EL PASO BAR ASSOCIATION
Founded in 1897

# EL PASO BAR JOURNAL

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An Update of Events and Information

December 2012/January 2013

## Regrets of the Past can Open Pathways to a Better Tomorrow

By Judge Oscar G. Gabaldón, Jr., CWLS *Page 17*

## Federal Courts and the Fiscal Cliff

By Judge Phil Martinez

*Page 12*

# Avoiding a Permanent "Waive": Preservation of Error, *Part II*

By Chief Justice Ann McClure *Page 7*

## President's Page

# This Bar's For You!

This Journal should reach you just before the Joint Bar Association Holiday Party, scheduled for December 6th at the El Paso Community Foundation. It is a time to come together to end the year on a good note. I hope to see you there.

The Fall has been very busy beginning with two great speakers at the October and November lunch meetings. Bill Chriss talked about the noble profession that is ours and Buck Files, SBOT President, helped us honor our veterans and show cased the Bar's "I am the Bar," video. In October, we had a fun and relaxing bowling event which brought together new and veteran attorneys and their families and in November, we had a very successful Speed Mentoring Event. Equally important, the Bar held two fantastic service events-- the Access to Justice Legal Fair in October and the El Paso Lawyers for Patriots Legal Clinic in November. Both were incredibly successful in that members of our community were served, but they also provided another opportunity for young and more experienced lawyers to meet one another and work together.

I mention these events to talk about an overriding thought I have as the end of 2012 nears. I tried in the last President's Page to discuss why participating in the Bar is important for our profession. I will try again. It is my contention that participation in the Bar and engaging with other lawyers shapes the culture of our local practice.

The culture of the practice does not merely involve an adherence to the rules of professional conduct—those are the minimal standards. The culture of the practice is how we practice, what we think are the acceptable norms of conduct and whether or how we believe it is our individual responsibility to maintain that culture. And we talk about "the El Paso practice culture" all the time. We do it at the Bar luncheons; we do it when we talk to our fellow bowlers; we talk about it when we meet young lawyers and only have 4 minutes to give them a piece of advice; we do it every time a new lawyer is sworn into the practice and we get to tell them the one thing we think will help them for the long haul; and Crawford Kerr and Judge Martinez do it in this month's issue when they talk about respecting the rule of law.

The culture of the practice in El Paso is one of collegiality and respect. When lawyers do not respect each other, when judges demean lawyers or litigants, when lawyers disrespect judges, we know it. It is not accepted nor is it condoned in this community even when there are real, deep-seated disputes. Having an adversarial process does not require vitriol; upholding the constitutional rights of litigants seeking to recover (or defend from) money damages in a civil suit or more seriously, protecting the freedom and rights of a defendant charged with a criminal offense does not mandate disrespectful behavior between opposing sides. While we are all less than perfect in our conduct, those instances should be exceptional and consistent with our culture, we should all be tolerant of that exceptional misstep. Having lost my temper and/or expressed frustration with attorneys, I know it happens but those instances are my failures to manage my own feelings as well as that of the lawyers. We can all do better.

***Continue on page 4***

*Cover photo of El Paso by Assistant County Attorney Lucila Camarena, taken in December 2011*

*Continued from page 3*

The culture of the practice includes all the unwritten rules about why we find practices in other communities unbearable and much more agreeable, the unique character of cooperation and reasonableness that *mostly* guides local lawyering. I've had the great privilege of seeing this culture in the courtroom, but also at the social events and legal clinics the Bar has hosted. Thank you to all of you who continue to engage each other and foster this wonderful culture of respect and collegiality. A special thank you for the fantastic involvement of many young lawyers in all these events; your willingness to reach out, to meet some of us "older" lawyers and assist members of our community tells me I am right about the culture of our practice and that you will secure it to the benefit of our noble profession.

May your 2012 end safely and successfully and may 2013 be another productive, honorable year for us all!

Judge Maria Salas Mendoza

## El Paso Bar Association
## December Bar Luncheon
### Tuesday, December 11, 2012

**El Paso Club** • 201 E. Main, 18th Floor, Chase Bank - $20 per person, 12:00 Noon

*Guest Speaker will be*

Herbert Ehrlich, 50-year attorney,

who will speak as part of our tribute to our 50-year attorneys.

We will also have Michael Zimprich who will discuss Business Appraisals and TADC discussion of Supreme Court proposed rule changes on Expedited Actions

El Paso Bar Foundation will present plaques to the attorneys who have fulfilled their commitment to the foundation

**Door prizes will be given out**

**Please make your reservations by Monday, December 10, 2012 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net**

## El Paso Bar Association
## January Bar Luncheon
### Tuesday, January 8, 2013

**El Paso Club** • 201 E. Main, 18th Floor, Chase Bank - $20 per person, 12:00 Noon

*Guest Speaker will be*

Lydia Clay-Jackson,

*President, Texas Criminal Defense Lawyers Association*

**Door prizes will be given out**

**Please make your reservations by Monday, January 7, 2013 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net**

# CALENDAR OF EVENTS

*PLEASE NOTE: Please check the Journal for all the details regarding all above listed events. If your club, organization, section or committee would like to put a notice or an announcement in the Bar Journal for your upcoming event or function for the month of February/March 2013, please have the information to the Bar Association office by Friday, January 11, 2013. In order to publish your information we must have it in writing. WE WILL MAKE NO EXCEPTIONS. We also reserve the right to make any editorial changes as we deem necessary. Please note that there is no charge for this service: (915) 532-7052; (915) 532-7067-fax; nancy@elpasobar.com - email. If we do not receive your information by the specified date please note that we may try to remind you, but putting this journal together every month is a very big task and we may not have the time to remind you. So please don't miss out on the opportunity to have your event announced.*

## December, 2012

**Tuesday, December 4**
*EPBA BOD Meeting*
**Wednesday, December 5**
*Annual Attorney Paralegal Luncheon*
**Wednesday, December 5**
*Court Administrators Holiday Banquet*
**Thursday, December 6**
*Joint Bar Association Holiday Party*
**Thursday, December 6**
*Federal Sentencing Issues CLE*
**Tuesday, December 11**
*EPBA Monthly Luncheon*
*50-Year Attorneys*
**Monday, December 24**
*EPBA Office Closed*
*Christmas Eve*
**Tuesday, December 25**
*EPBA Office Closed*
*Christmas Day*
**Wednesday, December 26**
*EPBA Office Closed*
*Day after Christmas*
**Monday, December 31**
*EPBA Office Closed*
*New Year's Eve*

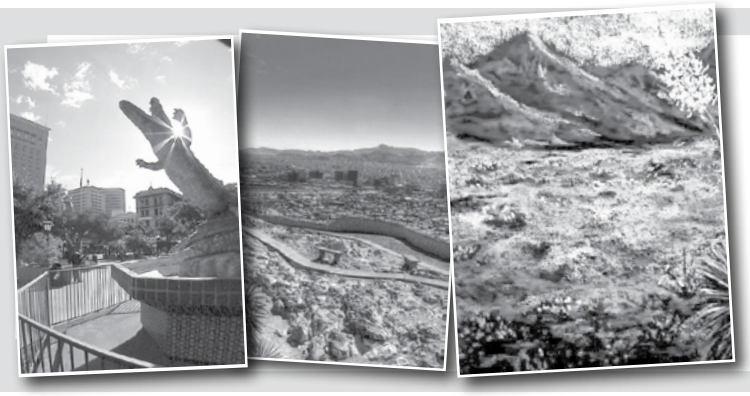
## January, 2013

**Tuesday, January 1**
*EPBA Office Closed*
*New Year's Day*
**Wednesday, January 2**
*EPBA Office Closed*
*Day after New Year's*
**Thursday, January 3**
*EPBA Board Meeting*
**Tuesday, January 8**
*EPBA Monthly Luncheon*
**Wednesday, January 9**
*EPWBA Monthly Luncheon*
**Thursday, January 17**
*EPPA Monthly Luncheon*
**Thursday, January 17**
*Civil Discovery CLE*
**Monday, January 21**
*EPBA Office Closed*
*Martin Luther King Day*

## Upcoming Events:

**Friday, February 15, 2013**
*17th Annual Civil Practice Seminar*
*Monte Carlo Hotel & Resort Casino*
*Las Vegas, Nevada*

**Saturday, February 16, 2013**
*17th Annual Civil Practice Seminar*
*Monte Carlo Hotel & Resort Casino*
*Las Vegas, Nevada*



## *BE OUR COVER:*

*The El Paso Bar Journal is accepting submissions of photos or other art by its members to serve as the cover of the Bar Journal. This is an exciting opportunity for El Paso lawyers to exhibit their artwork and is designed to inspire and expose the talents of El Paso Bar members. To have your art considered, please send your submission to Nancy Gallego, 500 E. San Antonio, L 112, El Paso, Texas 79901 or e-mail it to her at ngallego.epba@sbcglobal.net, no later than the 10th day of the month preceding publication.*

EPYLA Spotlight

# Joshua Spencer

by Patsy López

The El Paso Young Lawyer's Association is pleased to profile local attorney Joshua Spencer. Joshua, better known around the courthouse as "Josh," had the drive and gumption to hang out his shingle and jump in to private practice shortly after graduating from Thurgood Marshall School of Law at Texas Southern University in 2008. He is currently licensed and practices in the states of Texas and New Mexico.

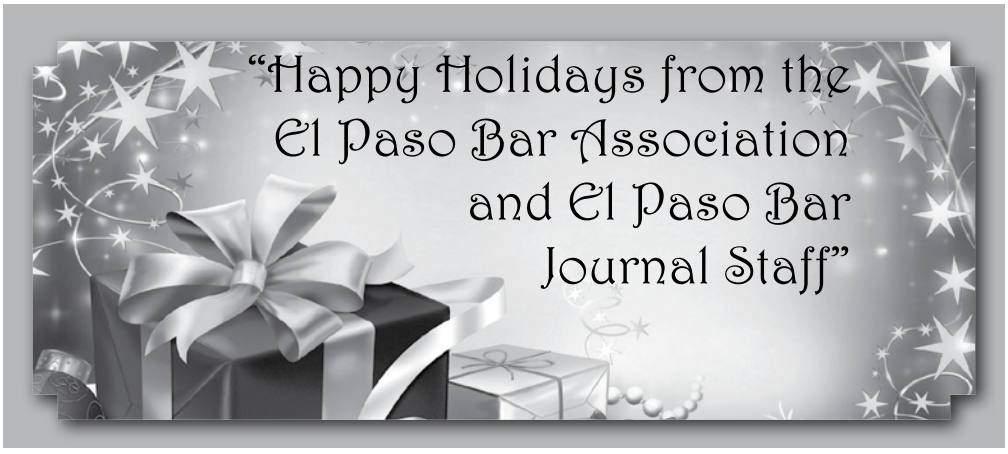
Josh was born in El Paso and raised by his parents who he holds in very high regard. Josh is still very close to his mother who he recalls always made Josh and his younger brother her highest priority. Josh also has a great relationship with his father, local attorney Joe Spencer. Josh half jokingly credits his dad with teaching him the importance and benefits of honesty through the skilled art of cross-examination you can only get from a father who just happens to be a first-rate litigator!

