EL PASO BAR ASSOCIATION
Founded in 1897

El Paso Bar Journal

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An Update of Events and Information

Feb - Mar 2014

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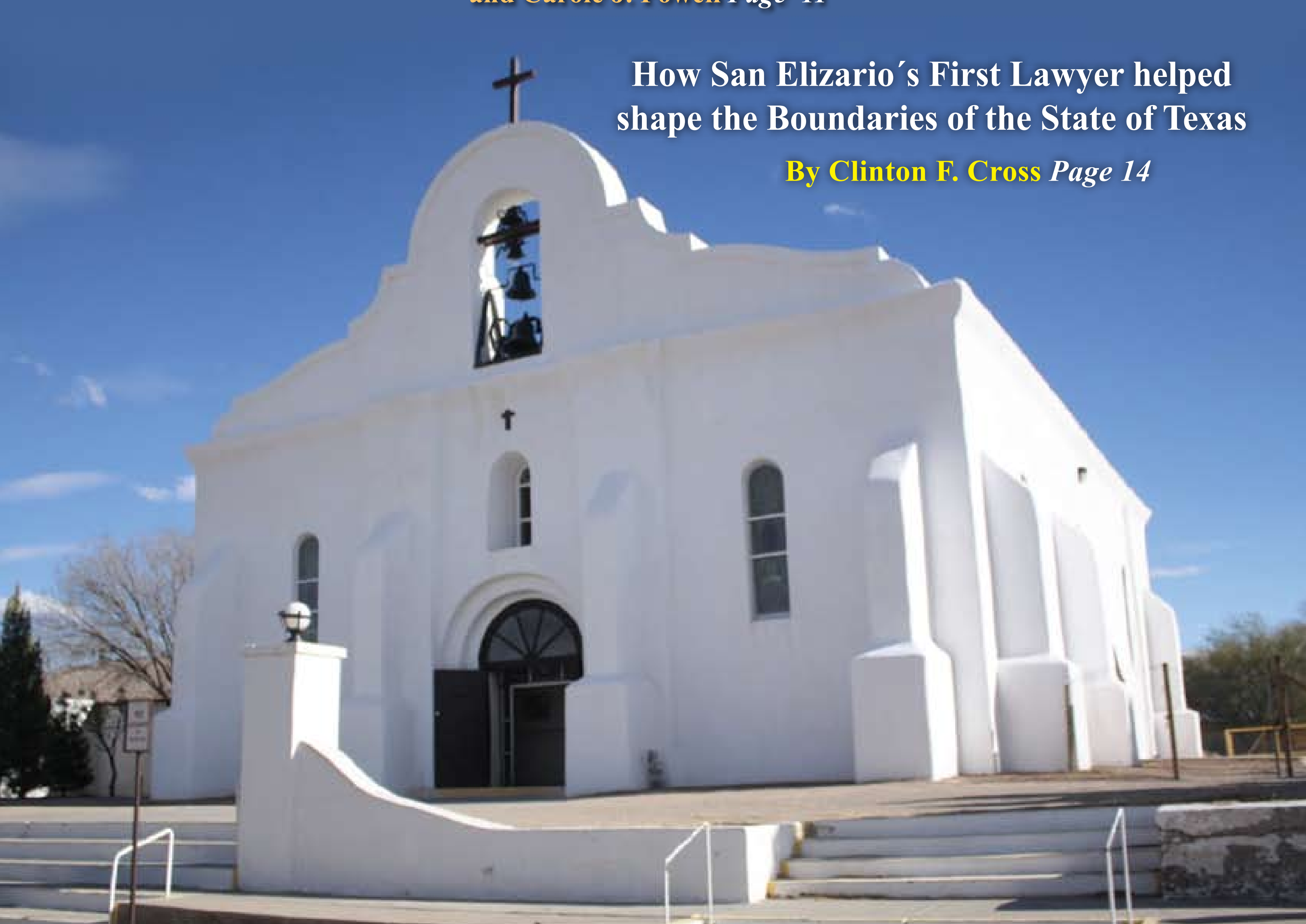

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Outstanding Partnership Award
Outstanding Newsletter
Publication Achievement Award
NABE LexisNexis Awards
Community & Education Outreach Award
-2007, 2010 & 2012
Excellence in Web Design – 2007
Excellence in Special Publications – 2008

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The El Paso Bar Journal is a bi-monthly publication of the El Paso Bar Association. Articles, notices, suggestions and/or comments should be sent to the attention of Nancy Gallego. All submissions must be received by the Bar office on or before the 10th day of the month preceding publication. Calendar listings, classified ads, display ads, and feature articles should not be considered an endorsement of any service, product, program, seminar or event. Please contact the Bar office for ad rates. Articles published in the Bar Journal do not necessarily reflect the opinions of the El Paso Bar Association, its Officers, or the Board of Directors. The El Paso Bar Association does not endorse candidates for political office. An article in the Bar Journal is not, and should never be construed to be, an endorsement of a person for political office.

President's Page

Honoring our past and building for the future

With the start of the New Year, all members of the El Paso Legal Community should strive to maintain the culture in El Paso of practicing law with collegiality and respect. I encourage all members of the El Paso Bar Association to continue to practice law the El Paso way through out 2014 by showing respect and professionalism toward our judges, adversaries and fellow lawyers.

The El Paso Bar Association has been very active during the past three months.

This past November, the El Paso Bar Association continued its tradition of supporting the El Paso Lawyers for Patriots Legal Clinic at the El Paso Community College Transmountain Campus. Don W. Williams and the El Paso Lawyers for Patriots Program again provided exceptional service to our veterans.

The El Paso Bar Association hosted an informative seminar on mandatory e-filing, the Odyssey System and standard court procedures for attorneys and their legal assistants. Under the direction of Judge Maria Salas-Mendoza the seminar was a huge success. By the time you receive this Bar Journal, The El Paso Bar Association will have hosted a second seminar on mandatory e-filing.

The Joint Bar Association Holiday Party in December was a great success thanks to the hard work of Yvonne Acosta and Kamie Smith. Those who attended the celebration had the great opportunity to enjoy their fellow colleagues' company as well as the opportunity to bid on fabulous silent auction items. Proceeds of the silent auction benefitted the El Paso Bar Foundation.

Dan Hernandez and members of his committee have done a great job in planning the El Paso Bar Association's 18th Annual Civil Trial Practice Seminar to be held in San Diego, California February 13-15th, 2014. A diverse program is planned which includes such topics as Preservation of Error, Consumer Law, HIPPA, Texas Supreme Court update, Estate Planning and Probate, Employment Law, Tax for Litigation, Jury Selection, Family Law and the Military, Commercial Litigation, and Mediation and Mandatory E-filings.

I encourage all members of the El Paso Bar Association to join us in San Diego. I also encourage all members of the El Paso Bar Association to join us for our monthly luncheons on the second Tuesday of every month at the El Paso Club.

Randolph Grambling,
President

Cover: Presidio Chapel of San Elizario

El Paso Bar Association
February Bar Luncheon
Tuesday, February 11, 2014

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

We will have the Judicial Candidates Forum for the following races:

Chief Justice, 8th Court of Appeals
168th District Court
205th District Court
243rd District Court

Door prizes will be given out

Please make your reservations by Monday, February 10, 2014 at 1:00 p.m.
at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

Please make sure you RSVP.

El Paso Bar Association
March Bar Luncheon
Tuesday, March 11, 2014

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

Guest Speaker to be announced

Door prizes will be given out

Please make your reservations by Monday, March 10, 2014 at 1:00 p.m.
at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

Please make sure you RSVP.

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CALENDAR OF EVENTS

February, 2014

Tuesday, February 4
EPBA BOD Meeting

Tuesday, February 11
EPBA Monthly Luncheon
Judicial Candidate Forum

Thursday, February 13
18th Annual Civil Trial Practice Seminar
The Declan Suites, San Diego, CA

Friday, February 14
18th Annual Civil Trial Practice Seminar
The Declan Suites, San Diego, CA

Saturday, February 15
18th Annual Civil Trial Practice Seminar
The Declan Suites, San Diego, CA

Monday, February 17
President's Day
EPBA Office Closed

Thursday, February 20
EPPA Monthly Luncheon

March, 2014

Tuesday, March 4
EPBA BOD Meeting

Tuesday, March 11
EPBA Monthly Luncheon

Thursday, March 20
EPPA Monthly Luncheon

Monday, March 31
Cesar Chavez Day, EPBA Office Closed

Upcoming Events

Saturday, May 10, 2014
Law Day Dinner, El Paso Country Club

Joint Bar Association Holiday Party, 2013

We would like to give a very special thank you to all our generous sponsors and to all the sponsors of the Silent Auction.

