# Voice For The Defense

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOL. 1 NO. 3 FALL, 1972

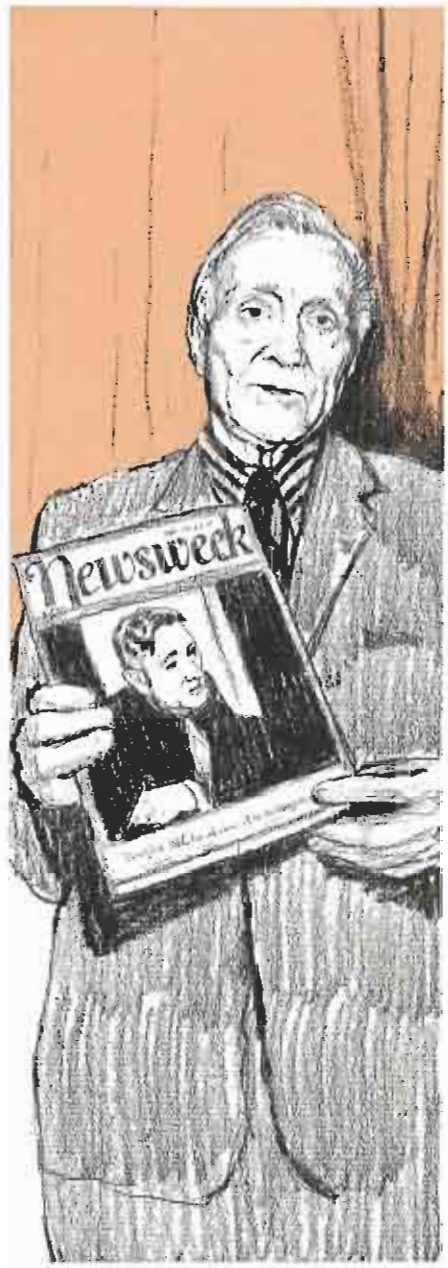

## Friloux Elected President

C. Anthony Friloux, Jr. of Houston was unanimously elected President of **TCDLA** at its second annual meeting in Houston on July 5, 1972. President Friloux, a Charter Director of **TCDLA**, was one of its initial organizers and chaired its founding membership drive which marshalled a force of 350 members within a span of one year. He also served as Charter President of the Harris County Criminal Lawyers Association, the state's pioneer criminal defense organization.

On behalf of the membership of **TCDLA**, President Friloux presented outgoing Charter **TCDLA** President Frank Maloney with a plaque inscribed "Texas Criminal Defense Lawyers Association Pays Tribute to Frank Maloney in Recognition of the Lofty Purpose and Professional Excellence That He as Founding President Has Created within Our Organization in a Manner That Charts a High Course for All Who Would Aspire to Follow."

At the annual business meeting held in conjunction with the election of officers, several key resolutions were adopted. Among them was a resolution urging legislation to establish a ten per cent deposit bail bond system based on the experience of the Illinois Plan whereby ten per cent of the face amount of the bond is deposited into the registry of the court by the defendant and ninety per cent of that amount is returned to the client at the conclusion of the case rather than having the ten per cent lost to a third party at a time when the client can ill afford a depletion of available funds for his defense effort. The resolution, subsequently adopted by the Texas State Bar at its 1971 General Assembly, was the handiwork of the **TCDLA** Bail Bond Reform Committee chaired by Charles Orsburn. Also adopted was a resolution urging the Governor to open the Special Session of the Legislature to the consideration of legislation to reduce marijuana penalties.

Other officers elected were: Phil Burleson, Dallas, President-Elect George E. Gilkerson, Lubbock, 1st Vice President Randell C. Riley, Fort Worth, 2nd Vice President Mrs. Joe Kegans, Houston, Secretary-Treasurer Stuart Kinard, Houston, Assistant Secretary-Treasurer.




## Justice Douglas Keynote Speaker

*TCDLA presented Justice William O. Douglas, keynote speaker of the Texas Bar Association Criminal Law Section, a copy of the March 27, 1939 issue of Newsweek which announced as its cover story, "Douglas, S.E.C. Head Named to Supreme Court."*

# President's Report

By C. Anthony Friloux, Jr.

