovery of damages in excess of the amount demanded. The "sum demanded in good faith in the initial pleading shall be deemed to be the amount of controversy" unless one of the above three situations apply and the removal notice asserts the amount in controversy. [9] Finally, the Act adopts the majority view that the preponderance of the evidence is required to show the amount in controversy.[10]

The Act continues with sweeping changes to venue rules, starting at 28 U.S.C. § 1390. This includes inserting a new section, § 1390, defining venue and clarifying the application of Chapter 87 of Title 28 of the U.S. Code.[11] In addition to the addition of § 1390, the Act removes §§1391 (a) through (d) and replaces them with vastly different language. One of the most important venue changes in (a) through (d) is that the Act resolves the question of residency for the purpose of venue. Now, under 28 U.S.C. § 1391(c), residency is a natural person's state of domicile.[12] This is the same standard used to determine citizenship for diversity jurisdiction. For the venue of defendant corporations, however, they are still deemed to reside "in any judicial district in which such defendant is subject to the court's personal jurisdiction."[13] Finally, under the new 28 U.S.C. § 1404, litigants may stipulate to the transfer of venue to a district where the lawsuit may otherwise have not originally been brought.[14]

The Act has completely reorganized the jurisdictional statutes in Title 28 of the U.S. Code. First, the Act amends 28 U.S.C. § 1445 to change the procedure for removal of criminal actions.[15] The Act also changes the jurisdiction rules regarding legal permanent residents under 28 U.S.C. § 1332(a).[16] Additionally, the Act amends 28 U.S.C. § 1332(c) so that a corporation or insurer may be deemed the citizen of a foreign state.[17] The Act also repeals 28 U.S.C. § 1392.

There is no indication that the Act intends to abrogate the decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.* *Murphy* dealt with the provision in § 1446 which states that the 30-day removal period is triggered by service or "receipt" of the pleading.[18] In *Murphy*, the issue was whether the 30-day period started on the date of official service, or on the date of defendant's receipt of a "courtesy copy" which was faxed to defendant's office.[19] The Court ultimately held that formal service, not mere receipt, is required for the 30-day period to start.[20] This too is good news for defendants.

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 is intended to make federal practice more predictable and uniform, and it should make things easier on practitioners dealing with these issues in federal court.

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1. *Getty Oil Corp., a Div. of Texaco, Inc. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1262 (5th Cir. 1988).
2. *Bailey v. Janssen Pharm., Inc.*, 536 F.3d 1202, 1209 (11th Cir. 2008).
3. *Marano Enterprises of Kansas v. Z-Texas Restaurants, L.P.*, 254 F.3d 753, 756 (8th Cir. 2001).
4. *Id.* at 755.
5. FEDERAL COURTS JURISDICTION AND VENUE CLARIFICATION ACT OF 2011, PL 112-63, December 7, 2011, 125 Stat 758 at Section 103(b)(3)(B) (hereinafter "Jurisdiction and Venue Clarification Act") ("[e]ach defendant shall have thirty days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal.").
6. *Id.* (when "defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though the earlier-served defendant did not previously initiate or consent to removal.").
7. *Id.* ("all defendants who have been properly joined and served must join in or consent to the removal of the action.").
8. Id. ("if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.").
9. *Id.* at Section 103(b)(3)(C).
10. *Id.*
11. *Id.* at Section 201.
12. 28 U.S.C. § 1391(c) will now read, in part: "For all venue purposes (1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled. . . ." *See* JURISDICTION AND VENUE CLARIFICATION ACT at Section 202(1).
13. JURISDICTION AND VENUE CLARIFICATION ACT at Section 202(1).
14. 28 U.S.C. § 1404(a) will now read: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district *or division where it might have been brought or to any district or division to which all parties have consented*." (emphasis added to indicate amended text). *See* JURISDICTION AND VENUE CLARIFICATION ACT at Section 204(1).
15. JURISDICTION AND VENUE CLARIFICATION ACT at Section 103(c).
16. 28 U.S.C. § 1332(a) will now read: "The district courts shall have original jurisdiction of all civil actions where the matter in

controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . (2) citizens of a State and citizens or subjects of a foreign state, *except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State*." (emphasis added to indicate amended text). *See* JURISDICTION AND VENUE CLARIFICATION ACT at Section 101(2).

17 28 U.S.C. § 1332(c)(1) will now read: "[A] corporation shall be deemed to be a citizen of any State or foreign state by which it has been incorporated and of the State or *foreign state* where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of (A) *every* State and *foreign state* of which the insured is a citizen; (B) *every* State and *foreign state* by which the insurer has been incorporated; and (C) the State or *foreign state* where *the insurer* has its principal place of business . . ." (emphasis added to indicate amended text). *See* JURISDICTION AND VENUE CLARIFICATION ACT at Section 102(3).

18 28 U.S.C. § 1446(b) ("The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.").

19 *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999).

20 *Id.* at 347—48 ("we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.").

PLEASE SUBMIT YOUR 2012 AWARD NOMINATIONS!

The Women and the Law Section is seeking nominations for the Sarah T. Hughes Women Lawyers of Achievement Award and the Ma'at Justice Award. These awards will be presented at the State Bar Annual Meeting in Houston on June 21, 2012 during our section's annual meeting.

The Sarah T. Hughes Women Lawyers of Achievement Award recognizes women who have achieved excellence in their fields while influencing other women to pursue legal careers or facilitating their advancement in their legal careers. The impressive list of past recipients includes Louise Raggio, Harriet Miers, Gaynelle Griffin, Justice Alma Lopez, and last year's honoree, Mary Korby.

The Ma'at Justice Award looks at contributions that women have made in their communities, with an equally impressive list of names, including Carolyn F. Moore, Jonita Borchardt, Judge Migdalia Lopez, ileta Sumner, Alicia Key, and last year's honoree, Deborah Fitzgerald Fowler.

You can find more information on these awards and past recipients of each at the Women and the Law website, located at **www.txwomenlawsection.org.**

If you know of someone deserving of either of these awards, please email Alison Colvin at aw.colvin@rcclaw.com.

Please include in your email the following: (1) the nominee's name; (2) the nominee's contact information; (3) a brief description of why the nominee should receive the award; and (4) any other information that you believe would be helpful to the council in making its decision. Nominations close on March 20, 2012.