Josh's admiration for his father's profession, more specifically the manner in which Joe practices law, made Josh want to become an attorney and encourages him every day to strive to be the best at what he does. While in law school, Josh practiced criminal defense in Harris County through a criminal defense clinic and interned with the El Paso District Attorneys Office. Once he graduated and returned to El Paso, Josh recognized the importance of getting involved and working with other attorneys to address community issues. He joined EPYLA and MABA, in which he served as a board member for two years, chaired the Endorsement Committee, and volunteered with projects held in conjunction with The El Paso Community College.

Since he was a child Josh has been a fan of extreme sports. He loves snow skiing, waterskiing, *bmx*, motor-cross, and recently even started bungee jumping! As exciting as Josh's hobbies are however, his favorite thing to do, by far, is to spend time with his eight year old son Tommy whose life currently revolves around soccer and playing video games with his dad. Josh is currently also looking forward to the arrival of his daughter Tatiana in December 2012.

In his young career Josh has successfully established his law practice and maintained a regular presence amongst local bar associations. We know that his energy, work ethic, and positive attitude will make him an integral part of EPYLA's future.

**PATSY LÓPEZ** is an Assistant El Paso County Attorney responsible for prosecuting criminal cases.



# Avoiding a Permanent "Waive": Preservation of Error

## Part II

By Chief Justice Ann McClure
8th Court of Appeals

### III. Preserving evidentiary error at trial

**A. Requirement of Objection**

The most important line of defense is the objection. Objections are fundamental; they protect your client from the wrongful exercise of power by the trial court, its failure to exercise a power it should exercise, and abuse or misuse of the system by your opponent. Objections as to evidentiary issues relate to the trial court admitting evidence it should not admit, and to your opponent offering evidence in violation of some rule. Objections require practitioners to clear several hurdles to preserve evidentiary error for the appellate court.

**1. When objection is required**

To preserve error complaining that improper or inadmissible testimony was admitted during the course of the trial, an objection must be made at the time the testimony is offered. Rule 33.1 of the Texas Rules of Appellate Procedure provides the general rule that to preserve error for review on appeal, a party must present to the trial court a timely request, objection or motion stating the specific grounds for the ruling it desired the court to make if the specific grounds were not apparent from the context. The rule further states that it is necessary for the complaining party to obtain a ruling from the court to the party's objection. If the trial court refuses to rule, an objection to the court's refusal is sufficient to preserve the complaint.

Rule 103(a) of the Texas Rules of Evidence provides:

**(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating the objection.

*Chief Justice Ann McClure*
*8th Court of Appeals*

(2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

In *Hollon v. Rethaber,* 643 S.W.2d 783 (Tex. App.--San Antonio 1982, no writ), the managing conservator complained on appeal that evidence was admitted during a modification proceeding which related to events occurring prior to the entry of the divorce decree. The court of appeals held that she could not for the first time on appeal urge alleged errors not raised at trial. Because no objection had been lodged against the testimony, error was not preserved.

**2. When objection is not required**

Is there ever a situation where an objection to the admissibility of evidence is not required to preserve error? If the alleged error is fundamental in nature, then an objection will not be necessary. The Amarillo Court of Appeals addressed the issue in the context of a child custody case in *In the Matter of the Marriage of Knighton,* 723 S.W.2d 274 (Tex.App.--Amarillo 1987, no writ). The mother was a member of the Worldwide Church of God, which was less than a mainstream religion. She complained on appeal that evidence concerning her religious beliefs deprived her of a fair and impartial trial. It constituted fundamental error, she argued, because admission of the evidence violated her constitutional right to the free exercise of her religion and the separation of church and state. She also claimed that jury argument was inflammatory and prejudicial.

The court noted the father's position that the best interest of the children required his appointment as managing conservator because of the deviation from the norm of Mrs. Knighton's religious beliefs. Yet it concluded that other than Mr. Knighton's conclusory statements, there was no direct evidence, expert or otherwise, that the mother's religious beliefs would cause serious bodily or mental injury to the children or would cause the mother to neglect her children. Thus, without supporting evidence, Mr. Knighton's statements led to a constitutionally impermissible trial of the orthodoxy of the mother's religious beliefs.

Objections had been raised at various points in the trial, and at one point a motion for mistrial was made on behalf of the mother. The trial court indicated he would grant the mistrial, whereupon counsel for Mrs. Knighton withdrew the motion. Mr. Knighton contended on appeal that the withdrawal of the motion for mistrial waived all error. The majority opinion found the waiver issue to be immaterial:

However, in a case involving the custody of a child or children, the interests of the State are involved since the sovereign's duty is to look after and protect the welfare of children located within its boundaries. . . . No action of, or failure to take action by, Mrs. Knighton could waive that State interest. *Id*. at 284-85.

In a concurring opinion, Justice Countiss disagreed that the waiver issue was unimportant. Speaking to the issue of preservation of error, he stated that the case was not one in which the State's interest was so overriding that error could not be waived, nor did he believe the trial court is protected from all antecedent error when it offers mistrial. He agreed that if the trial court offers a mistrial and the offer is declined, the parties should not thereafter be allowed to complain about the event that led to the offer. However, other errors or other events that preceded the offer should remain viable. *See Eubanks v. Winn,* 420 S.W.2d 698, 702 (Tex. 1967). Otherwise, at the end of a hard and complex case, the trial court could cleanse itself and place counsel in an intolerable tactical position of offering a mistrial.

The Dallas Court of Appeals specifically declined to follow *Knighton* in *In the Matter of the Marriage of Rutland,* 729 S.W.2d 923 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). The mother in this modification case was a member of Jehovah's Witnesses. She failed to object to any testimony during the trial concerning her religious beliefs, yet she complained on appeal that the admission of the evidence violated her constitutional right to freedom of religion. Not surprisingly, she relied upon *Knighton*. The Dallas court refused to accept the argument that error of constitutional dimension is fundamental. Instead, it concluded that failure to object to the introduction of evidence waives any error, citing *Stonecipher v. Butts,* 686 S.W.2d 101, 108 (Tex. 1985). The court also noted an abundance of case law holding that even constitutional error may be waived by the failure to object. *In re M.A.B.,* 641 S.W.2d 621, 623 (Tex.App.--Corpus Christi 1982, no writ); *Phillips v. Phillips*, 532 S.W.2d 161, 163 (Tex. Civ.App.--Austin 1976, no writ). It concluded that any error in the admission of evidence regarding the mother's religious beliefs and practices was not fundamental merely because it may have violated her rights under the federal and state constitutions. Nor did fundamental error exist simply because the State has an interest in promoting the welfare of children within its boundaries. Error, pronounced the court, was waived.

While it is inconceivable that counsel would not object to such testimony during the course of the trial, those cases sometimes arise. If you are employed as appellate counsel in a similar situation, you had best hope that your court of appeals agrees with the *Knighton* approach.

**3. Reconciliation: Fundamental error**

*Knighton* and *Rutland* cannot be reconciled, but a glance at the writ histories suggests *Rutland* is the safer approach. The Supreme Court has narrowly construed the concept of fundamental error, holding that it exists in those rare instances in which the trial court lacked jurisdiction or the public interest is directly and adversely affected. *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 328 (Tex. 1993).

**B. Requisites of a Proper Objection**

1. OBJECTION MUST BE TIMELY

The window of opportunity for objections to evidence at trial slams shut not long after the jury is exposed to it. A timely objection, therefore, is one made either when the evidence is offered, *St. Paul Medical Center v. Cecil*, 842 S.W.2d 808, 816 (Tex.App.--Dallas 1992, no writ), or before the evidence is admitted. *Perez v. Bagous,* 833 S.W.2d 671, 674 (Tex. App.--Corpus Christi 1992, no writ). Testimonial evidence should be challenged when the question calling for objectionable testimony is asked, or if the question is not defective, when the witness begins giving objectionable testimony. A few moments after the jury is exposed, the opportunity is lost, and a motion for mistrial cannot resurrect the point. *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.,* 703 S.W.2d 806, 811 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

The importance of timely objections is demonstrated by *Cactus Utility Co. v. Larson,* 709 S.W.2d 709 (Tex.App.--Corpus Christi 1986), *rev'd on other grounds,* 730 S.W.2d 640 (Tex. 1987). In *Cactus,* one party attempted to introduce into evidence a stock purchase agreement. The same agreement had been attached as an exhibit to the plaintiff's original petition. Special exceptions had been filed, along with other requests that the court not consider the agreement. The court had ruled it would carry the exceptions along with the trial. During the trial, the agreement was offered into evidence and defendant's counsel made no objection, obviously believing that his objections to the document had been made and that the court was still considering those objections. The agreement was admitted. At the beginning of trial the next day, counsel introduced an objection into the record to clarify his position as to the document to ensure that error was preserved. The court of appeals ruled that the objection was untimely, inasmuch as an objection must be made when the evidence is offered, not after it has been received. Upon rehearing, the appellate court acknowledged that the defendant had made a lengthy formal objection at the beginning of trial the next day and that he had excepted to admission of the document from the beginning. However, the court noted that the trial court never ruled upon his objection. The court concluded that an objection must actually be overruled before error is preserved. Fortunately for counsel and his malpractice carrier, the case was reversed on other grounds. *See also, Harry Brown, Inc. v. McBryde,* 622 S.W.2d 596 (Tex.Civ.App.--Tyler 1981, no writ).

2. OBJECTION MUST BE SPECIFIC

Objections must be sufficiently specific so that the trial court can understand the objection and make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *Campbell v. Paschall,* 132 Tex. 226, 121 S.W.2d 593 (1938)*; Celotex Corp. v. Tate,* 797 S.W.2d 197, 205 (Tex.App. --Corpus Christi 1990, no writ). Objections which are not sufficiently specific include:

"I object," *Murphy v. Waldrip*, 692 S.W.2d 584, 590 (Tex.App.--Fort Worth 1985, writ ref'd n.r.e.);

"I object to the form of the question," *Scott v. Scruggs,* 836 S.W.2d 278, 280 (Tex.App.--Texarkana 1992, writ denied);

"Objection, the evidence is irrelevant and immaterial," *Wilkins* v. *Royal Indemnity Co.,* 592 S.W.2d 64, 67 (Tex.Civ.App.--Tyler 1979, no writ);

"Objection, no predicate has been laid," *Waldon v. City of Longview,* 855 S.W.2d 875, 878 (Tex.App.--Tyler 1993, no writ);

"Objection, there are no underlying data for the report," *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n.,* 809 S.W.2d 268, 272 (Tex.App.--Austin 1991, writ denied); and

"Objection, the testimony is incompetent and hearsay," *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.,* 703 S.W.2d 806, 811 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

A valid objection identifies a specific rule of evidence violated by the offered evidence. *Smith Motor Sales, Inc.,* 809 S.W.2d at 273;

*United Cab Co. v. Mason,* 775 S.W.2d 783, 785 (Tex.App.--Houston [1st Dist.] 1989, writ denied); *Burleson v. Finley,* 581 S.W.2d 304 (Tex.Civ.App.--Austin 1979, writ ref'd n.r.e.). General objections amount to no objection at all. *Murphy v. Waldrip,* 692 S.W.2d 584 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.). *See also, In Interest of McElheney,* 705 S.W.2d 161 (Tex.App.--Texarkana 1985, no writ), a termination suit, in which the mother failed to preserve any error concerning the admission of evidence of her homosexual preferences. The court of appeals determined that the objections which were raised at trial were in general terms and failed to state any grounds. Error was waived. And in *University of Texas System v. Haywood,* 546 S.W.2d 147 (Tex.Civ.App.--Austin 1977, no writ), an objection was made at a pre-trial conference but no objection was raised at trial. Because the objection did not specify a particular rule of evidence, it was considered too general and error was waived.