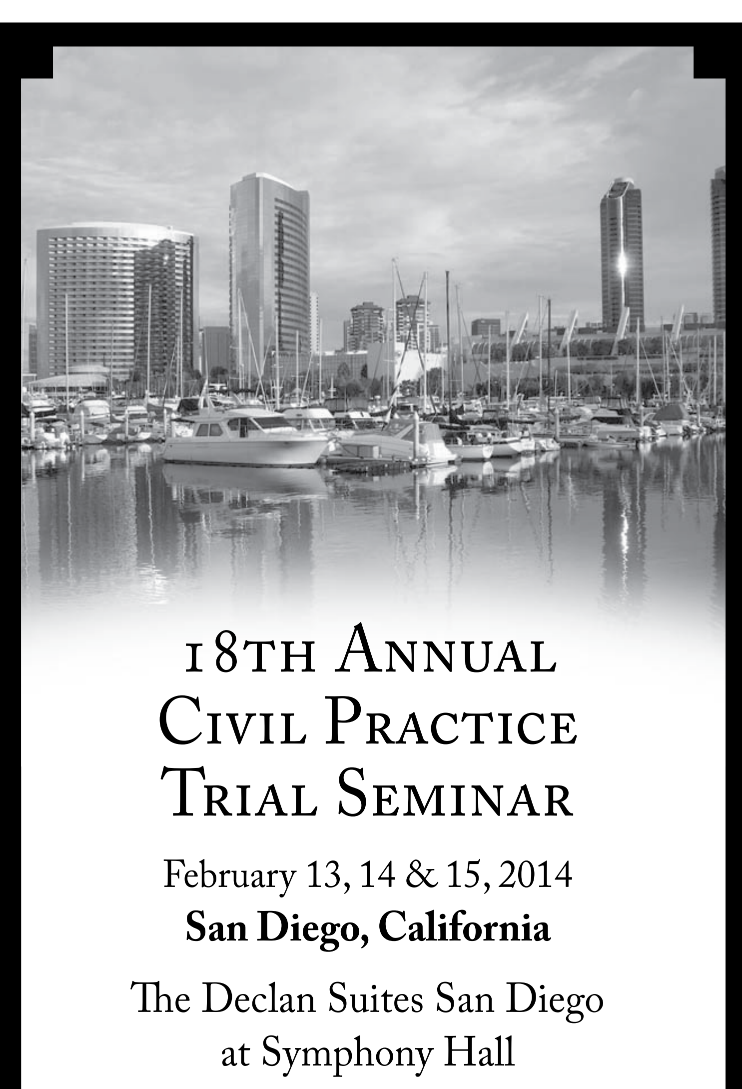
We would also like to thank the Holiday Party Committee for all your work in putting on a great party.

Upcoming Holidays

The El Paso Bar Association office and the El Paso County Courthouse will be closed on the following holidays:

Monday, February 17, 2014
President's Day

Monday, March 31, 2014
Cesar Chavez Day



18th Annual Civil Practice Trial Seminar

February 13, 14 & 15, 2014
San Diego, California

The Declan Suites San Diego at Symphony Hall

Registration form is on page 18 of this bar journal.

Meet Your Board Leaders

Each issue the Journal will feature several members of the Bar's Board of Directors so that members will know their leaders and representatives.

Christopher Antcliff

For the last 12 months, Chris Antcliff has been in private practice as a full-time mediator/arbitrator at Antcliff Mediation. In addition, he has taken on a few cases where he thought that I might be able to help people. Antcliff began his legal career with a clerkship for U.S. District Judge David Briones in 1995. Two years later, he started a solo practice and later partnered with Tom Stanton, which practice lasted nearly ten years. In 2007, Antcliff was appointed by Governor Perry as the first judge of the newly created 448th District Court, and after losing that race, he was appointed to the 168th District Court. He returned to private practice when he did not retain his seat in 2010. In late 2011, he was appointed as a Justice on the 8th Court of Appeals. Says Antcliff of that appointment, "[It was] a job I truly loved." After losing one last general election as a Republican, he re-entered private practice. Antcliff is a graduate of Austin High School and spent several years after high school graduation in Europe—holding various jobs while living in Stuttgart, including forklift driver, warehouseman, and manager of a gym on an American Military Base. When he returned to the States, he began working for Texas Tech University where he met his wife Linda. Her condition—that he get a degree before she would marry him—was met when he graduated with a political science degree; he then obtained his law degree in 1995.

Antcliff serves on the Bar board to give back to the community and the profession. He says, "Things have changed a great deal since this country was founded when, in the words of past Bar president Steve James, lawyers were heroes. I think today that the vast majority of lawyers still join our profession to help others and to make life better. The mission of the El Paso Bar Association is the advancement of justice and the science of jurisprudence, the advancement of the professional interests of persons licensed to practice law, the preservation of high standards of integrity, honor and courtesy in the legal profession, the improvement of relations among the judiciary, legal profession and the community. What other organization has such lofty goals? I am proud to be a member of this organization and want to do what I can to advance our profession and bring back the dignity and respect once associated with all lawyers."

Antcliff has been married to his wife Linda for 24 years. They have 3 children—Lauren, a sophomore at Texas Tech University studying elementary education, Matthew, a junior at Cathedral High School, and Katherine, a third grader at Lundy Elementary School. The Antcliff family travels "quite a bit in [their] free time," and he also serves as a member of the Board of Directors for the Amigo Airsho and the Public Service Board.

Laura Enriquez

Laura Enriquez, president-elect, will take the helm of the Bar Association in the next year. She currently works for Mounce, Green, Myers, et al. and is Board Certified in Personal Injury Trial Law. She has also served as Assistant District Attorney for the 34th Judicial District. Enriquez is graduate of the University of Texas at Austin where she received her bachelor's degree and the Baylor School of Law, where she was on the Board of Barristers. Having spent several years on the executive committee of the Bar Board, Enriquez sees the role of the Bar Association to serve as the liaison for all bar associations and central to the collaboration of all bar associations' efforts to improve our community. She says her primary function this year is to support President Randy Grambling and to help him achieve his goals for this year.

Enriquez is married to Humberto Enriquez and they have three children, Daniela, Diego and Lucas. The Enriquez family is rounded out by their dogs, Lulu and Cowboy. She says that her hobbies are watching sports with an emphasis on NFL football. Since she named her first born after Dan Marino, one would be correct to surmise that watching NFL football is more passion than hobby.

Felix Valenzuela

An El Paso native, Felix Valenzuela graduated from Andress High School and UTEP, where he majored in political science. He received his law degree from Yale Law School and his Masters degree from the University of Notre Dame, while also practicing law in the surrounding vicinity. Felix then returned home to El Paso and served as a law clerk for United States Federal Judge Philip R. Martinez. He has worked for the Chavez Law Firm and has spent several years teaching numerous classes at UTEP, including the LSPI, Social Media and the Law, and Philosophy of Law.

Felix joined the El Paso Bar Board in 2013; he chairs the Technology committee and hopes to continue the excellent work completed by previous chairs. He also is currently on the board for EPYLA, in the director's circle for the Rubin Center for the Visual Arts, on the executive board for the UTEP Alumni Association, volunteers as the Texas director for Yale University's Day of Service, and serves on various state bar committees.

Playing Well With Others: Simple Professional Courtesies

(Part two of three)

Chief Justice Ann Crawford McClure
Eighth Court of Appeals

In the last issue, Chief Justice McClure discussed the birth of Rambo litigation and its threat to professionalism. In this issue, she reviews the Standards of Appellate Conduct adopted by the Texas Supreme Court and the Court of Criminal Appeals. Ed.