# "NO" To Public Defenders

The indigent problem in Texas has reached the critical stage.. A concerted move by the national public defender organization to establish local defender organizations in Texas is now in progress.

Because of the total lack of any program by the State Bar Association or local governments, the resultant vacuum is made to order for a successful move by the public defender forces.

It is critical that defense attorneys in Texas realize that such a prospect is fraught with many dangers. The history of legal aid clinics and other defender units clearly reflect that these approaches do not result in the indigent defendant receiving the most effective assistance of counsel.

An indigent is entitled to the services of a qualified attorney who is free to represent him without economic or political pressure from the district attorney or the press.

Bureaucratic organizations—such as public defender organizations—have a strange way of becoming dependent on their relationship with the district attorney and the courts. They are subjected to pressures relating to either state funding agencies or Federal funding agencies.

All too often the staff personnel of the public defender organization is composed of attorneys who have never been able to succeed as private practitioners; this results in the indigent defendent receiving a **second-class** representation when the intent and tenor of the decisions of the Supreme Court clearly reflect he is entitled to **first-class** representation.

Regardless of these ills of the public defender concept, they will succeed in stepping into the void presently existing in Texas unless the defense bar takes the lead in spearheading a constructive alternative.

Having over the years represented many state and Federal indigents, without fee, I am fully convinced that most private practitioners spend as much time and effort, if not more, on court appointed indigent cases as they do on clients paying a regular fee.

**TCDLA**, and all defense attorneys in Texas have a chance to stop this impending move by the Public Defenders only if we are willing to recognize that private practicing attorneys can assume this obligation on a reasonable fee basis. . . and then accept the responsibility of providing the leadership to get the necessary legislation passed to assure retention of a system wherein private practitioners represent the indigents.

Failure to act immediately will assure a substantial intrusion into the professional income of Texas attorneys practicing criminal law, and deny to the indigent defendant 'an attorney who can—free from pressure—fully represent his interest. He is entitled to nothing less!

## Amicus Curiae Committee

Should you know of a particularly significant point of law on appeal with broad implications for the defense practice, you are urged to contact Tom Sharp, **TCDLA** Director in Brownsville who is Amicus Curiae Committee Chairman in order to activate exploration of the advisability of filing an Amicus Curiae Brief on behalf of the Association concerning that particular point of law.

## Law Enforcement Committee

**TCDLA** members are urged to report to the Law Enforcement Committee in care of the **TCDLA** office in Austin any abuse of police power which, because of repetitious exploitation by a particular officer or because of the flagrance of the violation should be red-flagged for investigation and appropriate follow-up action.

Warren Burnett of Odessa is chairman and Charles McDonald of Waco, co-chairman, of this committee.

## DPS Narcotics Officers Indicted

The DPS agents who filed aggravated assault charges on **TCDLA** Director, Charles McDonald, have now discovered that the boot is on the other foot. In the aftermath of vigorous protest by **TCDLA,** McDonald was found "Not Guilty" on May 12 of the charge of allegedly attacking the agents. On Monday, July 24, 1972, a Federal Grand Jury in Waco indicted the two agents, Billy Clifton and Bobby Adams, for violations of Charles McDonald's civil rights under Section 242 of the Civil Rights Act.

Conforming to the often repeated, but seldom rectified, police pattern the confrontation out of which the DPS agents claimed that they had been assaulted by McDonald resulted in McDonald, not the officers, being hospitalized with fractures of three ribs, a perforated eardrum and numerous contusions.

# In the wake of the Death Penalty Decisions

# ... A TEXAS DILEMMA

By Richard T. Marshall

*EDITOR'S NOTE: About the author—Richard Marshall is a charter member of TCDLA. He received his Juris Doctorate from Yale Law School in 1951 and is a member of the El Paso Bar Association.*

Four months after the U.S. Supreme Court's historic death penalty ruling, confusion persists in Texas as to whether the State can avoid re-trying the formerly condemned persons by means of commuting their sentences to life imprisonment. In its decision of June 29th, the Supreme Court, with four dissenters, held the imposition of the death penalty in three cases to be cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Furman v. Georgia, Jackson v. Georgia* and *Branch v. Texas*, 408 U.S. 238, 92. S.Ct. 2726, 33 L.Ed.2d 346. These convictions, and scores of others summarily ruled upon the same day, were vacated only insofar as "the judgments below left undisturbed the death penalty imposed."