An objection that the proffered testimony is "irrelevant and immaterial' is too general to preserve complaint on appeal. *Wilkins v. Royal Indemnity, Company,* 592 S.W.2d 64 (Tex.Civ. App.--Tyler 1979, no writ). An objection as to irrelevancy does not enable the trial court to make an intelligible ruling or permit the offering party to remedy the defect. As such, it is insufficient to require consideration by an appellate court. *Mayfield v. Employer's Reinsurance Corp.,* 539 S.W.2d 398 (Tex.Civ. App.--Tyler 1976, writ ref'd n.r.e.). Relevance objections should incorporate the test contained in Rule 401 of the Rules of Evidence and identify the material fact issue to which the evidence is purportedly directed, but irrelevant.

Where a party seeks introduction of evidence without laying the proper predicate, it is insufficient to merely object that the predicate has not been laid. The complaining party must identify the portion of the predicate which is lacking. *See Seymour v. Gillespie,* 608 S.W.2d 897 (Tex. 1980); *In the Matter of Bates,* 555 S.W.2d 420 (Tex. 1977). Both cases involved the introduction of tape recordings over a general objection as to the predicate.

**3. Objection must be ruled upon**

Appellate review of an objection requires that the trial court rule on the objection. Tex.R.App.P 33.1 (a)(2)(A). A trial court cannot commit error if it does not act. If no ruling is obtained on an objection, it is waived. *City of Los Fresnos v. Gonzalez,* 848 S.W.2d 910, 914 (Tex.App.--Corpus Christi 1993, no writ). If a trial court refuses to rule, an objection to that refusal preserves the error. Tex.R.App.P. 33.1(a)(2)(B); *Greater Houston Transp. Co. v. Zrubeck,* 850 S.W.2d 579, 585 (Tex.App.--Corpus Christi 1993, writ denied).

**4. Offers of proof**

**a.** Getting It In

Where evidence is admitted over objection, the reporter's record will provide the court of appeals with sufficient information to rule upon the point of error. So, as a proponent, the first procedural step in preserving evidentiary error is to offer the evidence. There is no refusal to admit evidence if there is no offer of that evidence. *Giles v. Cardenas,* 697 S.W.2d 422, 424 (Tex.App--San Antonio 1985, writ ref'd n.r.e.). The burden is on the proponent to show the admissibility of evidence. *Ruth v. Imperial Ins. Co.,* 579 S.W.2d 523, 525 (Tex.Civ.App.--Houston [14th Dist. 1979, no writ). Often the evidence itself reveals the basis for the offer, but if it is unclear, the proponent should insure that the record contains the rule of evidence under which the offer is made and sufficient facts to establish admissibility. *Vandever v. Goettee,* 678 S.W.2d 630, 635 (Tex.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see McInnes v. Yamaha Motor Corp.*, 659 S.W.2d 704, 710 (Tex.App.--Corpus Christi 1983), *aff'd,* 673 S.W.2d 185 (Tex. 1984), *cert. denied,* 469 U.S. 1107 (1985).

Evidence may be admissible for a more narrow purpose when an objection is sustained to a general offer. The proponent bears the burden on appeal of showing that no basis existed to exclude the evidence. *Minnesota Mining & Mfg. Co. v. Nishika, Ltd.,* 885 S.W.2d 603, 630 (Tex.App.--Beaumont 1994, no writ). This is avoided by narrowing the offer until the evidence is admissible. Failure to do so waives any complaint that the evidence was admissible given some more limited offer. *Brown v. Gonzalez,* 653 S.W.2d 854, 864 (Tex.App.--San Antonio 1983, no writ). In the same vein, when evidence is objectionable on some grounds, but admissible on other grounds, there is no error if the trial court sustains an objection to a general offer; the proponent must re-offer the evidence on some admissible ground. *Ferguson v. DRG/ Colony North, Ltd.,* 764 S.W.2d 874, 882 (Tex. App.--Austin 1989, writ denied).

**b.** Keeping It Out

When evidence is excluded by the trial court, the proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal. *Weng Enterprises, Inc. v. Embassy World Travel,* 837 S. W. 2d 217, 221 (Tex.App.--Houston [1st Dist. 1992, no writ); *see* Tex.R.Evid. 103. Compliance with the evidentiary rules on an offer of proof preserves error for appellate review. Tex.R.App.P. 33.1(a)(1) (B).

To preserve error concerning the exclusion of evidence by offer of proof, the appellate record must show (1) the substance of evidence sought to be admitted was relevant and made known to the court; and (2) the court either adversely ruled, or after timely request affirmatively refused to rule. *Lopez v. Southern Pacific Transportation Company,* 847 S.W.2d 330 (Tex.App.--El Paso 1993, no writ). An objection to the trial court's refusal to rule is sufficient to preserve error for appeal under Tex.R.App.P. 33.1(a)(2)(B). Remember, however, that the offer of proof or the objection to the court's refusal to rule must be made prior to the court's charge being read to the jury, or it is waived. *See Raw Hide Oil & Gas, Inc. v. Maxus Exploration Company,* 766 S.W.2d 264 (Tex.App.--Amarillo 1988, writ denied).

**c**. Waiver of Error

**1. Similar evidence admitted without objection**

Objections to evidence are unavailable when similar evidence to the same effect is offered and received without objection. The Supreme Court has considered this issue in *Bushell and Sydex Corporation v. Dean,* 803 S.W.2d 711 (Tex. 1991). Dean had sued her employer and former manager for sexual harassment. During the course of the trial, she offered the testimony of an expert witness who indicated that he would be able to give a "working definition" of sexual harassment, including "general things that are true about a person who harasses." Counsel for Sydex objected to the testimony of the witness as a whole to the extent that it went to the "profile" of a harasser. The trial court determined that the witness had not yet crossed the line but that at some point the evidence might cross into character evidence prohibitions. The judge also advised counsel that he would need to reurge his objection at that point. Later, the expert testified as to the "profile" of a sexual harasser, but no objection was lodged. The Supreme Court concluded that error had been waived.

In, *Fabian v. Fabian,* 765 S.W.2d 516 (Tex. App.--Austin 1989, no writ), in which the wife complained that the husband should not be able to use evidence derived as a result of a wire tap placed on her telephone to learn of her extracurricular sexual activities. The court never reached the question of the Texas Wire

Tap Statute, however, holding that the complaint was waived because similar testimony was received without objection. *Accord, City of Houston v. Riggins,* 568 S.W.2d 188 (Tex. Civ.App.--Tyler 1978, writ ref'd n.r.e.); *Hundere v. Tracy & Cook,* 494 S.W.2d 257 (Tex. Civ.App.--San Antonio 1973, writ ref'd n.r.e.); *New Hampshire Fire Insurance Company v. Plainsman Elevators, Inc.,* 371 S.W.2d 68 (Tex. Civ.App.--Amarillo 1963, writ ref'd n.r.e.). In this instance, any error in admitting the proffered testimony is deemed harmless. *Lopez v. Southern Pacific Transportation Company,* 847 S.W.2d 330 (Tex.App.--El Paso 1993, no writ); C *& H Nationwide*, *Inc. v. Thompson,* 810 S.W.2d 259 (Tex.App.--Houston [1st Dist.] 1991, no writ); *Top Value Enterprises v. Carlson Marketing,* 703 S.W.2d 806 (Tex. App.--El Paso 1986, writ ref'd n.r.e.); *Badger v. Symon,* 661 S.W.2d 163 (Tex.App. - 1983, writ ref'd n.r.e.).

**2. Grounds of objection as a limitation**

On appeal, a party will be confined to the grounds of objection as stated in the trial court. *Banda v. Garcia,* 955 S.W.2d 270, 272 (Tex. 1997); *Texas Department of Transportation v. Olson,* 980 S.W.2d 890, 898 (Tex.App.--Fort Worth 1998, no pet.). A party cannot enlarge his complaint on appeal. *See Perez v. Baker Packers,* 694 S.W.2d 138 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack,* 491 S.W.2d 714 (Tex.Civ.App.--Corpus Christi 1973, error dism'd). Thus, the grounds which are urged in an objection to the trial court limit appellate review. This rule operates in two directions. When an objection is predicated on one ground during trial, but no point of error is predicated on that ground on appeal, error is waived. By the same token, if a ground of objection is not raised during the trial, but is raised by point of error on appeal, no error has been preserved. Two cases demonstrate the difficulty.

*In re Estate of Plohberger,* 761 S.W.2d 448 (Tex.App.--Corpus Christi 1988, writ denied), involved a dispute as to which of two wills of the deceased was entitled to probate. Her surviving husband sought to probate a will in which her entire estate passed to him. The proponent of the other will offer into evidence medical records which contained statements by the deceased that her husband was a Nazi who had exterminated Jews and who had treated her as a slave. The records were offered as a whole. The husband's objection as to hearsay was overruled. When enlarged copies of the damaging sections of the records were marked as evidence, the husband objected again as to hearsay. This objection was overruled as well. The sections of the records were then read to the jury; this time the objection was that the statements were inflammatory. The trial court overruled the objection. The court of appeals determined that any error in the admission of the statements was harmless. Its logic places definitive restrictions on the estoppels theory discussed above:

Since the statements appellant objected to being read to the jury **had previously been admitted without objection** (that the statements were prejudicial and should be excluded under Rule 403), we conclude that if any error existed, **it was not reversible error.**

The highlighted portion of the quotation is important. Obviously, the husband **had** previously objected. He had merely objected on a different and insufficient ground. Thus, it is imperative that you make the correct objection the first time the evidence is offered. If the first objection is predicated on the wrong basis or is a general objection, error will be waived inasmuch as the same or similar evidence will have been previously admitted without **proper** objection.

In *Lade v. Keller,* 615 S.W.2d 916 (Tex.Civ. App.-Tyler 1981, no writ), the proponent of a holographic will was represented by two attorneys. One of the attorneys called the other as a witness concerning the testator's testamentary capacity and state of mind. On cross examination, the attorney was asked whether he presently represented Lade in a criminal matter. The first objection lodged was that the answer was a matter of attorney-client privilege. The question was also objected to on the basis that it was immaterial. The privilege issue was not raised on appeal and was deemed waived. The immateriality issue was found to be too general to preserve any error. In the appeal, Lade urged that the testimony should have been excluded because it was highly prejudicial. This ground was waived because it had not been raised in the trial court.