Standards For Appellate Conduct

As an appellate specialist, former appellate practitioner, and current appellate judge, I want to publicly thank Justice Cook, Kevin Dubose, and Skip Watson, whom I have affectionately referred to as the Three Musketeers, for the countless hours they spent ensuring passage of the *Standards*. "All for one, one for all," they have endeavored to advocate the code of chivalry.[1]

Lawyer-Client

Professionalism has its greatest potential when the attorney-client relationship is established. The simple reason is that a client's expectations are formed during the initial interview. This is the time to explain how the judicial system works and how there is a proper role to be played by the litigant, the lawyer, and the judge. While we owe a duty to each other, we also owe a higher duty to the administration of justice. Clients must grasp this concept from the beginning.

The *Standards*

The *Standards* address not only the responsibilities of the attorney, but the attorney's expectations of the client. This section begins with the following preamble:

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.

•Counsel will advise their clients of these Standards of Conduct when undertaking representation.

•Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.

•Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.

•Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.

•Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.

•Counsel will not foster clients' unreasonable expectations.

•Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.

•Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.

•Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

•Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

•A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.

•Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

•Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

This last proviso refers to the *Anders* cases.[2]

Client Control

On many occasions, I have heard opposing counsel say that s/he can't agree to a continuance or an extension of time because "my client won't let me." This is an admission that the client is controlling the lawyer rather than the lawyer controlling the client. When an attorney told my husband that he would not agree to a continuance necessitated by my having surgery, I decided to start attaching the Texas Lawyer's Creed to my fee agreements. When I had a client demand that I raise certain points of error which I firmly believed to be frivolous and which I thought weakened legitimate arguments, I began inserting a contractual provision that I retained the authority to determine the issues for appeal, after discussion, of course. Had the *Standards* been in effect at the time I was in

1. Alexandre Dumas, *The Three Musketeers* (1844).

2. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, reh. denied, 388 U.S. 924, 87 S.Ct. 2094, 18 L.Ed.2d 1377 (1967) (allowing court appointed counsel to withdraw after presenting a professional evaluation of the record and demonstrating why, in effect, there are no arguable grounds to be advanced). *Anders* has been extended to parental termination cases in Texas. *Porter v. Texas Dept. of Protective and Regulatory Services*, 105 S.W.3d 52 (Tex.App.–Corpus Christi 2003, no pet.); *In re K.M.*, 98 S.W.3d 774 (Tex.App.–Fort Worth 2003, no pet.)

private practice, I would have attached them to every fee agreement.

Why is this important? If a client balks at signing the contract because of the *Standards*, you will know at the outset you have a problem client and you should decline to undertake representation. It isn't worth it.

Self Control

Litigators have a tendency to be possessed of a strong ego. There may be a desire to strut, puff up one's accomplishments and skills, even suggest a unique or special relationship with one of the judges. Perhaps there are months when the cash flow is depleted and the temptation arises to take an appeal that should not be pursued, or to bleed the case for financial gain. Resist the temptation. Integrity means doing the right thing simply because it's the right thing to do. But even if you don't buy that, inflating your client's expectations as a means of inflating your self-esteem can be counter-productive. Nothing like a malpractice case to burst your bubble. If you're so good, and the case is worth so much money, and you know the judges by their first names, why didn't you win?

It's also important to set a good example for your client. Don't make disparaging comments about the judge, opposing counsel, or your client's trial counsel. Your client wants to appeal because s/he is dissatisfied with the outcome of the trial. To suggest that the judge is on the take, or that the judge is stupid, or that the other lawyer is known for offering bribes, only serves to discredit our system of justice. The client has already imagined these scenarios anyway. Offer a realistic and constructive analysis of the likelihood of success on appeal, as well as the expense of success. Clients seldom anticipate the length of time an appeal will take, nor do they comprehend that at best, they may only be paying to get a second bite at the apple.

Lawyer-to-Lawyer

This is the section that most resembles the Golden Rule. Treat other lawyers as you would want to be treated. Mistreat them and I guarantee they will never forget.

The Standards

Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

•Counsel will treat each other and all parties with respect.

•Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

•Counsel will not request an extension of time solely for the purpose of unjustified delay.

•Counsel will be punctual in communications with opposing counsel.

•Counsel will not make personal attacks on opposing counsel or parties.

•Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

•Counsel will not lightly seek court sanctions.

•Counsel will adhere to oral or written promises and agreements with other counsel.

•Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

•Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

•Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

Your Word Is Your Bond

Your reputation for keeping your word is fundamental to integrity. Attorneys quickly learn who plays hardball and who negotiates in good faith.

> Professionalism imposes no official sanctions. It offers no official reward. Yet sanctions and reward exist unofficially. Who faces a greater sanction than the loss of respect? Who faces a greater reward than the satisfaction of doing right for right's own sake?[3]

Choose your mentors well

I mentioned earlier that Justice Cook was a mentor. I should explain how that happened. I began my practice in Houston in 1979, nearly 35 years ago. I practiced with a small firm that specialized in family law and as luck would have it, Justice Cook practiced family law as well. I worked with him through the Family Law Section of the Houston Bar Association and we served as officers of that organization together. I moved to El Paso and he ultimately moved to Austin when he was appointed to the Supreme Court. Dedicated to gender diversity, Justice Cook immediately took steps to expand the participation of women in State Bar activities. With his support, I was appointed to the Continuing Legal Education Committee and ultimately served as the vice chair. Justice Cook asked me to serve as his assistant course director in 1990 when he directed the Advanced Family Law Seminar. And he ultimately instigated my appointment to the Texas Board of Law Examiners and administered my oath of office. He was a leader, a role model, and a friend.

Over the course of my practice, I have observed young attorneys become associated with practitioners who regularly and purposefully walk right to the edge of the ethical line, and at times cross it. These young lawyers are learning the tricks, tactics and tantrums of their employers. Some realize it, some don't. But the integrity and credibility of a professional is often judged by the company s/he keeps. Bluntly put, you can't take a bath with a hog without getting dirty.

Self Reflection

Analyze your methods. Do you oppose an extension of time because an adversary opposed yours? Have you handed your opponent a reply brief as you walked into the courtroom for oral argument? Have you argued that opposing counsel is lying when the brief contains a simple typographical error? Do you roll your eyes or shake your head during your opponent's argument? Do you misstate the facts or misquote the law? Have you argued outside the record? Do you do it occasionally when provoked, or has it become a habit?

Lawyer-to-Court

Judges are in the unique position of putting a stop to unethical and unprofessional behavior.[4]

> Appellate judges hold the key to what appellate lawyers do. If counsel cannot derive any meaningful benefits from a given course of conduct, the conduct probably will not take place. That is, the bench can save us from ourselves.[5]

3. Chief Justice Harold G. Clarke, Supreme Court of Georgia, *The Rewards of Professionalism*, The Professional Lawyer, August 1991 at 1.

4. *In the Matter of J.B.K.*, 931 S.W.2d 581, 583 (Tex.App.–El Paso 1996, orig. proceeding).

5. David M. Gunn, *Why Appellate Law is so Appealing*, State Bar of Texas Advanced Civil Appellate Practice Course M, M-1 (1994).

The *Standards*

As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.

•An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

•An appeal should not be pursued primarily for purposes of delay or harassment.

•Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

•Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

•Counsel will present the Court with a thoughtful, organized, and clearly written brief.

•Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

•Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

•Counsel will be civil and respectful in all communications with the judges and staff.

•Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

•Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

Vent and toss

It is only human nature to be upset when you lose. Depending on the personal investment one has in the case, "upset" can become "outrage." It's never a good idea to whip out a motion for rehearing in this frame of mind. Write it to vent if you must, but put it away for a day or two until you have cooled off. You will likely want to toss it and start over. Here are a few examples of attorneys who did not allow cooler heads to prevail and the price they had to pay. The first arises from the San Antonio Court's reaction to a plaintiff's motion for rehearing.

