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**WHAT HAPPENS IN VEGAS? –
OR, WHITHER IMMORALITY?**

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A. Decline of “Immorality”?

Prior to the 1995 Education Code recodification, Section 13.109 of the Code listed six reasons for discharge of a probationary or continuing contract during the school year, and the first listed reason was “immorality.” Section 13.109(a)(1) of the Code simply listed “immorality” as a reason for discharge, without regard to where the immoral conduct occurred. As part of the 1995 recodification of the Education Code, old Section 13.109 was essentially replaced with current Section 21.156, which provides the “good cause” reason for discharge, “good cause” being defined as “the failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state.” “Immorality” is not mentioned.

In 1997, the Texas Legislature amended the Family Code by adding so-called “heart balm” statutes. Black’s Law Dictionary defines the term “heart balm statutes” as state “statutes abolishing right of action for alienation of affections, breach of promise to marry, criminal conversation, and seduction of person over legal age of consent.” The Legislature added Sections 1.106 and 1.107 to the Texas Family Code, providing that a right of action by one spouse against a third party for criminal conversation or for alienation of affection “is not authorized in this state.”

The common law tort of alienation of affection generally required (1) some degree of love between spouses; (2) the spousal love was alienated and destroyed; (3) by the defendant’s malicious conduct. The tort of alienation of affections “is a tort based upon willful and malicious interference with marriage relation by third party, without justification or excuse.” It involves the wrongful conduct of a defendant, causing the plaintiff’s loss of affection or consortium of the spouse. Black’s Law Dictionary (5th Ed. West 1979). Only a handful of states still recognize the tort.

Criminal conversation was a similar common law tort action. “Conversation” is an antiquated expression for sexual intercourse. Black’s defines “criminal conversation” as “defilement of the marriage bed, sexual intercourse of an outsider with husband or wife, or a breaking down of the covenant of fidelity. Tort action based on adultery, considered in its aspect of a civil injury to the husband or wife entitling him or her to damages.”

At the same time, the Legislature added Section 1.108 to the Family Code, providing that a promise or agreement “made on consideration of marriage or nonmarital conjugal habitation is not enforceable unless” in writing and signed.

In 2003, the Supreme Court decided *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Scalia, in dissent, argued that the court majority had espoused the view expressed by then-Justice Stevens’ dissent in a prior case, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,” and that this view “effectively decrees the end of all morals legislation.” *Id.* at 599 (Scalia, J. dissenting).

“Immorality” used to be seen with some frequency as a reason for nonrenewal in school district policies. It is far less common now, and since 2004, most school districts have deleted it as a reason for nonrenewal. Only a handful of districts still list it. School district policies do commonly contain reasons for nonrenewal consisting of “failure to meet the District’s standards of professional conduct,” as well as “any activity, school-connected or otherwise, that because of publicity given it, or knowledge of it among students, faculty and community, impairs or diminishes the employee’s effectiveness in the District.”

The Houston ISD retains immorality as a reason for nonrenewal in its Board Policy DFBB (Local). In that policy, it is defined as follows:

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