**The moral of this story is, "Get it right the first time!"**

**3. No utilization of aligned party's objection**

It is not unusual to have two distinct parties aligned by a common purpose. Paternal grandparents and the father may seek substantially similar relief against the mother. It is important to note that a party complaining of the improper admission of evidence must have objected to that evidence at trial. Thus, if the grandparents had objected to evidence at trial but the father did not, and only the father appealed, he would be precluded from reliance upon the grandparents' objection.

A party must either make its own objection to the evidence or state an exception to the ruling of the court regarding the objection if it wishes to preserve any error for appeal. *Wolfe v. East Texas Seed Co.,* 583 S.W.2d 481 (Tex.Civ.App.--Houston [1st Dist.] 1979, error dism'd).

**4. Withdrawal of objection**

It is also important to note that when an objection to the admissibility of testimony is withdrawn, even following an adverse ruling by the court, the objection is not preserved for review. The same is true if the exhibit is withdrawn by the party offering it. *Paramount Petroleum v. Taylor Rental Center,* 712 S.W. 2d 534 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). Counsel should never withdraw an exhibit or an objection if an appeal is even remotely likely.

**D. Running Objection**

Less delineated are running objections, where a trial court allows one objection to apply to an area of testimony generally. Since Rule 611(a) of the Rules of Evidence permits the court to exercise reasonable control over the mode and order of interrogation of witnesses and presenting evidence so as to avoid the needless consumption of time, the granting of running objections is within the trial court's discretion.

The appellate courts are inconsistent in their view of running objections, so they should be exercised with caution. Generally, any variance between the testimony given to which a formal objection is made and testimony which may be slightly different or dissimilar may render the running objection a waiver. Further, the later admission of testimony successfully excluded earlier in a trial is considered a waiver of error. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 201 (Tex.App.--Corpus Christi 1990, no writ). In *City of Houston v. Riggins,* 568 S.W.2d 188 (Tex.Civ.App.--Tyler 1978, writ ref'd n.r.e.), the appellate court concluded that the trial court had not erred in admitting testimony where the party offering the testimony thereafter introduced the same type of testimony from other witnesses without objection and full cross examination was conducted. *See also, Kelso v. Wheeler,* 310 S.W.2d 148 (Tex.Civ. App.--Houston 1958, no writ); *F. W. Woolworth Co. v. Ellison, 232* S.W.2d 859 (Tex.Civ.App.-

-Eastland 1950, no writ). Some courts hold, however, that a party who makes a proper objection to testimony that is overruled is entitled to assume the judge will make the same ruling as to other offers of similar evidence, and is not required to make further objections. *See Atkinson Gas Co. v. Albrecht,* 878 S.W.2d 236, 242-43 (Tex.App.--Corpus Christi 1994, writ denied); *Bunnett/Smallwood & Co. v. Helton Oil Company,* 577 S.W. 2d 291 (Tex.Civ.App.--Amarillo 1978, no writ); *Crispi v. Emmott,* 337 S.W.2d 314 (Tex.Civ.App.--Houston 1960, no writ). This is akin to the idea of the running objection. Still others limit running objections to testimony elicited from the **same witness**. *City of Fort Worth v. Holland,* 748 S.W.2d 112, 113 (Tex.App.--Fort Worth 1988, writ denied). The Dallas Court of Appeals has loosened that rule in bench trials, and allows running objections to all evidence sought to be excluded, even when elicited from other witnesses. *Commerce, Crowdus & Canton, Ltd. v. DKS Construction, Inc.,* 776 S.W.2d 615, 620 (Tex.App.--Dallas 1989, no writ).

Since running objections appear fraught with peril, they should be avoided if you believe continuing objections will not turn judge and jury against you. If a running objection is the only choice, then certain steps should be followed:

• request a running objection on specific grounds, otherwise the courts may waive error on subsequent admission of testimony. *See, City of Houston v. Riggins,* 568 S.W.2d 188, 190 (Tex.App.--Tyler 1978, writ ref'd n.r.e.) (Holding error was waived when counsel did not object to testimony from other witnesses);

• obtain a ruling on the request for a running objection. *See City of Forth Worth v. Holland,* 748 S.W.2d 112, 113 (Tex.App.--Fort Worth 1988, writ denied) (referring negatively to counsel's failure to gain a ruling on his request for a running objection);

• make a new request for a running objection if similar testimony is sought from another witness; and

• remember to make proper objections to other objectionable testimony elicited while you have a running objection, otherwise face the specter of waiver on untimely or non-specific objection grounds.

**E. Partially Admissible Evidence**

Specific objections are critical when evidence is admissible in part. A general objection to evidence admissible in part, which does not point out *specifically* the objectionable portions, is properly overruled. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 205 (Tex.App.-Corpus Christi 1990, no writ) *citing Brown & Root, Inc. v. Haddad,* 142 Tex. 624, 180 S.W.2d 339, 341 (1941). This rule is most often applicable to documentary evidence. *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.,* 779 S.W.2d 474, 477 (Tex.App.--El Paso 1989, writ denied).

**1. Where complaint is made of admission**

A general objection to a unit of evidence as a whole which fails to specify the portion objected to is properly overruled if any portion of the evidence is admissible. *Speier v. Webster College,* 616 S.W.2d 617 (Tex. 1981); *Brown & Root, Inc. v. Haddad,* 142 Tex. 624, 180 S.W.2d 339 (1944); Wolfe v. *Wolfe,* 918 S.W.2d 533 (Tex.App.--El Paso 1996, writ denied). It is incumbent upon the objecting party to make a specific objection to the inadmissible portion and then request a limiting instruction. *Ramirez v. Wood,* 577 S.W.2d 279 (Tex. Civ.App.--Corpus Christi 1978, no writ). If a specific objection is made, the trial court can strike the objectionable portion. In the absence of a specific objection, error is waived. *Zamora v. Romero,* 581 S.W.2d 742 (Tex.Civ.App.--Corpus Christi 1979, writ ref'd n.r.e.).

**2. Where complaint is made of exclusion**

Where evidence is tendered, only a portion of which is admissible, and an appropriate and specific objection is sustained, it is the burden of the party offering it to separate the admissible from inadmissible testimony. In *Hurtado v. Texas Employers Insurance Association,* 574 S.W.2d 536 (Tex. 1978), TEIA sought to introduce 280 pages of medical records. Over objection, the trial court admitted the records in their totality. The court of appeals concluded the problem was one of determining which party had the burden of separating the inadmissible portions of the exhibit from the admissible portions. It decided that the trial court had the discretion to determine which party should specifically point out the objectionable portions. In his dissent, the Chief Justice declared that a specific objection had been made as to the inadmissible nature of the records and that the admission was error. The Supreme Court agreed with the dissent. If that burden is not met by the tendering party, the trial court does not err in excluding it in its entirety, and a point of error challenging the exclusion will not be preserved. *Perry v. Teras Municipal Power Agency,* 667 S.W. 2d 259 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

**F. Motions to Strike and Motions for Mistrial**

Witnesses often motor on while counsel makes objections to questions and testimony. The jury hears the answer, and the testimony appears in the appellate record. Also, evidence sometimes becomes properly objectionable later in a trial. It is insufficient in these instances to merely object; a motion to strike is required in order to prevent the jury from considering the testimony, and to prevent the appellate court from considering it on a sufficiency review. *Hur v. City of Mesquite,* 893 S.W.2d 227, 231 (Tex.App.--Amarillo 1995, no writ); *Prudential Ins. Co. v. Uribe, 595* S.W.2d 554, 564 (Tex.Civ.App.--San Antonio 1979, writ ref'd n.r.e.); *City of Denton v. Mathes, 528* S.W.2d 625, 634 (Tex.Civ.App.--Fort Worth 1975, writ ref'd n.r.e.).

**1. No resurrection of error after waiver**

Basically speaking, since untimely objections are frowned upon, a motion to strike will be of little assistance in preserving error where an objection could have been made at the time the evidence was offered but none was forthcoming. Neither the motion to strike nor the motion for mistrial will prevent waiver of an objection when the grounds for the mistrial or the motion to strike do not clearly indicate the objectionable portion of the testimony. *Top Value Enterprises v. Carlson Marketing,* 703 S.W.2d 806 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

**2. When required**

When an objection is made and sustained as to testimony which has been heard by the jury, the testimony is before the jury unless they are instructed to disregard it. *Chavis v. Director, State Worker's Compensation Div.,* 924 S.W.2d 439 (Tex.App.--Beaumont 1996, no writ). If an objection to an answer is made but there is no ruling and no motion to strike is urged, there is no error. *Prudential Insurance Company of America v. Uribe,* 595 S.W.2d 554 (Tex.Civ. App.--San Antonio 1979, writ ref'd n.r.e.). Where objection is made to expert testimony after the testimony is admitted, any error in admitting the testimony over the objection is waived if no motion to strike is made. *City of Denton v. Mathes,* 528 S.W.2d 625 (Tex.Civ. App.--Fort Worth 1975, writ ref'd n.r.e.).

***To be continued …..***

**ANN CRAWFORD MCCLURE**
is Chief Justice of the 8th Court of Appeals.

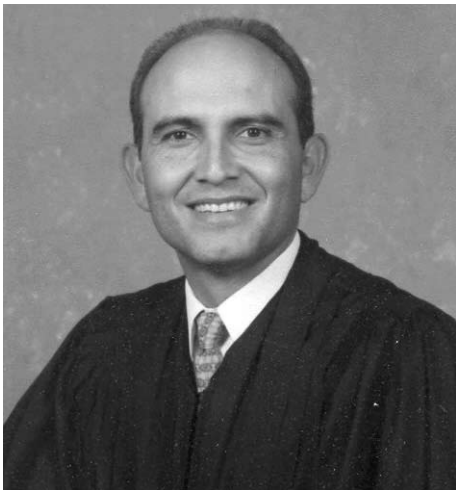
# Federal Courts and the Fiscal Cliff

By Judge Phil Martinez

Notwithstanding its characterization as the Third Branch of Government, the Judiciary is funded based upon legislative appropriations which are incorporated into the larger federal budget each and every budget year. As a non-defense discretionary appropriation agency, the Judiciary is subject to drastic budget cuts if sequestration goes into effect at the beginning of 2013. The Budget Control Act of 2011, which Congress passed in response that year's standoff over the debt ceiling, will require approximately $1.2 trillion in deficit reduction measures. Because Congress has yet to enact legislation to reduce the national debt by a targeted amount prior to a deadline contemplated by the Act, a package of tax increases and spending cuts – the latter referred to as "sequestration" in budget parlance – is scheduled to automatically go into effect on January 2, 2013. For the Third Branch of Government, the required reductions are 8.2 percent of the preceding year's spending level. While the El Paso Division of the Western District of Texas has not yet determined how the automatic reductions would affect the provision of services, other jurisdictions, most notably, the Northern District of Illinois, has preliminarily determined that sequestration would require periodic closure of the court, most likely each Wednesday from January through September of 2013. The following information is based upon an editorial in the September/October issue of Judicature. It sets out in stark detail the crisis that federal courts will face if "sequestration" goes into effect after the new year.