> Specifically, Maloney asserts in the motion that "[p]olitics should not win the day over incapacitated rape victims," and "Plaintiffs can think of no reason for this opinion other than politics." Maloney further contends that "[i]t must be embarrassing to take such a pro-rapist, pro-big-insurance-defense-firm position with so appallingly non-existent legal or logical basis," and "[the] Court should admit it is writing new law to assist the insurance companies of a sleazy nursing home that happen to be represented by an insurance defense firm." Finally, Maloney describes the court's reasoning as "specious" and states that the court "goes on to make some rather outlandish representations which are not supported by the record, the transcript, or by any matter before the court.[6]

The appellate court issued an order directing Maloney to show cause why the court should not sanction and refer her to the grievance committee. Drawing a distinction between respectful advocacy and judicial denigration, the court found the former to be a protected voice while the latter can only be condoned at the expense of public confidence in the judicial system.[7] Recognizing that a judge who receives information clearly establishing that a lawyer has violated the Texas Rules of Professional Conduct should take appropriate action, the court referred Maloney to the Office of the General Counsel for the State Bar of Texas.[8]

Attacks upon the judiciary violate the rule requiring counsel to "demonstrate respect for the legal system and those who serve it, including judges... "[9]

The attorney in *Johnson* attacked not the appellate court but the trial judge: "The trial court's pathetic determination to 'take from the rich and give to the poor,' regarding the entire Record of the matter of [Mr. Johnson's] separate property, is a classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand." The appellate court was not amused. [10]

> In light of counsel's disparaging remarks about the trial court, his firm adherence to those remarks during oral argument, and his claims of error about matters that never occurred or were never presented to the trial court, a substantial question has been raised about counsel's honesty, trustworthiness, or fitness as a lawyer. Consequently, we are bound by Canon 3D(2) of the Code of Judicial Conduct to inform the State Bar of Texas of this matter. [11]

The court additionally imposed sanctions of $500 pursuant to Rule 84 of the Texas Rules of Appellate Procedure. It then vindicated the trial judge -- a senior judge sitting by assignment who had served as a trial judge for four years, a justice of the court of appeals for fifteen years (the last ten years as chief justice), a justice of the Texas Supreme Court for eight years and the Dean of Baylor School of Law for eight years.[12]

Similar reprisals have been imposed by the Corpus Christi Court of Appeals.[13] There, the attorney representing the appellants filed a motion to disqualify each of the justices on the court and to transfer the appeal to another appellate court. In his motion, counsel alleged:

> It is Mr. Condit's and his clients' belief that the Court will decide this case not on the well-established law cited in the briefs and not on the factual merits of this case, but solely to promote the democratic agenda in order to assist the Court's democratic colleagues and/or to retaliate [sic] against him.[14]

He attached to his motion twenty-seven pages of material including campaign literature

6. *In re Maloney,* 949 S.W.2d 385, 386 (Tex.App.–San Antonio 1997, orig. proceeding).
7. *Id.* at 388.
8. *Id. See also Cap Rock Electric Coop., Inc. v. Texas Utilities Electric Company*, 874 S.W.2d 92, 102 (Tex.App.–El Paso 1994, no writ).
9. *Johnson v. Johnson*, 948 S.W.2d 835 (Tex.App.–San Antonio 1997, writ denied), *citing* Tex.Disciplinary R. Prof. Conduct preamble ¶¶ 1, 4 (1989), *reprinted* in Tex.Gov't Code Ann., tit. 2, subtit G, app. A (Vernon Pamphlet 1997) (State Bar Rules art. X § 9).
10. *Id* at 840, n. 1.
11. *Id.* at 841.
12. *Id.* at 840, n.1.
13. *See Sears v. Olivarez*, 28 S.W.3d 611 (Tex.App.–Corpus Christi 2000, no pet.).
14. *Id.* at 613.

relating to his effort to unseat one of the justices on the court. Each justice determined that he or she was not disqualified and none of the justices chose to recuse. Finding that counsel had violated the disciplinary rules, and that as a judicial candidate, he had also violated the Code of Judicial Conduct, the court referred him to the Judicial Conduct Commission and the Office of the General Counsel of the State Bar, but chose not to impose monetary sanctions.[15] When *Havner* was appealed to the Supreme Court, counsels' conduct did not improve. After learning of the adverse ruling, counsel fired off another vitriolic motion for rehearing. The Supreme Court responded by issuing notice to counsel of their opportunity to respond as to why the court should not refer each of them to the appropriate disciplinary authorities; prohibit one of the attorneys from practicing in Texas courts; and impose monetary sanctions.[16]

The Supreme Court is not the only court to take a harsh view of unprofessional conduct. The Court of Criminal Appeals has also found it necessary to put the hammer down.

> Aside from the grounds for rehearing, the motions present a more serious matter. Each motion contains highly offensive, inappropriate, and scurrilous accusations against this Court. The motions accuse this Court of being sloppy, dishonest, and hypocritical. The motions charge this Court with being intentionally careless in order to achieve a desired result. The motions claim this Court treats the State as a second-class party. The motions question the lengths to which this Court is allegedly willing to go to cover for one of its own. The motions suggest the delivery of a per curiam opinion is cowardly. Finally, the motions accuse this Court of violating the Code of Judicial Conduct.
>
> Advocacy, whether in a trial court or appellate court, is not incompatible with due respect and civility. No attorney appearing in this Court furthers the cause of justice by filing a document designed to belittle, degrade, obstruct, interrupt, prevent, or embarrass this Court and the administration of justice. (Page references to motions deleted).[17]

What is most surprising is that the State had prevailed. One can only imagine the rhetoric if the State had lost! While the majority ordered the motions for rehearing stricken with prejudice, one justice believed the court should order the assistant district attorney to show cause why he should not be held in contempt. Perhaps Judge Ferguson's observation that civility is not a problem in the criminal justice system is not altogether accurate. Or maybe much has changed in the years since he penned those words.[18]

***Ex Parte* communications**

Improper conduct is not limited to a written harangue. The rules of disciplinary conduct prohibit *ex parte* communications with a court for the purpose of influencing the court or gaining an advantage.[19]

"Private communications between a lawyer in a pending action and a staff member of an appellate court before whom the case is pending concerning the merits of the then pending appeal are '*ex parte* communications' not authorized by law."[20] There, J.B.K. served as appellate counsel and, following oral argument, called a staff attorney who was his acquaintance to inquire what his "chances" were and whether he should settle before the opinion issued. The appellate court issued notice to counsel to appear, finding that the allegations, if true, raised a substantial question as to counsel's honesty, trustworthiness, or fitness to practice law. Because the court does not act as a fact finder, it issued no finding that the allegations were true. Instead, the matter was forwarded to the Office of the General Counsel of the State Bar of Texas for investigation.[21]

Coming in the next issue: Final Comments and Conclusion.

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

15. *Id.* at 617. *See* also *Merrell Dow Pharmaceuticals v. Havner*, 907 S.W.2d 565, 566 (Tex.App.–Corpus Christi 1994, opinion on motion).
16. *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997).
17. *See Proctor v. State*, 841 S.W.2d 1, 7 (Tex.Crim.App. 1992).
18. *See also Davis v. State*, 2001 WL 951278 *1 n.1 (Tex.App.–Houston [14th Dist.] 2001, no pet.) (appellate counsel, misunderstanding the court's notice of submission and oral argument, filed a motion complaining that "[i]n light of the Court's order requiring that appointed counsel make certain that somebody appear for oral argument, this Motion is nothing but a complete waste of time, effort and energy not to mention a total waste of paper." The court found his remarks demonstrated a lack of professionalism and respect for the court, and violated the Standards for Appellate Conduct).
19. Tex. Disciplinary R. Prof. Conduct 3.05(b)(3), reprinted in Tex.Gov't Code Ann. tit. 2, subtit. G, app. A (Vernon Supp. 1996).
20. *In the Matter of J.B.K.*, 931 S.W.2d 581, 584 (Tex.App.–El Paso 1996, orig. proceeding).
21. *Id.* at 585.

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Valuing Gideon's Gold: How Much Justice Can We Afford?

(Second of three parts)

By M. Clara Garcia Hernandez and Carole J. Powell

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In the last issue, the authors briefly review the history of the constitutional right to court appointed cases in criminal cases and the challenges created by that right. In this issue, the authors discuss the challenges presented to the El Paso Public Defender's Office in representation of their clients. Ed.