The *Furman* rule is an amalgam of the different views of the majority of the Supreme Court, who expressed their separate opinions in concurrences. Only Justices Brennan and Marshall would have held the death penalty unconstitutional *per se*. Justice Douglas considered the application of the death penalty as discriminatory against the poor and the minorities and hence unconstitutional. Justices Stewart and White refused to hold the death penalty itself unconstitutional, but found the infrequency and manner of imposition of the death sentences to be cruel and unusual, and in fact, "freakish."

Prosecutors in Texas were appalled at the prospect of up to fifty new trials, some of them depending upon evidence which would be difficult or impossible to prove once more because of the passage of time. In some other states, statutory law provided for resentencing by the trial judge, or even the appellate court. Still

other states provided for new trials on the issue of penalty alone. Texas, however, was an exception. Under our Code of Criminal Procedure, the Court of Criminal Appeals cannot resentence one whose original sentence has been vacated by the Supreme Court. Article 44.24, VACCP limits the Court to affirming judgments, reversing and remanding for new trial, reversing and dismissing, or reforming and correcting the judgment. This does not include the authority to re-sentence defendants. Improper convictions and sentences can only be remanded to the district courts for new trials. Such new trials cannot be limited to the punishment issue; the entire question of guilt as well as penalty must be relitigated. And the right to jury trial is preserved, too. *Ellison* v. *State*, 432 SW2d 955 (Tex. Crim. App., 1968), *Grider* v. *State*, 468 SW2d 393 (Tex. Crim. App., 1971) and *Ocker* v. *State*, 477 SW2d 288 (Tex. Crim. App., 1972).

On June 28th, just a day before the *Furman* ruling, the Court of Criminal Appeals rendered a decision which gave the State a way out. *Whan* v. *State*, No. 41,789, SW2d . Whan's death penalty had been vacated by the U.S. Supreme Court in July of 1971, on a finding that he had been convicted by a jury selected in violation of the test of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), wherein the Supreme Court ordered, "that the judgment of the Court of Criminal Appeals of Texas, insofar as it imposes the death sentence, be reversed, and that this cause be remanded to the Court of Criminal Appeals of the State of Texas for further proceedings. . . " *Whan v. Texas*, 403 U.S. 946. Five months later, and before the Court of Criminal Appeals had acted on the Supreme Court's mandate, the Governor granted Whan a commutation to life imprisonment. This the Court of Criminal Appeals held to be valid, finding that, "The imposition of the death penalty is no longer possible by virtue of the commutation." The Court reasoned that since a commutation doesn't affect the judgment but merely mitigates the punishment, no change in the original judgment was necessary. The commutation had rendered the death penalty portion of the judgment a nullity. On this basis, the Court of Criminal Appeals once again affirmed Whan's original conviction.

Presiding Judge Onion dissented in *Whan*. He cited the majority's action as being inconsistent with its prior actions

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**Texas Dilemma** *continued*

following Supreme Court death penalty reversals in *Ellison, Grider* and *Ocker*. The difference in *Whan* was the Governor's commutation, and the question was whether he could commute a death penalty to life imprisonment before the Court of Criminal Appeals had had an opportunity to act on a Supreme Court mandate which in effect had declared the death sentence a nullity. Judge Onion concluded that the Governor did not have this authority under Article IV, Section 11, Texas Constitution, because he could not commute a sentence which no longer was in existence, having been set aside by the Supreme Court, which found it to have been improperly assessed. He criticized the majority for confusing commutation with pardon, pointing out that the Governor's authority to grant commutations is less extensive than the constitutional authority to pardon, which may be granted without regard to whether or not a valid penalty has been assessed, and which, unlike commutation, requires the acceptance of the defendant.

Prosecutors throughout the State greeted the *Whan* sanction of commutation to life imprisonment with enthusiasm, since it meant they could secure the maximum punishment now allowed by law without new trials. They quickly deluged the Board of Pardons and Paroles with letter applications for commutation. Where motions to remand for new trial were pending with the Court of Criminal Appeals, in most cases they ignored answering or controverting such motions, taking their business to the Board of Pardons and Paroles in what seemed to be a legally sanctioned executive short cut.