A trip over the fiscal cliff would obviously have dire consequences. The debate over such consequences has focused on the potential havoc wreaked on the economy. Against this backdrop, it is perhaps unsurprising that the consequences of budget sequestration for the federal judiciary have received relatively little attention. Yet those consequences, too, would be high-reaching and catastrophic, and the need to avoid them provides yet another significant reason for Congress to take action to avert sequestration.

To be sure, budget pressures are nothing new for the federal judiciary. In his 2004 Year-End Report on the Federal Judiciary,



*Judge Phil Martinez*

Chief Justice Renquist identified a budget crisis extending back to at least a decade and asked that the Judicial Conference focus on cost control. In response to these funding realities, and mindful of the belt-tightening required throughout government, the Judicial Conference has worked hard to contain costs, redoubling its efforts as of late: Over the last several years it has worked with the General Services Administration to reduce its ongoing facilities' costs, and [in October 2012,] the Conference agreed to close court space in six facilities that do not have a resident judge. Even more closings are under consideration. The Judicial Conference has also generated cost savings through consolidation and standardization of its computer systems as well as through efforts to limit growth in the cost of law clerks and to more efficiently allocate the resources and probation and pretrial services offices.

Of course, personnel costs consume the bulk of the judicial branch budget. Costs have been contained there as well: the level of funding provided for fiscal year 2012, coupled with concern about fiscal year 2013, has led to a reduction in staffing of nearly 1,100 personnel and more than 3,200 furlough days since July 2011. This has left the courts' staffing level at 80 percent of what the judiciary staffing formula calls for given its workload, even after a re-examination of the formula itself. In fact, if the funding level for fiscal year 2013 were simply to remain frozen at 2012 levels, the Judicial Conference estimates the need for the elimination of an additional 1,000 personnel. In total, this would represent a nearly ten percent reduction in staff over a roughly two-year period.

These costs containments are, it bears repeating, the consequences of a mere freeze in funding levels. As the numbers suggest, the consequences of the Budget Control Act's across-the-board spending cuts would be dire indeed. The Judicial Conference projects that the mandated 8.2 percent cut would entail a 5,400-person staffing reduction, a mandatory four-week furlough for all personnel, or some combination thereof which would result in equivalent savings. That would be only the beginning: payments to lawyers representing indigent criminal defendants would be suspended for the final six weeks of the fiscal year and civil jury trials would have to be suspended for the same period due to a lack of funds to pay jurors. Court security programs and personnel would have to be cut and many courthouses would literally have to close secondary entrances to save on security costs.

. . . .

In contrast to most governmental entities, the Judiciary lacks the ability to control the amount of services that it is required to provide. Courts must adjudicate the matters that come before them. Cut backs, then, will disproportionally affect the quality and timeliness of services that are offered. As Judge Julia Gibbons, Chair of the Judicial Conference Committee on the Budget, testified before the House of Representatives' Subcommittee on Financial Services and General Government,

*'[I]n the end, with fewer staff some work will simply not be done. Staffing at public counters to assist individuals with case filings and court services will be reduced. With fewer employees to docket cases and perform quality assurance on electronic case filings, some case processing will be delayed. Computer software upgrades will be deferred. And our probation officers will*

*have to reduce supervision of lower risk offenders in order to focus limited resources on high-risk offenders.'*

These effects are likely to be magnified by an increase in the demands made of courts. State judiciaries have likewise been faced with severe funding cuts, and many states have had to drastically reduce their services as a result. To the extent that state court budget cuts and closures may lead some litigants to choose federal court venues in diversity and concurrent jurisdiction cases where that is an option, the federal courts will see growing caseloads coupled with a reduced ability to process them.

. . . .

Furthermore, while the impact of budget sequestration on the Federal Judiciary would be catastrophic, its contribution to the deficit-reduction goals of the . . . Act would be minimal. This is simply because the entirety of the Judiciary's budget amounts to less than two-tenths of one percent of the federal budget. And while the logic of this sort of "drop in the bucket" argument might normally be unpersuasive – very few programs constitute a substantial enough portion of the federal budget that they could not make such an argument – there are reasons to take it seriously when it is offered by the courts. The Judiciary, after all, is a coequal branch of the federal government.

Of course, to merely highlight the Judiciary's status within the federal government is to grossly understate its importance. It is not simply the Judiciary's standing as a coequal branch of government that merits concern in the face of such cuts, but rather the courts' crucial role in maintaining the rule of law, which in turn is central to the functioning of our economy and ultimately our democracy. Budget sequestration threatens to bring us to a point at which a failure to fund the courts becomes a constitutional issue. Denying resources for a branch of government to do its job runs afoul of fundamental separation of powers principles.

. . . .

Congress has many good reasons to avoid taking the nation over the impending fiscal cliff. Maintaining the federal courts' capacity to implement the rule of law may not be among the most publicly prominent reasons, but it is certainly among the most important and most deserving of the attention of elected representatives.

The judges of the Western District of Texas are planning to convene immediately after the new year in order to address the situation and determine the extent to which the Court will be able to continue providing services throughout the Western District of Texas. It is our hope that the issues related to sequestration will become clearer with each passing day enabling the judges of the Western District of Texas to continue the provision of services throughout the district while maintaining the highest standards of stewardship of public funds.

**PHIL MARTINEZ** is a United States District Judge for the Western District of Texas, El Paso Division.

# Supporting the Federal Bar:

## The El Paso Chapter of the Federal Bar Association

By Kristin M. Connor

The El Paso Chapter (Chapter) of the Federal Bar Association (FBA) is a small, but thriving, local chapter of a national association serving the needs of the federal practitioner and jurist. Re-established in 2004 after years of dormancy, the Chapter has over a hundred members spanning the entire legal spectrum: civil and criminal, legal firms and federal agencies, and members of the judiciary. The Chapter shares in the FBA's mission to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.

To fulfill this mission, the Chapter offers a variety of high quality CLE programming, mentorship programs for new and future attorneys, and other events that facilitate the communication between the bench and the bar, as well as between the private and public sectors. In 2011 and in 2012, the FBA recognized the Chapter's achievements by awarding it a Chapter Activity Presidential Excellence Award and an Outstanding Newsletter Award. We hope you visit our website, http://www.fedbar.org/Chapters/El-Paso-Chapter.aspx, to learn about upcoming programs, browse through past newsletters, and discover the extent of the FBA's resources. This article highlights some the programs and services the Chapter and the FBA offer.

**Providing Quality CLE Programs**

During the 2011-2012 term, the Chapter provided over twenty hours of CLE, most of which were free and occurred during the lunch hour at the Albert Armendariz, Sr. U.S. Courthouse. The Chapter's CLE have addressed hot topics in immigration and nuanced aspects of federal criminal practice. The Chapter recently finished a workshop series entitled "Bail to Jail" that tracked the life of a federal criminal case. This year, the Chapter is highlighting civil practice by providing a CLE series on the life of a federal civil case. This series will feature well-known local attorneys and federal judges as speakers. January 19th marks the next program in that series and will focus on discovery issues. Also, on December 6th, officials from the Bureau of Prisons (BOP) will visit El Paso to provide a three-hour CLE on BOP programs, designations, and other topics of interest. This is all in addition to the CLE programming provided by national Federal Bar Association throughout the country.

**Enhancing Professional Growth and Competence**

The Chapter is committed to increasing mentorship opportunities to ensure that federal attorneys have the resources they need and to entice newly-licensed attorneys to build

their practice in El Paso. This past year, the Chapter launched a Criminal Justice Act (CJA) mentorship program that paired new CJA defense attorneys with seasoned ones so that defense attorneys new to federal practice could receive personalized advice and training. This year, we are designing a membership directory to facilitate communication between members. Additionally, this summer marks our fourth Annual Introduction to Federal Practice for New and Future Lawyers, a one-day seminar designed to introduce prospective and current law students to federal practice. We will also award the Chapter's fourth Annual Law School Scholarship this summer for an El Pasoan beginning law school the next fall.

**Promoting the Welfare of Attorneys, Judges, and the Community**

Recognizing that our members' needs extend beyond the courtroom, the Chapter launched a SOLACE network in the summer modeled after the program begun by the Honorable Jay C. Zainey of the Eastern District of Louisiana. SOLACE stands for Support of Lawyers/Legal Personnel – All Concern Encouraged, and is a simple, email notification system in which legal professionals—attorneys, judges, legal secretaries, and the like—who experience a tragedy can seek support and assistance from our legal community. If you know of an event needing a SOLACE response, or if you would like to be part of our SOLACE network, please email Marta McLaughlin at marta_mclaughlin@txwd.uscourts.gov.

**Keeping Members Informed**

Finally, our award winning biannual newsletter, *Dicta*, updates our membership about the courthouse family, Chapter activities, recent verdicts, and new members. Additionally, FBA National publishes a monthly magazine, *The Federal Lawyer*, replete with substantive articles and judicial profiles.

In short, the beauty of our small, active organization is that a good idea can get traction and transform into a reality in a short period of time. We welcome new members and constantly seek to improve our organization and better serve our legal community. For membership information, visit www.fedbar.org or email elpasoFBA@gmail.com. We hope to see you at our upcoming CLEs on December 6th and January 19th!

**KRISTIN M. CONNER** is the President of the El Paso Chapter of the Federal Bar Association. She is also a Research and Writing Specialist for the Office of the Federal Public Defender.

Senior Lawyer Interview

# Crawford Kerr

By Clinton F. Cross

***CROSS: Tell me something about your family history.***

**KERR:** I know Hugh and Lucy Kerr settled in Union Hill, Texas, in 1831. My paternal family line begins with Hugh, then Augustus Thomas Kerr, then Augustus H. Kerr, then Augustus Park Kerr, and lastly my father Crawford S. Kerr.

My father was an engineer with the International Water and Boundary and Commission.

My mother was Edythe Moore and her great-grandfather was David Ayers. In 1832, responding to a call from his Methodist preacher to deliver Bibles to Texas, he migrated from New York to Texas.

In 1835, shortly before Texas declared its independence from Mexico, his daughter married L.P. Moore 'by bond.' In the early days of Anglo-American settlements in Texas, marriage by bond was permitted because there were not enough preachers or priests available to marry folks who wanted to get married. The problem was solved by allowing people to start living together and put up a bond promising to get married when a preacher or priest became available. In 1840, when the Republic of Texas adopted the 'Common Law of England' as the law of the Republic, the Republic recognized common law marriage as the law of the land. England had already abolished common law marriage, but perhaps in Texas, priests and preachers were still in short supply.

I was talking about my great-great maternal grandfather, David Ayers. One of the last letters from Col. William Travis was sent to David Ayers, as Travis had left his son with Ayers before going to the Alamo. In that letter, he asked David Ayers to educate and raise his son if he failed to return and, as we all know, Travis never returned; David Ayers kept his promise.

***CROSS: Who were your parents?***

**KERR:** My father, Crawford S. Kerr, and my mother, Edythe Moore, met in Rogers, Texas, near Temple. When he was in school at Baylor, my father read a San Antonio newspaper that reported the Army was hiring truck drivers to transport supplies from Ft. Sam Houston to Ft. Bliss. So in 1916, my father quit school and moved to El Paso where he drove trucks to Columbus, New Mexico. He later got a job in El Paso with the Bureau of Reclamation.