III. NO JURY, NO FOUL: GIDEON'S PLEA

Our trial rate the past two years has been 1.1% for felonies, and less than 0.5% for misdemeanors.[28] Although our trial rate for juvenile cases (felony and misdemeanor combined) jumped from 2.5% to 9% from 2011 to 2012,[29] the uncomfortable fact of criminal practice is that most criminal cases never go to trial. A recent article noted that the percentage of felonies that proceed to trial in nine states fell to 2.3% in 2009, from 8% in 1976."[30] Similarly, 97% of all federal criminal cases are resolved by plea agreement.[31]

Clearly, ensuring that a competent—even brilliant—lawyer is standing up for the accused at trial does virtually nothing for the vast majority of poor people who are accused of crimes. Yet, criminal defense training doggedly continues to focus on trial technique, to the exclusion of pretrial and plea practice. We, as criminal defense lawyers, doggedly continue to focus on trial performance as the ultimate measure of our lawyering skills. However, we need to understand our ethical and professional duty to our clients who will never stand trial. All other players in the system (prosecutors, judges, magistrates, detention personnel, probation officers, and communities) must also acknowledge their own duty to provide fundamental fairness and due process to individuals who waive their right to trial. The Supreme Court, to a degree, has addressed this blindness over the last forty years,[32] but much remains to be done.

Convincing even an innocent client to fight, and risk harsh punishment, can be difficult.[33]Pleading guilty is the client's decision, whether or not he is actually guilty.[34] We cannot intrude upon this sacred right, but must ensure that the client makes this decision based upon competent advice, with complete knowledge of the consequences and the strength or the weaknesses of the evidence against him, and with a knowing and intelligent waiver of the right to trial and the ability to have the case fully investigated. No criminal defense lawyer or public defender office should operate a cut-rate "plea mill" where defendants are quickly, and without the necessary preparation, advised and even pressed to plead guilty. Plea mills are an abhorrent practice, but guilty pleas are not evil, ineffective, or unjust per se. On the contrary, effective and just pretrial and plea practice requires investigation, research, and preparation. Meticulous trial preparation is often what enables our lawyers to work out advantageous pleas. The stronger the defense's theory, the stronger the prosecutor's incentive to bargain. Successful plea practice also requires imagination, resourcefulness, and acute negotiation skills. These skills, which are so prized in civil practice, are often overlooked in criminal practice and are rarely the subject of criminal defense education and training. Criminal defense lawyers are compelled to fight to make the pretrial and plea process a fair and just one, to work on collateral issues, and to structure better pretrial outcomes to fit the individual needs of clients.

In conjunction with the low rate of jury trials, we must confront the difficult fact that the United States is now the most imprisoned nation in the world,[35] even in the face of declining crime rates over the past two decades.[36] State

Footnotes

28. Internal office data revealed trial rates of 0.9% and 0.8% for fiscal years 2011 and 2012, respectively. El Paso Cnty. Pub. Defender, Office Data (on file with authors) [hereinafter EPPD Data]. Case information is maintained in our county's Justice Information Management System (JIMS).

29. *See infra* notes 41-43 and accompanying text for an explanation of the relative rates.

30. Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times, Sept. 25, 2011, http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push -for-plea-bargains.html (citing data from the National Center for State Courts).

31. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, Wall St. J., Sept. 23, 2012, http://online.wsj.com/article/SB10000872396390443589304577637 610097206808.html.

32. *See Hill v. Lockhart*, 474 U.S. 52 (1985) (invalidating a plea of guilty based on the erroneous advice of counsel regarding parole eligibility). Pre-plea advice must be both correct and sufficient. It is not enough to tell a client that he could suffer collateral consequences as a result of a plea or finding of guilt. We must advise the client of any particular clear consequences before entering a guilty plea. *See Padilla v. Kentucky,* 130 S. Ct. 1473 (2010). We are ineffective if we fail to communicate to a client a plea offer by the prosecutor, the offer expires, and the client later pleads to harsher punishment. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012). We are also ineffective if we give erroneous advice that causes the defendant to reject the plea offer and receive a more severe sentence at trial. *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

33. *See Lucien E. Dervan & Vanessa Edkins*, *The Innocent Defendant's Dilemma: An Innovated Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1 (2013).

34. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

35. *See Entire World Prison Population Rates per 100,000 of the National Population*, Int'l Centre for Prison Stud., http://www.prisonstudies.org/info/worldbrief/wbp_stats.php?area+all&category+wb_poprate (last visited Apr. 2, 2013 (listing the United States first in incarceration rate); *Entire World—Prison Population Totals*, Int'l Centre for Prison Stud., http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area+all&category+wb_poptotal (last visited Apr. 3, 2013) (listing the United States first in total inmate population).

36. Violent crime began declining in the early 1990s from a rate of 757.7 per 100,000 inhabitants in 1992, to a rate of 403.6 per 100,000 inhabitants in 2010. *Crime in the United States, Table 1*, Fed. Bureau Of Investigation, http://www.fbi.gov/about-us/cjis/ucr /crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls (last visited Apr. 3, 2013); *See also* Daniel B. Wood, *U.S. Crime Rate at Lowest Point in Decades. Why America Is Safer Now*, Christian Sci. Monitor, Jan. 9, 2012, http://www.csmonitor.com/USA/Justice/2012 /0109/US-crime-rate-at-lowest-point-in-decades.-Why-America-is-safer-now (discussing factors that may account for the trend).

spending on prisons and prisoners tripled nationwide between 1990 and 2010.[37] This is not only a challenge to the parties in court—our entire society bears this massive burden in terms of fiscal and social costs. This burden was never contemplated fifty years ago, and is still uncounted.

This fundamental failure of the entire criminal justice system—including defense lawyers, prosecutors, judges, and legislatures—has an insidious impact. The system is weighted in favor of conviction and confinement. Sentencing risks often outweigh considerations of guilt. A client's fear-driven decision to plead guilty can spell moral hazard for the public defender forced to negotiate the best bad outcome, or to push for trial at great risk to the client. How do we counsel a client who wants to accept a reasonable plea deal when guilt may be in doubt? Each criminal defense lawyer, each public defender office, and each individual public defender must be armed with an ethical and professional moral compass that always points to the client's best interests, whatever the circumstances of the client, the facts of the case, or the biases of a particular court or prosecutor.

In 1995, I, Clara Hernandez, was appointed to my current position as Public Defender. After a few years, I became concerned that we were not trying enough cases, and so I focused on recruiting and training experienced trial lawyers. In 2005, I was too dismayed and embarrassed to discover that we were still trying too few cases. I saw this as an indictment of our performance, a failure on our part. More disturbing, I feared we were failing our clients. Our office had many discussions on the subject. Trial lawyers insisted that they were trying the cases that should be tried, and that trial quotas were anathema. We adopted a soft approach, appealing to lawyers' competitiveness: recognizing lawyers who tried the most cases and encouraging or shaming those who rarely tried cases. We set up a "trial dawg" chart with every trial lawyer's name on it, displayed on a very prominent wall, and we tallied every trial. We sent out office-wide e-mails congratulating lawyers on trials, acquittals, and other favorable verdicts. We gave lawyers compensatory time or administrative leave at the conclusion of a trial. We included trial/plea considerations in supervisory file reviews. These tactics produced complaints and no significant results.

Our lawyers objected that the chart misled clients and family members to believe higher trial rates mean better lawyers and to ask for the lawyer with the highest trial rate. In turn, this recognition devalued the amount and quality of work performed pretrial—obtaining pretrial release, investigating and developing evidence, negotiating favorable outcomes, and even preparing for trial only to be reset or offered a sweet deal on the day or eve of trial. Some lawyers argued that certain lawyers tried more cases because they were poor negotiators. They also felt chastised for factors over which they had no control. Prosecutors and judges vary widely in characteristics that control trial rates. Finally, our lawyers pointed out that we were overlooking the role that personal relationships play in this arena. The El Paso legal community, especially in criminal practice, is very small. Defense lawyers and prosecutors are friends. They worship in the same churches, live in the same neighborhoods, and bump into each other picking up their children from the same schools. Many defense lawyers are former prosecutors, and some prosecutors are former defense lawyers. In addition, when a prosecutor and a public defender are assigned to the same court for a period of time, they gain better knowledge of each other's strengths, weaknesses, pet peeves, and tendencies, thereby facilitating pretrial negotiations.[38]

With increasing frustration, and some hesitation, we tied salary increases to trial quotas in 2007. Without interference by supervisors on case-by-case decisions, each lawyer had to try at least two cases that year—a modest quota that most lawyers already met and several surpassed. We would increase the minimum annually until we were satisfied with the trial rate.