The Board, in turn, requested an opinion of the Attorney General, in the light of *Furman* and *Whan*, as to its authority to recommend commutations. First, it wanted to know if *Furman* had rendered the death penalty unconstitutional, *per se*. Next, could commutation be granted over the protest of the condemned person? In all, they submitted five questions to the Attorney General, clearly revealing a desire for authority to accommodate the hard-pressed prosecutors who were out to take advantage of an opportunity to avoid new trials. Incidentally, in many cases the same prosecutors a year earlier had resisted commutations and insisted on new trials following *Witherspoon* reversals, when they could still seek the death penalty on retrial.

On August 1st, the Attorney General issued his opinion No. M-1187 in response. He explained that *Furman* did not hold the death penalty unconstitutional *per se*, but had declared unconstitutional the Texas procedure of assessing the penalty. The Governor, he said, could commute death sentences to life imprisonment at any stage of the proceedings between jury verdict and granting of a new trial, including, "Where the U.S. Supreme Court has granted death penalty relief and remanded the cause to the Court of Criminal Appeals (but where the Court of Criminal Appeals has not yet acted to grant a new trial)." Further, the Board could act *sua sponte*, although by its own rules commutation action must be initiated by unsolicited recommendation of a majority of the trial officials (the present Judge of the convicting court, the prosecutor and the Sheriff). Moreover, in commuting death sentences under these circumstances the Board and the Governor had no obligation to refer cases back to the courts for resentencing. Finally, commutations of death sentences to life imprisonment could be granted over the protests of the condemned persons.

Within the next ninety days nearly all of the approximately fifty Death Row inmates found themselves facing life imprisonment as a result of commutations. Some had consented but many others opposed commutation. Some protested to various officials, including the Attorney General, the Board and Judges of the convicting courts. A few petitioned the Court of Criminal Appeals, either by way of *habeas corpus* or motion to remand for new trial, as they saw the hard-won hopes raised by *Ellison, Grider* and *Ocker* being denied them. Argument was set on all these petitions and motions by the Court of Criminal Appeals on October 25th, and on that day attorneys representing three of the men, Elmer Branch, Billy Stanley and Leopoldo Morales, Jr., presented to the Court the case against commutation.

Without expressly demanding a reversal of *Whan*, they argued that the Court's sanction of blanket commutations by the Governor amounted to a delegation of judicial authority to the executive and an abandonment of the separation of powers basis of our form of government. They pointed out that mass commutation of invalid death sentences to the maximum punishment allowed now by law was neither an exercise of clemency nor an executive function. Such an intrusion by the Governor into the judicial process was a perverse extension of his constitutional authority, not merely a gross abuse of that authority. It amounted to an *ex post facto* resentencing done without due process and a denial of the right to jury determination of sentence under Article 37.07 VACCP,—in short, a denial of rights which are federally protected in the Seventh and Fourteenth Amendments. They reminded the Court that the Supreme Court had invalidated the "imposition" of the death penalty, and not the "assessment" or mere "execution" thereof. Hence the death sentences were vacated when the Governor sought to commute them, and his attempted act was no better than a legislative bill of attainder, which is constitutionally prohibited.

Clearly, it was further argued, in resetting sentences at life imprisonment, the Governor was acting as only a judge or jury could, in a proper trial, under due process and on the basis of judicially admissable evidence, with the consideration of all punishments allowed by law, including those lesser than life imprisonment. Citing opinions of the Florida, Illinois and Virginia Supreme Courts rendered in September and October, 1972 and not yet reported, they pointed out that even in other states where courts had greater flexibility than in Texas, federal due process had required new trials after Supreme Court reversals of death sentences. This right to due process standards on resentencing, moreover, was not limited to the minimal due process standards set out in *Mempa* v. *Rhay*, 389 U.S. 128 (1967), dealing with the right to counsel and hearing in deferred sentencing probation revocations; nor those of *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), extending similar rights to parole revocation hearings.