*Crawford Kerr*

In 1918, my father joined the Navy. He was sent to Algiers, Louisiana, where he contracted influenza; at the same time, his fiancé got tuberculosis and was in a sanitarium in Brownwood, Texas. He was able to get a discharge from the Navy, married, and in

1919 moved to Clint, Texas. Luckily, he was rehired to work for the Bureau of Reclamation surveying for drainage and irrigation ditches. Finally in 1926 (the year I was born) he went to work for the International Water and Boundary Commission, becoming their third employee. He was eventually promoted to Construction Supervisor. During his tenure, he built the levees from El Paso to Ft. Quitman in Box Canyon, Hudspeth County. As Chamizal Manager, he also supervised transition of properties in the area transferred from the United States to Mexico in the Chamizal Treaty.

***CROSS: Siblings?***

**KERR:** My parents had four children; Mary Edythe, Crawford (me), William and Larry.

***CROSS: Where did you grow up?***

**KERR:** We lived in Ysleta until I was 15; then we moved to El Paso.

***CROSS: School?***

**KERR:** I went to Ysleta High School, then to El Paso High School where I was elected President of the Student Council my senior year. After graduating, I went to the College of Mines for one year.

In 1944, I was drafted into the Navy. My two years in the United States Navy was a crash course in life resulting in my early maturity. I had 19 months of sea duty as a signalman mostly in the Pacific aboard a Landing Ship Tank (LST). Our ship carried all types of cargo, such as troops, trucks, construction equipment and bombs to various islands. We also transported 200 Japanese POWs from Iwo Jima to Guam. Japanese planes strafed our ship at least twice. We survived three typhoons, and the invasion of Okinawa. We participated in several successful rescue efforts, including rescuing two sailors at sea, two civilians in a tidal wave in Hilo, Hawaii, and finally the crew of a gunboat that was sinking in the Caribbean.

This was a wonderful experience with wonderful people that I will never forget. A picture of my ship hangs in my office. As far as I know, only three members of the crew of 110 still survive. I was discharged in 1946 and returned home, where my family met me at the train station. My brother jokingly said that it was now my turn to mow the lawn.

I entered the University of Texas Law School in 1948. The University of Texas allowed me to obtain my college degree after one year of law school, so I graduated from the College of Mines in 1949. I took the Bar exam and passed it, becoming a lawyer in 1950 before even obtaining my law degree. I graduated from the law school in 1951.

***CROSS: Wife?***

**KERR:** In 1948, I married Marian "Nita" Rogers. Her grandmother, Marie Shelton, married Judge Walter Howe who was judge of the 34th District Court for 33 years. Her sisters married successful men, such as Richard Semple, Richard F. Burges, Maury Kemp, the last two of whom played a significant role in El Paso's history. Richard Semple was a successful businessman. William H. Burges and Richard Burges pioneered establishment of the Scott Hulse law firm. Richard's grandson Burges Perrenot was a partner in the Mayfield, Broaddus, and Perrenot law firm. Maury Kemp was one of the founders of the Kemp Smith law firm.

***CROSS: What did you do after you graduated?***

**KERR:** I returned to El Paso and went to work for the law firm of Edwards, Belk, and Hunter where my mentors were Bates Belk and Frank Hunter. I engaged in the general practice of law focusing on probate, banking, and real estate and I might add my most famous divorce client was Sam Donaldson. Frank Hunter taught me how to try cases. Bates Belk was a very generous business partner with whom I participated in the organization of Chelmont State Bank, now the Bank of El Paso, Sun Towers Hospital, Coronado Hills subdivision and shopping center and in many other projects.

***CROSS: Are you still with the firm?***

**KERR:** The firm disbanded in 2009; but I continue to practice.

***CROSS: In the last issue of the* El Paso Bar Journal, *we ran a story about the murder of Mannie Clements. I understand you have a personal story to tell about Pat Garrett's murder with a 'Clements' connection.***

**KERR:** Pat Garrett is perhaps best remembered for killing Billy the Kid. In February, 1908, he met an untimely death and the circumstances of his murder are disputed to this day. According to the prevailing theory, Garrett had rented his ranch to Wayne Brazel. Brazel did not have a reputation as a good shot and had no prior criminal history. As a general rule, cattle ranchers did not like people who raised goats or sheep because goats and sheep destroyed the grasses that cattle fed upon. Against Garret's wishes, Brazel grazed goats on the land. Garret was accompanied at the time by Carl Adamson, cousin of outlaw and killer Jim Miller. Brazel claimed he and Garrett argued, and that he shot Garrett in self-defense. He was tried for the killing but found not guilty.

After the killing, it was rumored that before Garrett was shot a group of people including Oliver Lee and Jim Miller had met at the St. Regis Hotel in El Paso for the purpose of planning Garrett's murder. According some of the rumors, Brazel was part of the conspiracy and he grazed goats on Garrett's ranch to "get Garrett's goat" and trigger a confrontation. According to other rumors, the plan was for Adamson to stop Garrett at a pre-determined location, giving Miller the opportunity to shoot him. It was also claimed that Adamson wanted Garrett's land as a headquarters for planning and conducting his many illegal activities. In any event, shortly after Garrett was killed, Adamson was, in fact, arrested for human smuggling.

Incidentally, the St. Regis Hotel was owned by Earnst Kohlberg. He was shot to death in 1910. The story of his murder was covered in the El Paso Bar Journal a year ago. (Mark Cioc-Ortega and Evelina Ortega, *The Leech Trial of 1910: The Hardest Fought Legal Battle in the History of the El Paso Courts*, El Paso Bar Journal, December 2011/January 2012, *Ed*.)

In 1952 or 1953, Maury Kemp, my wife's great uncle-in-law, told me a story that deals with the issue of Garrett's death. We were living on Galloway Street, and Kemp lived behind us on Baltimore Street. By that time, he had retired from the practice of law. In the evenings, we would sometimes walk around the neighborhood and visit him. He was a fine gentleman, and he loved to tell stories about El Paso's history.

Kemp recalled that when he was practicing law, lawyers would sometimes stop at each other's offices on the way home and have a drink.On one such occasion, Maury had arranged to meet Walter Howe at his office. After Maury opened the door and found a place to sit, an individual who he could not see and who identified himself as Jim Miller said "Don't turn on the light!" Shortly thereafter, Miller left the office. When Walter Howe arrived, Maury Kemp was the only person there.

Three days later, Pat Garrett was killed in Las Cruces. Maury Kemp was surprised to learn about his death. A Southern Pacific Railroad detective arrested Jim Miller at Peach Tree Creek in Oklahoma after Garrett's death. The

detective claimed that Miller had confessed to killing Pat Garrett. The detective shared this information with Maury Kemp who represented the railroad company at the time. Shortly thereafter, Jim Miller was hanged for robbing banks in Oklahoma. His secrets, which were probably many, died with him.

My sister Mary Edyth Kerr's husband Elmer Treat ranched near Hope, New Mexico. Years after they married, I learned that Elmer's grandmother who I knew as grandma 'A' was married to Carl Adamson. Carl Adamson never testified at Brazel's trial. Many years later, when in a New Mexico sanatorium and dying of tuberculosis, Adamson whispered to my brother-in-law Elmer Treat that Jim Miller was the person who killed Pat Garrett.

I later also learned that grandma 'A' was a member of the Clements family. One of her relatives was Mannie Clements, Jr. the subject of the story in last month's *El Paso Bar Journal* about the trial of Joe Brown for allegedly shooting Clements at the Coney Island Saloon in December, 1908. (Ken Jackson, *Joe Brown's murder trial*, El Paso Bar Journal, October/November, 2012, *Ed.*)

***CROSS: Any children?***

**KERR:** My wife and I have five children, Carolyn Anderson, Jay Kerr, Betsy Nickel, Shelly Norris, and Jenney Frye. Jay is a lawyer practicing in El Paso with the law firm of Firth, Johnson, and Martinez. I have ten grandchildren and two great grandchildren.

***CROSS: During your career, did you do any public service work?***

**KERR:** In the early 1950's, I was President of the El Paso 20-30 Club, a service club similar to the Jaycees. I was also President of the El Paso Sheriff's Posse, and today I am its oldest active member. I rode my horse in 41 consecutive Sun Bowl parades. I have been a member of the El Paso County Bar Association for 62 years, and I was chairman of the Ethics Committee.

***CROSS: Any advice for young lawyers?***

**KERR:** Whether or not you agree or disagree with your judges, respect them. Civilized society depends on maintenance of community respect for the Rule of Law.

**CLINTON CROSS** is an Assistant El Paso County Attorney responsible for prosecuting criminal Deceptive Business Practice cases

# Providing Advocacy To Hijos (PATH): Diocesan Migrant and Refugee Service's PATH Project: Seeking Volunteers

By Kristen Conner

The Diocesan Migrant and Refugee Service's PATH Project increases the representation of undocumented immigrant children eligible for legal immigration status by matching eligible children with pro bono attorneys, putting the children on a path to citizenship and future success. Most PATH Project cases involve children eligible for "Special Immigrant Juvenile Status" (SIJS) due to abandonment, abuse, or neglect by their parents. Attorneys can volunteer for *pro bono* roles in SIJS cases, including representing adult petitioners (whether present or absent), a child or children in family law or child abuse cases, or a child or children in an immigration proceeding. Attorneys who successfully complete a PATH Project case *pro bono* can be listed on the PATH Project referral list, distributed to clients who do not qualify for free services.

The Diocesan Migrant and Refugee Service (DMRS) currently has 20 cases placed with fourteen *pro bono* attorneys. DMRS has another 27 youth waiting for pro bono attorneys and over 25 youth waiting to be screened for SIJS. This influx of numbers is largely due to President Obama's creation of the "Deferred Action for Childhood Arrivals" program this summer. Since June 15, 2012, over 1,000 potential applicants have come to DMRS's free information sessions on Tuesday mornings. People who attend these information sessions are invited to complete a brief questionnaire aimed to screen them not only for deferred action but also other immigration relief such as SIJS. Based on these responses, approximately 10% of youth eligible for deferred action also may be eligible for SIJS. Unlike deferred action, which only offers a two-year work permit, SIJS would actually put them on a path to citizenship.

If you are interested in volunteering for the PATH Project, please contact Michelle Martinez at (915) 532-3975 ext. 236 or mmartinez@dmrs-ep.org. The next PATH training will be in the Spring. DMRS thanks the following attorneys for their *pro bono* representation in a PATH Project case in the past two years:

Lauren Armstrong
Tristan N. Bouilly
Chris Marie Borunda
Mark Briggs
Beatriz Ferreira
Linda Flores
Iliana N. Holguin
Veronica Teresa Lerma
Cynthia Lopez
Mark Mainwaring
Pamela Munoz
David Proper
Francisco Ortega
Enrique Ramirez
Susan Waller Ramos
Arturo Rodriguez Hernandez
Raymondo E. Rojas
Everett Saucedo
Corey Sherí Sainz
Karla Vargas
Kristina Voorhies Legan
Jamye Boone Ward
John L. Williams
Michael R. Wyatt

**KRISTIN M. CONNER** Is currently a Research and Writing Specialist for the Office of the Federal Public Defender. From September 2010 to 2012, she was an Equal Justice Works Fellow at Diocesan Migrant & Refugee Services, Inc.