Every lawyer met the trial quota. However, some had to serve as second chair alongside another lawyer when their own trials fell through. A second-chair trial furthered our goals of increasing each lawyer's trial experience, but did nothing to increase our trial rate. When we were in the throes of the Great Recession, county budgets were slashed, positions were cut, salaries were frozen, and every county employee was furloughed. Our trial quotas were placed on hold.

Our trial rate appears to be driven primarily by our clients' choices and prosecutors' willingness to negotiate. In fiscal years 2011 and 2012, we obtained dismissals on almost a quarter of our felonies, more than a third of our misdemeanors, and a third of our juvenile cases.[39] In prior years, I had only focused on trials and pleas, never on the best possible outcome, which is dismissal of charges. I was pleased. Furthermore, while our trial rate was low, close to half of our trials resulted in acquittals. Moreover, 82% of all our adult cases were resolved favorably relative to the prosecutor's initial plea-bargain offer.[40]

The plea bargaining window under the

37. *Time Served: The High Cost, Low Return of Longer Prison Terms*, Pew Center on the States 7 (June 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew _Time_Served_report.pdf.

38. Certainly, we must be vigilant that public defenders assigned to work for a while with the same judge and prosecutor are not participating in a judicially sanctioned plea mill or facilitating bad pleas because everyone is too "chummy" or because the defender is concerned about retaliation for fighting too hard.

39. EPPD Data, *supra* note 28. In fiscal year 2012, we received a total of 10,197 appointments and closed 9,264. In fiscal year 2011, we received 10,184 appointments and closed 9,969. These include adult and juvenile trial cases (from capital to misdemeanors), appeals, criminal contempt for nonpayment of child support, and child abuse and neglect cases. They also include many short appointments to handle all cases set for a particular type of hearing on a given day, such as detention or review hearings in juvenile proceedings, adult jail pleas, and problem-solving court proceedings. Disposition rates are only for trial cases, which are less than 50% of total appointments.

One potential issue with our methodology can be illustrated through the following example: if we have a client who is booked on three charges and we get appointed prior to an indictment, we receive three separate letters appointing us on each count. We open a case file for each appointment letter and each file is a case, so we open and later close three cases. If this same person bonds out before a lawyer is appointed, is later indicted on all three counts in one indictment, and we then get appointed by the trial court, we will only get one appointment letter (for the one indictment) and will open only one file. When we are appointed pre-indictment on multiple charges, we do not know if the counts arise out of the same transaction, or if they will be indicted together. Our software does not allow us to go back and edit the initial appointment, but each appointed case must be accounted for and each file closed with some disposition or reason. Another problem is that every lawyer may not treat the disposition of these charges in the same manner. Some lawyers will close all but one file—if the case goes to trial, they will reflect the trial disposition on only one case. Some lawyers will keep all files open and reflect the trial outcome in each of the files, so these will be counted as three trials. In dealing with these potential methodological issues, we have verified the accuracy of each reported trial.

40. *Id*. Whether the outcome was dismissal, acquittal, or a guilty verdict by plea or by trial, the outcome was better than the original plea recommendation offered by the prosecutor.

Juvenile Justice Code[41] is small, and the juvenile prosecutors have become more and more averse to using it, which may explain why we try more juvenile cases than adult ones. Prosecutors and defense lawyers cannot agree to a particular type or length of sentence until after the child is adjudicated.[42] However, by then, agreement is usually pointless. Punishment for a misdemeanor is not a range; instead, it is probation up to the age of eighteen, either at home or in an institution. For a felony, the range is only two options: probation up to the age of eighteen, or commitment to the Texas Juvenile Justice Division until the age of nineteen. Penal commitment through adulthood and certification for trial as an adult are additional options for serious felonies.[43] Once the child pleads "true," the appropriate type (not length) of probation is determined largely by the probation officer's recommendation to the court. Our juvenile defenders try to negotiate dismissals, deferred prosecutions, or reductions of felonies to misdemeanors. However, prosecutors increasingly refuse to bargain and simply expect the child to admit to the offense as charged—which accounts in part for the spike in trials last year. Parental involvement further affects the child's decision to plead.

Our economic crisis presented us with an opportunity to evaluate our services. We have examined our case dispositions much more closely and strategically in our overall effort to become more client-centered in our process and more client-driven in our outcomes. We have made structural changes within the office, and more changes are forthcoming. We developed a short, simple survey to find out from our clients what they want. In October 2012, we began asking what they most want and value from us and the system, in terms of services, communication, and outcomes.[44] A caseworker administers the survey before the client speaks to our lawyers. We are planning to conduct an exit survey to measure the service we deliver against the client's expectations. While the content and the number of participants may not be sufficient to formulate statistically significant or rigorous conclusions, our clients' initial responses are thought-provoking.

Only 8% of the 558 surveyed clients wanted a trial, 39% wanted to negotiate a plea, and 51% were unsure.[45] We had presumed most clients began the process hoping for a trial and that over the course of time, a set of factors— inability to make bail coupled with a long wait for a trial date to be set, understanding the nature and amount of evidence possessed by the prosecutor, fear of a harsher sentence, our lawyers' persuasiveness, or perhaps lack of confidence in the system, our office, or their lawyer—eventually discouraged and convinced them to take a plea.

What began as a tool to guide us in our representation has produced more questions than answers. Why do so few clients want a trial? Is it a perception that public defenders are unwilling or unable to fight their case? Is it a perception about the system itself based on prior experience? How do race, gender, ethnicity, other characteristics factor in? A more comprehensive study will be necessary.

We have to conclude that it is absurd to punish lawyers for not going to trial, when they are in fact negotiating so many dismissals and other favorable outcomes for their clients—especially when the clients, who have the final word, often do not want to risk trial. Our duty is to ensure that our clients make this decision with our lawyers' effective advice and assistance. The lawyers' advice should not be driven by the expectations of a supervisor, court, or prosecutor. Rather, it must comply with well-defined standards to keep our pretrial and plea practice from becoming a plea mill. We now understand that the amount and quality of work performed by lawyers on cases does not correlate with the number of trials,[45] and the number of cases our lawyers set and prepare for trial far exceeds the number of actual trials. Quite often, lawyers who negotiate an excellent plea for their clients experience disappointment. Prepared for trial with a good defense, they sacrifice the thrill of trial for the client's best interest. Nonetheless, unable or unwilling to reconcile our plea practice with our self-image as trial lawyers, or with the meaning that "standing up for our clients" has for us, we will keep looking for ways to increase our trials without sacrificing more favorable outcomes such as dismissals.

Coming in the next issue: Gideon through the labyrinth of mental illness and Conclusion

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41. Tex. Fam. Code Ann. tit. 3 (West 2011).
42. *See id.* §§ 54.03, 54.04. Juvenile adjudication is the equivalent of the guilt phase, the juvenile's plea is "true" or "not true," and the disposition is the equivalent of the sentencing phase.
43. *Id.* §§ 53.035, 54.04(d)(3).
44. *See* EPPD Data, *supra* note 28.
45. *Id.*

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.

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How San Elizario´s First Lawyer helped Shape the Boundaries of the State of Texas

By Clinton F. Cross

When the Republic of Texas obtained its independence from Mexico, it claimed boundaries stretching from the Rio Grande through much of what is now New Mexico, parts of Colorado, and even Wyoming. The boundaries were disputed, first by the Mexicans, who claimed the boundary was the Nueces River, not the Rio Grande, and later by Hispanics who did not want to have anything to do with a slave state.

The Republic was admitted to the United States as a state in 1845. President Polk then sent troops to Texas, south of the Nueces but north of the Rio Grande rivers. When Mexican troops attacked, he claimed Mexico had provoked a war with the United States. The Mexican War had begun.