Within the next few weeks, the Court of Criminal Appeals may be expected to rule definitively, following *Furman*, on how far to extend the *Whan* rule, or whether to retain it at all. If its decision conflicts with the Illinois, Florida and Virginia opinions, we may expect to see an attempt to get certiorari in the U.S. Supreme Court. The State of Texas is relying on the *Whan* position, as it must. As the Attorney General admitted in his Opinion No. M-1187 on August 1st, "... absent commutation, the court concerned must either grant a new trial (or in habeas corpus, order the release of the prisoner if a new trial is not granted)."

# TCDLA Provides Effective Legal Education

The Texas Ciminal Defense Lawyers Association is making a concentrated effort to close the "skills-institute gap" that has heretofore handicapped the individual criminal defense lawyer. Numerous government funded mail-outs and government sponsored seminars keep the prosecution abreast of case law that serves the cause of conviction while, heretofore, there has been virtually no similar resource to equip the criminal defense lawyer in protecting the rights of the individual defendant.

Since its formation, **TCDLA'S** Continuing Legal Education Committee, under the Chairmanship of George Gilkerson, has accelerated the pace to close that gap through its Regional Institute Program.

San Antonio was the site of the Inaugural **TCDLA** Seminar, co-sponsored by the San Antonio Trial Lawyers Association. Co-chaired by Charles Butts and C. David Evans, it has presented the following topics and speakers:

*"Current Developments in Criminal Law"* by John Onion, Presiding Judge of The Texas Court of Criminal Appeals; *"Investigation Of Criminal Cases"* by Warren Burnett of Odessa; *"Preparation For Trial"* by Roy R. Barrera of San Antonio; *"Jury Argument"* by Emmett Colvin of Dallas; and *"Texas Supreme Court Jurisdiction In Ancillary Criminal Matters"* by Chief Justice Robert W. Colvert of the Texas Supreme Court.

On June 3, 1972, the Regional Criminal Defense Law Institute was held in Houston in co-sponsorship with The Harris County Criminal Lawyers Association. Speakers and topics were as follows:

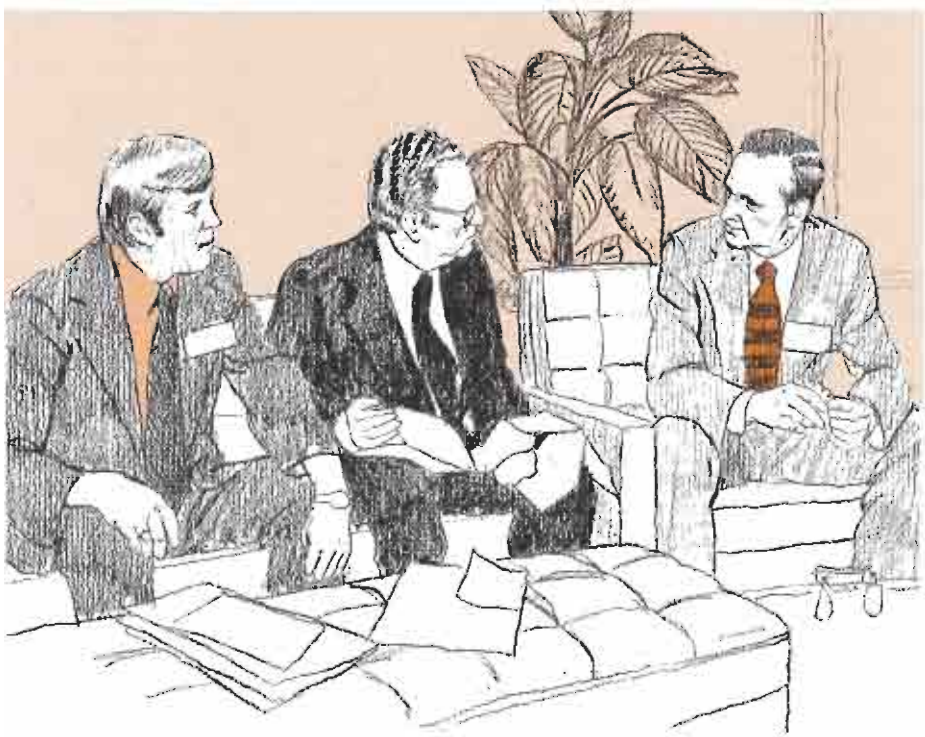
Emmett Colvin of Dallas on *"Defense Pre-Trial Preparation"*; Richard Haynes of Houston on *"Defense Cross-Examination Of Expert Witnesses"*; Frank Maloney of Austin on *"Critical Trial Problems For The Defense"*; George Gilkerson of Lubbock on *"Defense Voir Dire"*; and Charles Tessmer of Dallas on *"Defense Jury Argument"*. Stuart Kinard of Houston was Institute Chairman.