# Regrets of the Past can Open Pathways to a Better Tomorrow

By Judge Oscar G. Gabaldón, Jr., CWLS

The British statesman, Sir Winston Churchill, once remarked that "To every man, there comes in his lifetime, that special moment, when he is physically tapped on the shoulder and offered the chance to do a very special thing, unique to him and fitted to his talent; what a tragedy if that moment finds him unprepared or unqualified for the work which would be his finest hour."

We sometimes fail to seize opportunities that could have turned out to be doorways to a better life, to a more successful career, to the acquisition of greater knowledge and understanding, or to acquiring happier and more fulfilling personal life experiences. At times, we resist reaching out and grasping such opportunities for fear of the unknown, for fear of failure, or perhaps simply due to careless inattention. Whatever may contribute to our failure to seize such opportunities, there are always new opportunities ahead of us. They will come, and they will tap us on our shoulders. Will we be more vigilant about those future opportunities that life will grace us with? Will we be ready this time around? Will we answer their call?

Often times, we live out our lives with regrets in tow. These regrets can be quite burdensome at times. We carry them on our shoulders and will not let them go. However, most, if not all, of these regrets should be abandoned to the realm of forgotten history. That is, whatever they may be, they can no longer affect us, unless we give them permission to do so. What is done is done. We must be realistic, and hold on to the hope of a better tomorrow. We have the power to prepare ourselves so as not to repeat those things we store in our "bag of regrets." We have the innate ability to change our patterns, our thinking, and our overall approach to life so that we do not stumble and create new regrets.

Danny Frederick Wallace, British filmmaker, actor, and author of notable books such as Yes Man and Join Me, tells us in his own forthright and practical manner: "Take the stupidest thing you've ever done. At least it's done. It's over. It's gone. We can all learn from our mistakes and heal and move on. But it's harder to learn or heal or move on from something that hasn't happened; something we don't know and is therefore indefinable; something which could very easily have been the best thing in our lives, if only we'd taken the plunge, if only we'd held our breath and stood up and done it, if only we'd said yes." Healing, learning, and growth can only happen by letting go of our regrets and actively exploring and determining what our future may look like. While it is true that many things may be out of our control, many other things will be within our control and within our ability to define.

*Judge and Mrs. Oscar Gabaldon*

*All of us have our own stories of regret. However, many of these stories can continue on with newly created chapters, where we can author sequels with endings that we choose to create. These endings can be happy ones. They can be stories with wonderful and mesmerizing endings. They can be amazing stories of hope for a better tomorrow.*

Often times what we may regret about our past is no longer worthwhile or deserving of so much attention, time, and energy. In short, we can continue to empower our feelings of regret or we can choose to extinguish their hold on us. The truth is that some of the things we regret doing or that we regret happening can sometimes turn out for the better, for new opportunities present themselves in a course of a lifetime that can provide us with second chances or that afford us new and better opportunities.

For example, in my case, I wanted to be a Catholic priest, so I applied and was allowed to study for the priesthood…a celibate priesthood. About eight years into my studies for the priesthood, I met and fell in love with a young lady named Martha. At the time, I had mixed feelings about leaving behind what I considered to be a divine calling. I felt guilty about "abandoning" my vocation to the priesthood. However, I came to realize that I should not have any regrets, because I had discovered the love of a woman that embraced my entire being. In time, I realized that I no longer had regrets for leaving the seminary.

My calling was to become one with Martha. Instead of regrets, I became appreciative and thankful for all the good things seminary life gave me. Martha became my wife. She supported me through law school. She gifted me three cherished children. She gave me unconditional love. Today, she continues to be my anchor, my ideal woman, and my loving wife. Thus, while I no longer pursued life as a priest, another amazing opportunity presented itself to me, the opportunity to continue my life's journey as a husband, a father, and a family man.

All of us have our own stories of regret. However, many of these stories can continue on with newly created chapters, where we can author sequels with endings that we choose to create. These endings can be happy ones. They can be stories with wonderful and mesmerizing endings. They can be amazing stories of hope for a better tomorrow.

Dr. Steve Maraboli, the bestselling inspirational author of Life, the Truth, and Being Free, offers us this calculating thought: "We all make mistakes, have struggles, and even regret things in our past. But you are not your mistakes, you are not your struggles, and you are here now with the power to shape your day and your future." These words are indeed worthy of serious consideration, for they expound a reality that any reasonable man or woman can fully appreciate and relate to.

In essence, we hold the world in the palm of our hands to mold it in such a way that our future becomes a more promising future. In the process, of course, we also take ownership and accountability for how we shape and form our personal world. However, as Maraboli also cautions, "The truth is, unless you forgive yourself, unless you forgive the situation, unless you realize that the situation is over, you cannot move forward." Once we let go of the regrets in order to move forward, then a rainbow of splendid things can happen. Maraboli describes it this way: "Incredible change happens in your life when you decide to take control of what you do have power over instead of craving control over what you don't." Let us, therefore, embrace our present opportunities, but let us not lose sight of the fact that we can simultaneously begin to create our future in the present.

**OSCAR GABALDÓN** is an Associate Judge of the 65th District Court responsible for overseeing the trial of Child Abuse and Neglect cases. He is certified by the National Association of Counsel for Children and the American Bar Association as a Child Welfare Law Specialist (CWLS).

# ADVANCE SHEET, *1546*

By Charles Gaunce

Pleas of the Crown
Hilary Term, 1212

"William of Tameton, Alan of Sowerby, Nigel of Plumpton, Robert of Wivelsthrope, Robert Vavassour, Mauger Vavassour, all of these except Nigel Plumpton record, that whereas by the sheriff's precept they were at [York] castle to hold the adjourned pleas of that county, certain men brought before them from the gaol a man in bonds, namely, William, Andrew's son. And Geoffrey of Calthorpe came before them and appealed him, saying that the said William came to his court by night and wickedly and in larceny stole from him a cow (which was bound to him by a tie which he had previously stolen from [Geoffrey's] horse), and when [Geoffrey] saw that, he raised hue and cry and pursued him with cry and caught him, and that he thus stole the cow he offered to deraign against him, as the court should consider, by his body etc. And William defended felony and larceny and seisin of the cow and all of it word by word by his body as the court should consider. And since many were there [in court] who testified that he was thus captured by the hue and cry, seised of the cow as aforesaid without any demand being made for their testimony, [the aforesaid knights] adjudged that there should be battle between them.

The sheriff is asked whether anyone was summoned by him, and says No. It is considered by way of amendment that the battle be unwaged, since no one testified that [William] was taken with the cow, and the sheriff's serjeant was not with him when he was led to gaol, nor were any of the neighbors summoned by the sheriff [to testify]; and let Geoffrey be in mercy for having arrested him and taken him to gaol without view of the serjeant; let [Geoffrey] be arrested; and let the knights who assisted at the judgment be in mercy."

Did you ever have a client protest to you that something just wasn't fair? In my initial client interviews, I always tried to discern what the person was seeking. Frequently, the potential client would make the statement that what they wanted was justice. I always used that opportunity to advise them that when going to court, the best that could be expected to obtain was law, not justice. This is what Geoffrey got.

The assembled court, consisting of several knights of the realm, had William brought from the jail to appear in court. Geoffrey was there in court to testify that William had stolen a cow from him, that Geoffrey had raised an alarm and given chase, capturing William. His neighbors testified that they saw Geoffrey capture William, and that William had the cow when he was captured. In an ideal world, I am sure that Geoffrey was feeling that on these facts he just couldn't lose. There were no polls to unskew, the general feeling of all in attendance was that William was caught red-handed with the stolen cow. The eloquence of our governor is instructive: "oops."

When asked whether the sheriff had summoned these neighbors to court to testify on Geoffrey's behalf, the sheriff said no, and furthermore, when Geoffrey captured William as William was taking the cow, there was no law officer present. As a result, the court sent Geoffrey to jail for committing an offense against William. If Geoffrey were your client, how would you tell him that justice is served?

**CHARLES GAUNCE** is the Legal Reference Librarian at the University of Texas at El Paso.

*EPBA members provide free legal consultations at the Access to Justice Legal Fair held at the El Paso Community College Valle Verde Campus, October 2012.*


# Computer (Operating System) Upgrade; Yea or Nay?

by David J. Ferrell
djf@elpasolaw.com

In the last couple of months, I have had numerous e-mails, telephone calls and approaches at the courthouse by fellow lawyers and their staff with the same question. "What should we do to upgrade our computer system?" I have been thinking about this same issue myself. This year I have had three of my office computers fail and I lost no data (files) because I have a good backup system. BUT, it was still very time consuming and expensive to get my system up again. I have been asking myself, what is the main cause(s) of these multiple failures?

Besides regular human user error, and hardware and software obsolescence, I realized that a most frequent cause of my problems was a conflict between my production software (word processing, data bases, billing software, accounting management, etc.) and the operating system (henceforth to be called OS). Right now my OS system resides on my multiple computers on the indigenous hard-drives. Windows 7.0 OS is a great improvement over prior Windows OS versions but there are still compatibility problems with some of my production software.

What has Microsoft done? They have come out with Windows 8.0 that they want us to install on our indigenous hard-drives (i.e. a purchase and install on each computer). But that is not all they have done. They have now released a CLOUD OS. That is the major event that happened on September 4, 2012, that I hinted about in an earlier article. Initially, in my mind, that was a great move. Imagine not needing to keep buying Windows updates for your multiple computers and spending the time and effort to install and reinstall these updates. And what about those frequent automatic security updates (if you allow automatic) that slow down your computers when you need them most? And, what if the new CLOUD OS is maintained by an IT person at Microsoft at their expense so you do not have to do it yourself or hire your own IT person, isn't that a great step forward?

The release of Microsoft Windows Server 2012 (the CLOUD OS) has produced major changes within the operating system market. But, these changes are confusing to most of us since we do not know the ramifications of this change in our basic day-to-day computer use. Many of the Microsoft changes are small improvements in operation and efficiency, but the main Microsoft shift shows something major is happening in CLOUD services.

As we know, Microsoft has released Windows 8 (October 26, 2012) and since Microsoft also released a CLOUD OS, don't we see a conflict? Is Microsoft competing with itself? These are BOTH operating systems; will I need BOTH?

"CLOUD computing" is the rage. It has become the most used modern computer phrase. Software/archive space vendors are competing to get our stuff on the CLOUD. The problem is that everyone seems to have a different definition of what the CLOUD is, what it can do and whether or not it is SAFE.

CLOUD computing is presently in an early stage, with a diverse crew of providers large and small delivering a slew of CLOUD-based services, from full-blown applications to storage services to spam filtering. Utility-style infrastructure providers are part of the mix, but so are SaaS (software as a service) providers such as QuickBooks Online, DropBox, EverNote, SugarSync and many more. Today, for the most part, users must plug into CLOUD services individually, but CLOUD computing integrators are emerging.

We have all seen CLIO that is advertized on the Texas Bar Website (http://www.texasbar.com).