Men from Alabama were among the first to volunteer for the war. On May 25, 1846, probate Judge Sydenham Moore enrolled a company of volunteers in his law office, which still stands on a corner of the courthouse square in Eutaw, Alabama. Another unit was recruited by Stephen Hale, who is buried in Eutaw's Mesopotamia Cemetery. Together the two units became the "Eutaw Rangers."

One of fewer than 85 men to serve as volunteers in the Eutaw Rangers was Charles A. Hoppin, a lawyer and also former mayor of Mobile, Alabama.[1] After about four months of service in the Rangers, Hoppin ran for the position of second lieutenant. In a close election, he was defeated. Thereafter, on November 1, 1846, he transferred to Co. H, Alabama Regiment.

In 1848, the United States and Mexico signed the Treaty of Guadalupe-Hidalgo. Mexico ceded to the United States its claims to vast territories, which comprise the present states of Texas, New Mexico, Arizona, Utah, California, and parts of Colorado and Wyoming.

In 1849, Hoppin moved to San Elizario, Texas, a recently incorporated municipality located a few miles east of El Paso, Texas. Hoppin could find no familiar Anglo-American Common Law in his new home. Indeed, he was the first lawyer to ever practice in San Elizario. *Alcaldes* and other prominent citizens administered justice, but from Mexican Codes which he could not readily comprehend.

Frustrated, in January 1850 Hoppin wrote Texas Governor Peter Bell complaining about the lack of civilization in San Elizario. Governor Bell had already decided to organize the western counties having, in December, 1849, called for the organization of these counties. The Texas legislature quickly responded, and designated boundaries for Santa Fe, Presidio, El Paso, and Worth counties. The Governor appointed Major Robert Neighbors commissioner to organize the counties. Neighbors first arrived in San Elizario, in February, and issued writs of election. Elections were held in March. The county was organized as a Texas county. Hoppin was elected as the first chief justice.

When Neighbors went to Santa Fe, he met opposition. Local leaders did not want to be part of the State of Texas. Prior to the Mexican War, Mexico had banned slavery. New Mexicans did not want to be part of a slave state, and they did not want to be governed by a capitol located 800 miles away.

After El Paso County had been organized as a Texas county, California applied to the United States for admission to the Union as a free state.

Letter,

Charles A. Hoppin to Governor Peter Hansborough Bell
January 1850

We are here [,] sir [,] situated in a beautiful valley containing from 1,000 to 1,500 inhabitants—the majority of whom are Mexican, but Americans are daily coming in, and but few years will elapse before this island will become an important point from its position[,] fertility of soil[,] & abundant production. It will teem with inhabitants—To whom does it belong[?] If to Texas then,] sir[c] Texas ought to give its citizens dwelling her [sic] the protection of her laws. Now we are in a region without law. Tis true there is a prefect residing some miles above El Paso & and there [are] in each of the small towns up on the island Alcaldes appointed by him. The prefect rec[eived] his appoint from the Governor of the Territory of New Mexico, but what laws govern the decisions of the Alcales I know not. I presume each one selects such a Code as best suits him. Here the Alcalde[,] a very worthy Mexican[,] is governed by the Laws enacted by the state of Chihuahua. We have no Magistrates[,] no Sheriffs[,] no Courts. A case has just now arisen which exhibits[?] so clearly the situation in which we are placed that I have felt in a duty I owe to Law abiding citizens to present it to you. An American has been arrested and now is in the Guard House here charged with the revolting crime of rape. How can he be tried[?] If he is brought before an Alcalde has he the power of punishing if the charge is proven[?] An American Citizen is entitled to a jury trial. Who can summons [sic] the jury[?] Who gives sentence[?] Who is authorized to execute the sentence if given [?] You see[,] sir[,] the necessity of organizing Courts for this part of the state[.] The people wish it and it is their right to ask it. If this is not a part of Texas[,] then from New Mexico they must ask the protection of Civil Laws.

The organization of a county with the appointment of Magistrates and judges would have a highly beneficial effect upon the population here[.]

Let me ask you to confer upon me a great favor. I would be glad to receive a copy of the Laws of Texas. I do not think there is a copy this side of San Antonio[,] & important questions will arise requiring reference to the statutes.

If you see fit to send it[,] direct it to the care of the "officer Commanding[,] Post Opposite El Paso."

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1. The author´s great grandfather James F. Cross and his older stepbrother Pleasant Tannehill also joined the unit.

With the political balance of power between free and slave states threatened, the divided nation's political leaders began to contentiously debate what to do about California's request for admission to the union, and also what to do about all the land in between California and Texas.

With the nation divided and civil war triggered by a boundary dispute between Texas and New Mexico a very real possibility, Henry Clay proposed an omnibus bill that represented a political compromise. After months of contentious debate, the omnibus bill was defeated. John C. Calhoun, the main opponent of compromise, died. Then President Zachary Taylor got sick and died. Millard Fillmore, who favored a compromise, became President. Clay, depressed over defeat of the omnibus bill, took a short vacation.

Senator Stephen Douglas decided to break up the omnibus bill into five separate bills. After more debate and many proposed amendments, with shifting alliances on each bill, the five bills which collectively very closely resembled Clay's omnibus bill, finally passed into law. This legislation, now known as the Compromise of 1850, eventually drew the boundaries of the State of Texas and California, and also the boundaries of the New Mexico, Utah, and Arizona territories.

El Paso County was logically part of the Hispanic southwest, more closely linked to Santa Fe than Austin. The Compromise of 1850 left El Paso County in the State of Texas. After all, the county had already been organized as a Texas county.

Because of the work of San Elizario's first lawyer, Charles A. Hoppin, El Paso County remains today as a distant outpost of a southern state, doggedly independent, an oasis in middle of the Chihuahan and Sonoran deserts, a kind of city-state located half way between Houston and Los Angeles, linked by its history and by its present border to a place that belongs in a cultural and geographic grey area, a composite of the South, the West, and Mexico.

Court House
Eutah, Alabama

CLINTON CROSS is an Assistant El Paso County Attorney assigned to the criminal unit.

Serving others is at the core of the law profession

By Judge Oscar G. Gabaldon, Jr., CWLS

How often do we as lawyers and judges pass up opportunities to demonstrate to others that our profession is indeed "a helping profession"? Opportunities to help others, to serve others, to positively engage others, and to simply tend to others in their hour of need abound. Opportunities present themselves everyday in different forms and in different situations. Yet, we are sometimes so preoccupied with trivial concerns that we fail to seize golden opportunities that can help make lives better and more meaningful and that can raise the caliber and quality of the law and judicial professions to new heights.

I recently read an observation that Winston Churchill once made and it struck me as such a basic truth. He said, "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 and unqualified for the work which would be his finest hour."

Lawyers and judges often possess unique talents, skills, and experiences that qualify them to meaningfully counsel and guide others in matters of the law. They undergo years of advanced education, and then they continue to pursue continuing legal education programs throughout their careers. They undergo special examinations, and they pursue and engage in other professional activities that allow them to successfully engage in the practice or administration of law. Jurisprudence is a complex and technical system that lawyers and judges become better at navigating the more seasoned and learned they become in the profession. With this treasure chest of knowledge, professional skills, and valuable experiences, lawyers and judges can do amazing things to help their colleagues, their clients, the courts, the bar associations, and the community in general towards a higher quality of life.

All too often, though, we misplace our ethical and moral compass or forget that in the profession of the law, our fellow human beings are, in fact, always to be the primary focus. We sometimes give primary attention to amassing large legal fees and portfolios, to impressing our colleagues with our oratory or advocacy skills, to being given deference and special treatment, and the like. These things are all about us, not about others.

The canons and principles of ethics, our oaths of office, and all that is dear to the honest practice or engagement of the law, clearly indicate that we are here to serve others with perseverance, with integrity, with good character, and with the best interest of those we serve at the very heart and core of our actions. The law is about others, about people helping people. Yes, we need to make a living. Yes, money is necessary to meet financial obligations and to enjoy a nice and comfortable life. Yes, we enjoy being given special treatment by others. However, when this pursuit of the material world becomes our focus, our reason for doing what we do as professionals and the human being takes a back seat or less important role in our lives, then we have lessened our humanity and our nobleness. We have taken a step backward as lawyers, as judges, and as human beings. We must then rectify our priorities and our value system as human beings. We must revisit our principles and maybe even our orientation to life itself.