The Pre-Convention Institute at the Texas Bar Association meeting on July 5 in Houston was on the *"Defense Of Drug And DWI Cases,"* and was jointly sponsored by The Texas Criminal Defense Lawyers Association and The Criminal Law and Procedure Section. Speakers and their topics were:

Charles Tessmer of Dallas on *"Preparation And Trial Of Drug And DWI Cases"*; Warren Burnett of Odessa on *"Voir Dire Examination In Drug And DWI Cases"*; Erwin G. Ernst, Chief of the Felony Division of the Harris County District Attorney's Office, and Frank Price on *"Direct And Cross Examination Of Witness On Breathalyzer"*; Charles Tessmer on *"Cross Examination Of Floyd McDonald, City Chemist Of Houston"*; George Gilkerson of Lubbock on *"Jury Argument In Drug And DWI Cases"*; Dr. Arthur H. Briggs, Chairman, Department of Pharmacology, University of Texas Medical School at San Antonio, examined by Phil Burleson of Dallas for the defense and William F. Alexander of Dallas for the state, as a demonstration of expert testimony in drug cases; and Marvin Teague, now of Houston, on *"Appeal Of Drug And DWI Cases"*. Charles Tessmer and Joe Kegans co-chaired the Institute.

The North Texas Seminar was held in Dallas on October 6, 1972. Speakers and topics were as follows:

*"How To Deal With Your Client In A Criminal Case"* by Phil Burleson of Dallas; *"How To Win Your Motion To Suppress"* by Jack Rawitscher of Houston; *"A Demonstration Of The Polygraph"* by Dee E. Wheeler of Ft. Worth, a member of the Texas Board of Polygraph Examiners; *"The Unexplored Frontier:*



*Dallas Criminal Law Seminar speakers Phil Burleson (left) and Charles Tessmer (center) of Dallas confer with Judge Truman Roberts (right) of the Texas Court of Criminal Appeals, the special guest speaker at the seminar luncheon. The October 6th seminar attracted over 200 area lawyers.*

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**Legal Education** *continued*

*The Punishment Trial"* by Fred Time of Dallas; *"Breathalyzer: Fact And Fiction"* by Ira D. Scott, Breathalyzer Program Supervisor, Dallas Police Department; *"How To Win Your Case By Investigation"* by Charles W. Tessmer of Dallas; and *"The People Who Make Or Break Your Case And What Makes Them Tick"* by William J. Bryan, Jr., Los Angeles, California, founder of the American Institute of Hypnosis who is an author, lecturer, physician and attorney, and has helped notable defense lawyers such as F. Lee Bailey and Mel Belli in their selection of jury panels. Chairman for The Institute was Vincent Perini.

The Coastal Bend Seminar was held on October 13, 1972, at Port Lavaca, Texas, with the following topics and speakers:

*"Recent Developments In Discovery in Criminal Cases"* by Doug Tinker of Corpus Christi; *"How To Preserve Error In The Trial Of Criminal Cases"* by William F. Walsh of Houston; *"Presenting The Criminal Case On Appeal"* by Marvin Teague of Houston; and *"Recent Developments Of Search And Seizure Law In Motor Vehicle Cases"* by Jack Rawitscher of Houston. Chairman for the Seminar was Ted Dunham, **TCDLA** Director, of Port Lavaca.

Currently projected are future seminars for Angleton on December 1, 1972; San Antonio in January of 1973; Lubbock (date to be announced); and Ft. Worth (Pre-Convention) on July 4, 1973. An additional source which will be used for the defense arsenal is an agreement whereby The Harris County Criminal Lawyers Association will furnish to **TCDLA** members significant papers of mutual interest which **HCCLA** presents at its local monthly seminars.

# Join TCDLA Today!

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