The CLIO bullet message reads:

> CLIO is a 100% web-based legal practice management program that is optimized to meet the needs of solos and small firms. Web-based, secure, and easy-to-use, Clio overcomes many of the technical hurdles offered by conventional practice management solutions. With Clio, lawyers can spend their time building their practice and let Clio handle the rest.

That sounds good to solos and small firms but what if the CLOUD goes down or the system is hacked, or if your access to the CLOUD dies? And now that Microsoft is entering the CLOUD arena, after a seven year procrastination, what can Windows OS computer users expect? What new SaaS legal service software providers are coming to compete? EXPECT a FLOOD soon.

If you use any of these SaaS programs make sure you are in a month to month relationship AND at the end of your business relationship, you get your data back "in usable form." Remember in most cases the data you put on the SaaS CLOUD is not yours; it belongs to your clients.

Physicians have already gone through this with "in office" client billing/data third party providers. In many cases the doctors did not know what they were doing and allowed their billing/data records to be morphed into a format that only could be used with the software of the third party providers. Then came the new data (new client files) added to the old data that was reconfigured to respond only to the third party providers' proprietary software. All was well at first but then price hikes, expensive software upgrades, incompetent service, and disappearance of technical support emerged.

Unfortunately, it was then discovered that certain third party providers would retain the doctors' data (in what I call a hostage situation) with a contract that said the data was the property of the providers, and additionally, as hinted to above, the doctors' data was gibberish except when it was accessed by the proprietary (OS) software of the providers which software was removed from the doctors' computer system when the business relationship was terminated. This forced many doctors to retain these third party providers to prevent being put out of business without their client data. And YES, sometimes the third party providers went out of business and could not be found. UNCONSCIONABILITY *per se*!

So, now is the time for lawyers to protect themselves from becoming victims; *i.e.,* computer/internet/CLOUD/ virtualiztion victimology.

There is a huge number of computers that are still running Microsoft XP as their OS. These users never upgraded their computers to Vista (thank goodness) nor to Windows 7. Now here comes Windows 8 OS and Microsoft CLOUD OS.

What Microsoft has done to migrate their enormous operating system client base to their NEW OS is to articulate the cessation of "TECH SUPPORT." It has been published that Microsoft will no longer support Windows XP after April 2014. Microsoft is still selling Window 7 for another year but rest assured there is also obsolescence planned in tech support in that system. Microsoft just announced that it has developed Microsoft Office for use on the Ipad and on Android devices with an anticipated release date of early 2013. Android and Apple have their own OS systems and don't need any Microsoft OS.

The OS competitors are trying to get to the full Bring Your Own Device (BYOD) platform before anyone else so they can corner the market. BYOD means you can access your data from anywhere with a computer, smart phone and/ or pad (Ipad/Android/RIM Product, etc.). It will allow you to access and modify your data wherever you are (add a time slip, see your calendar, correct a typo in a contract, print that contract, work on a spread sheet, make a deposit/withdrawal from your bank account, attend a CLE in your home/car/gym, call home etc., etc., etc.

The CLOUD is here to stay. Now we need to know which CLOUD(s), and what OS to get to the CLOUD(s) we will use and one hundred other facts. Will we have to buy/upgrade our production software (i.e. our word processor)? What is the price for the OS that we will use? Will we have to buy/ upgrade our hardware? Is the CLOUD safe? How expensive will the upgrades be if we go there? Etc., etc., etc.

I wish I had the answers to these questions, but I don't. I do have an answer to the first question in this article, "What should we do to upgrade our computer system?" My answer: Let the OS market shake out for a while and use what you have if it's OK for now. If you HAVE to upgrade your computer, *caveat emptor*.

**DAVID J. FERRELL** is an El Paso attorney specializing in probate and criminal law. He also assists law firms in development of their computer trial and law office technology. He serves on the WEB Services Committee of the State Bar of Texas.

# Association News

## El Paso Women's Bar Association

National Adoption Day held on November 17th was a resounding success due to the efforts of 65th Court Judge Yahara Gutierrez, her staff, TDPS, and CASA as well as the El Paso Women's Bar and other volunteers ranging from photographers for the family portraits to the construction of the set for the photographer by UTEP Professor, Ross Fleming and his students. The El Paso Women's Bar members provided goody bags for the children being adopted by their foster parents. Additionally Veronica Lerma, vice president of the El Paso Women's Bar solicited the donation of turkeys for each adoptee family as well as the refreshments for the event.

The El Paso Women's Bar is conducting a children's book drive for the holidays targeting the over 420 foster children in the El Paso area. The El Paso Women's bar is seeking either new or gently used childrens/teen books for gift wrapping and delivery to the El Paso Foster Parent Association for delivery to the foster children in El Paso.

The El Paso Women's Bar Association is co-sponsoring along with UTEP, the El Paso League of Women Voters and other El Paso women's groups a showing of the movie entitled "Miss Representation" on March 8, 2013 in conjunction with "International Women's Day." The movie explores the reasons for the profound lack of women in the political and business leadership pipeline in this country.

The El Paso Women's Bar Association annual Charity Bash is in the planning stages set for April 2013, more information to follow soon.

## El Paso Paralegal Association

The El Paso Paralegal Association will hold its Annual Attorney Paralegal Luncheon on Wednesday, December 5, 2012, at noon at the El Paso Club, Chase Tower, 201 E. Main Drive, 18th Floor. Special Guest Speaker: J. Kirk Robison, "Son of a Butcher". The cost is $23.00 per person. Tickets must be purchased by November 28, 2012,. Contact Lynda Camacho for tickets or for more information at lcam@scotthulse.com or (915) 546-8311

The El Paso Paralegal Association will hold its January meeting on Thursday, January 17, 2013 from 12:00 noon to 1:00 p.m. at the El Paso Club, Chase Tower, 201 E. Main St., 18th floor. Speaker: TBD. Topic: TBD. The cost for lunch, which is optional, is: $16.00 buffet or $10.50 salad bar (price may increase). Please RSVP for the luncheon with Peggy Dieter at Kemp Smith: 546-5267.

## Federal Bar Association - El Paso Chapter

Federal Sentencing Issues Designations, Inmate Programs and Time Computations CLE will be held on Thursday, December 6, 2012 at the Albert Armendariz, Sr. U.S. Courthouse, Jury Assembly Room from 11:00 a.m. to 2:00 p.m. 3.0 hours of MCLE, FREE to FBA members, $30 for nonmembers. $10 lunch available at door with RSVP. RSVP to Deborah Fischer at deborah_ fischer@txwd.uscourts.gov

Civil Discovery on Thursday, January 17, 2013 at the Albert Armendariz, Sr. U.S. Courthouse, Jury Assembly Room at noon. 1.0 hour of MCLE, FREE to FBA members, $10 for nonmembers. $10 lunch available at door with RSVP.


# HELP!


The editors of the El Paso Bar Journal solicit your contributions dealing with substantive legal subjects or issues. We believe the interests of El Paso lawyers and law firms will be advanced by the publication of at least one or two articles in every Journal issue dealing with legal subjects and issues, such as the article by Janet Monteros published in the Journal's April/May, 2012 issue.

Good articles, of course, take time, thorough research and clear writing. In some instances, however, the research may be a product of your daily legal work--researching an issue or writing a brief. We invite you to share your work with the legal community in El Paso and wherever the Internet may travel. If issues of confidentiality are involved, the work usually can be sanitized to comport with ethical requirements, while at the same time sharing your hopefully brilliant work with the larger broader community.

Articles should be submitted by e-mail to **Nancy Gallego, Executive Director of the El Paso Bar Association**, at ***nancy@elpasobar.com.*** They must be submitted at least one month prior to the proposed publication date, and they should not exceed 2,500 words unless the article is to be published in more than one issue.

# El Paso Bar Association

Presents

# 17th Annual Civil Practice Seminar

***February 15 & 16, 2013,*** Monte Carlo Resort and Casino, Las Vegas, Nevada

**Pending Approval for 11.75 hours of MCLE, including 1.5 hours of Ethics by the State Bar of Texas and Pending for 10.0 hours of CLE, including 1.5 hours of Ethics by the Nevada Board of Examiners**

**Randy Grambling, Moderator**
**Judge Linda Chew, Course Director**
*Join us for a Weekend of Fun & Education*

## Schedule (Subject to change)

**Thursday, February 14, 2013**

6:00 – 7:30 p.m. El Paso meets Las Vegas (special program with El Paso and Las Vegas Attorneys)

**Friday, February 15, 2012**

8:00 a.m. Registration begins

9:00 - 9:05 a.m. Welcome and Introduction
Randy Grambling, President Elect of El Paso Bar Association

9:10 – 10:10 a.m. Intersection/Civil & Criminal
Carl Green, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C. and Mary Stillinger, Attorney at Law, El Paso

10:10 – 10:15 a.m. Break

10:15 – 11:15 a.m. Fiduciary Litigation
Milton Colia, Kemp, Smith, LLP, El Paso

11:15 – 12:00 p.m. Family Law – Protective Orders
Michael Alvarez, El Paso County Attorney's Office (Speaker TBA)

12:00 – 1:00 p.m. Lunch (Sponsors)

1:00 – 2:30 p.m. Evidence Jeopardy
Judge Tom Spieczny, County Court at Law #7, El Paso and Judge Gina Benevides,

2:30 – 2:45 p.m. Afternoon Break

2:45 – 3:30 p.m. Immigration ~ The Dream Lives On
Kristin Connor, El Paso

3:30 – 4:15 p.m. Probate
Joseph Strelitz, El Paso

4:15 – 5:15 p.m. Gender Bias – Lawyers Behaving Badly
Judge Maria Salas-Mendoza, President, El Paso Bar Association – Moderator, Daniel Hernandez, Ray, Valdez, McChristian & Jeans, P.C. & Gina Palafox, Attorney at Law, El Paso

5:30 – 6:30 p.m. Happy Hour

**Saturday, February 16, 2013**

8:00 – 9:00 a.m. Breakfast

9:00 – 9:45 a.m. Civil Law Update
Steven Blanco, Blanco, Ordonez, Mata & Wallace, P.C. & Sam Legate, Scherr & Legate, PLLC, El Paso

9:45 – 10:30 a.m. Federal Procedure
Speakers TBA

10:30 – 10:45a.m. Morning Break

10:45 – 12:15 p.m. Ethics – Conflict of Interest & Courtroom Decorum
Hector Zavaleta, Attorney at Law, Gina Palafox, Attorney at Law & Mario Martinez, Attorney at Law., El Paso

**Door prizes will be given throughout the Seminar**
Course Materials will be in the form of a flash drive
**$300.00** – Members of EPBA ~ **$350.00** – Non-Members
**$225.00** – Legal Assistants/Paralegals

Make your reservations directly to the **Monte Carlo Resort and Casino**, 800/311-8999 and tell them you are with the **El Paso Bar Association**, Group Code #XPASO13 or you can go to https://resweb.passkey.com/go/XPASO13 and it will take you directly to the El Paso Bar Association page. Hotel Room Rates are $60 on 2/14, $105 on 2/15 and $160 on 2/16. There is a two (2) night minimum stay.

## REGISTRATION FORM

Name: _____

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