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).

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A Funny Thing Happened on the Bus

By Clinton F. Cross

On January 5, 2014, after visiting my aunt, I took the El Paso-Juarez Limo in El Monte, California, and headed home. The El Paso-Juarez Limo's El Paso station is about two blocks from the border, caters to a Hispanic clientele, and travels to points both north, west and south. I was the only Anglo on the bus.

The elderly lady sitting next to me, however, spoke English and we began to talk. Her name was Helen Heroux. In the course of our conversation, she mentioned that one of her Anglo ancesters came to El Paso in 1824. I did not believe her. Mexico obtained its independence from Spain in 1821, and in 1824 had only begun trading with Anglo-Americans (the Spanish did not believe in "free trade"). I asked her for his name. She gave me his name and his son's name.

When I got home, I opened my computer to see if I could find out anything about William Price Cooper or Santiago Cooper. Much to my surprise, I learned that Price Cooper, an Irishman from Missouri, may have in fact arrived in El Paso in 1824.

Who was William Price Cooper? He probably worked as a wagon-master. He may have been a stage coach drive. It is almost certain that he was active in the Santa Fe—Chihuahua—Durango trading route. When the Mexican War broke out, Price signed up as a civilian teamster under Colonel Sterling Price and he participated in the capture of Paso del Norte and Chihuahua in 1848. It was during this time that he met Antonia Sanchez, a Tigua Indian, who he married. They had many children. One daughter, Anastacia, died in 1962, 102 years old.

After the Mexican War, Price took a job managing a ranch near what is now Canutillo. There he reported that he got into a bit of a problem when an Indian tribe captured him, angry that he had befriended another Indian tribe. His captors decided to get revenge by frying him on a pit of rocks, under which they built a fire. They fed the flames under the rocks for three days, until the stones glowed. Cooper was tied to a tree where he could at all times clearly imagine his fate. When the time came to fry him, the Indians stripped him of his clothes and his shoes and began to lead him to the stones. At that moment, Cooper noticed a squaw sitting near the fire with a baby in her arms. When Cooper got close to the squaw, he snatched the baby from its mother's arms, threw it on the stones, and then ran, nude and barefoot, from his captors. The Indians, trying to save the baby, gave Price a short head start. Price ignored the cactus and the rocks, running as fast as he could, for about an hour, until he collapsed. By that time, his pursuers had given up.

In 1866, fifty-seven year old Price Cooper got himself into another scrape when he decided to gather salt from a lake east of Ysleta and sell salt to settlers in Central Texas. He set out with a train of seven wagons and thirty-five oxen. His first trip was a success, and Price decided to repeat the venture. When camped near San Angelo, Indians surrounded Price and his crew. A crewman was on Price's horse, and he decided to make a run for it. The Indians grabbed his horse, he fell to the ground, and the Indians used their bows and arrows to kill him. Once again, Price took off running, this time towards the Concho River. With the Indians in hot pursuit, he suddenly came upon an *arroyo* about ten or twelve feet deep and quite wide. Cooper decided he had little choice but to try to jump it. Gathering all the speed and strength he could muster he was able to leap over the arroyo! When the Indians reached the *arroyo*, they reigned in their horses and began looking for a way around the ditch. By the time they found it, Price was gone.

Seventeen years later, in 1877, Price Cooper and his son Santiago Cooper joined a Texas Ranger's unit lead by John B. Tays. John Tays was the brother of Parson Joseph Tays, El Paso's first protestant preacher. The Texas Rangers were sent to San Elizario to protect Judge Charles Howard, who had purchased property rights to the salt flats east of San Elizario with an eye to getting rich selling the salt. For time immemorial, the salt, like the air and like the sea, had belonged to all the people who wanted to gather it and then use it or re-sell it.

What happened when the Anglo-Americans changed the traditional Mexican custom and law in the community regarding the right to take and use the salt? For an answer to that question, it is hoped the reader will read the next issue of the *El Paso Bar Journal.*

CLINTON CROSS is an Assistant El Paso County Attorney assigned to the criminal unit.

ADVANCE SHEET, *circa 1221 A.D.*

By Charles Gaunce

From Pleas at Worcester in the Fifth Year of Henry III (A.D. 1221)

> "Gilbert, Holdwin's son, was found slain in the forest of Malvern. It is not known who slew him. He was found in the highway between Little Malvern and Great Malvern. And because he was found in the covert of Malvern forest, there is no murder [fine], and this by ancient custom."

At first glance, this case appears to be a case of sterling police investigative skills. We have no clue who killed Gilbert, so obviously there was no murder. If only the majesty of the law was so direct.

Rather, this case involves a clear case of sovereign immunity. The prevailing legal practice at the time was that when a murder was committed on a premise, the owner of the premise was responsible for the payment of a fine (also called a murder). In some regards, we might consider this fine a cost-shifting mechanism so that the King was not required to bear the entire cost of investigation, clean-up, and arrest (and the accompanying detention). Rather the cost of these matters was, at least in part, shifted to the landowner. I suppose one of the underlying motivations was to convince the citizenry to maintain the peace or suffer the consequences of additional taxes being imposed. Nevertheless, if the circumstances of the crime were such that the only person to tax for the death was the King, then by ancient custom, there was no tax imposed.

One can only speculate that the custom referred to was introduced by the King as being ancient, and obviously divinely inspired, the first time an unsolved slaying occurred on the King's premises. As was later noted by a regal scholar, "It's good to be the King."[1]

1. Brooks, Mel. "History of the World, Part 1" 20th Century Fox Films, 1981.

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

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Thursday, February 13, 2014

6:00 – 8:00 p.m.	Legal Legends, Interviews of Justice Guadalupe Rivera and Hector Zavaleta by Charles Ruhmann, Ruhmann Law Firm, El Paso (Cocktails and Hors d'oeuvres)

Friday, February 14, 2014

8:00 – 8:45 a.m.	Registration
8:45 – 9:00 a.m.	Welcome Laura Enriquez, President-Elect, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso
9:00 – 10:00 a.m.	Preservation of Error John Mobbs, El Paso
10: 00– 10:45 a.m.	Consumer Law Steven James, El Paso
10:45 – 11:00 a.m.	Morning Break
11:00 – 12:00 p.m.	HIPPA CaraLyn Banks, Kemp Smith, LLP, Las Cruces, New Mexico
12:00 – 1:00 p.m.	Lunch with program Texas Supreme Court Update Chris Antcliff, El Paso
1:00 – 2:30 p.m.	Ethics Jeopardy Robert Dinsmoor, Ray, McChristian & Jeans, P.C., El Paso
2:30 – 2:45 p.m.	Afternoon Break
2:45 – 3:30 p.m.	Estate Planning and Probate Karin Carson, Hobson, Stribling & Carson, P.C., El Paso
3:30 – 4:15 p.m.	Employment Law John Wenke, El Paso and Chris Borunda, Ray, McChristian & Jeans, P.C., El Paso
4:15 – 5:15 p.m.	Judge's Panel: What to Do and What Not to Do Judge Maria Salas-Mendoza, Moderator, 120th District Court,El Paso Judge Laura Strathman, 388th District Court, El Paso, Judge Anna Perez, 41st District Court, El Paso, and Judge Patricia Chew
5:30 – 6:30 p.m.	Sponsorship Happy Hour

Saturday, February 15, 2014

7:30 – 8:30 a.m.	Breakfast
8:30 – 9:30 a.m.	Tax for Litigators Oscar Javier Ornelas, El Paso
9:30 – 10:15 a.m.	Jury Selection Gregory Anderson, El Paso
10:15 – 10:30 a.m.	Morning Break
10:30 – 11:15 a.m.	Family Law & the Military Philip Mullin, El Paso
11:15 – 12:00 p.m.	Commerical Litigation Frank Ainsa, El Paso
12:00 – 1:00 p.m.	Mediation Kitty Schild, El Paso and Jeff Ray, Ray, McChristian & Jeans, P.C., El Paso

Door prizes will be given throughout the seminar.
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