www.elpasobar.com

EL PASO BAR ASSOCIATION
Founded in 1897

EL PASO BAR JOURNAL

An Update of Events and Information

October-November 2015

"A Fair Day's Pay for a Fair Day's Work"

The Evolving Fair Labor Standards Act. Part II

By David L. Kern

Page 9

SPOTLIGHT ON A COURT REPORTER

Sharon Cardon

By Clinton F. Cross

Page 11

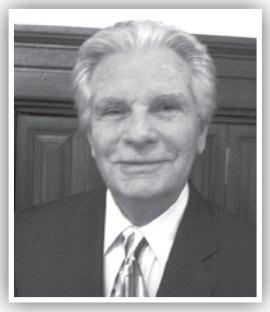
FOCUS ON A JUDGE

Norbert Garney

By Clinton F. Cross

Page 14

President's Page



Attorneys are Professionals

The attorneys practicing in El Paso are true professionals. Not only do the attorneys run their practices in such a way as to enhance the lives of their respective clients and families, but also make a decent living. While practicing law, most of the El Paso attorneys give back to their community. That is one of the hallmarks of being a true professional. Many of the most admired lawyers in our community are those whose character and commitment to our profession are demonstrated by their willingness to give back to the community of their time and resources. The old saying, "People are judged not by their words, but by their deeds," truly reflects professionalism and character.

The need for community service in El Paso is great. November affords El Paso attorneys the opportunity to perform deeds, not merely mouth the words. Through our education and training we have the unique and special ability to help people in need. I believe, more importantly, that as professionals we have a duty to help the less fortunate. The need is great so I am therefore asking for your help.

The month of November will be a unique opportunity for each attorney to give back to our community. On Saturday, November 7, 2015, the El Paso Bar will conduct its annual Access to Justice Fair for our needy El Pasoans who qualify financially. The fair will be conducted at the El Paso Community College, Valle Verde Campus, in the community college cafeteria, from 9:00am to 1:00pm.

On the following Saturday, November 14, 2015, the El Paso Bar Association will conduct its semi-annual El Paso Lawyers for Patriots Clinic at the El Paso Community College, Transmountain campus from 9:00am to 1:00pm. This particular clinic is conducted to benefit our local veterans, military personnel, and their spouses and families, without regard to financial need-based qualifications. You do not need to have any specialized knowledge about military law or veterans affairs. Most of the help is needed in the typical general legal areas such as family, consumer, and criminal law areas. Our patriots need our help and it is our responsibility to help in those areas that we, as lawyers, are specially trained.

We need attorney and paralegal volunteers to help in both of the above clinics from 9:00am to 1:00pm on November 7 and 14, 2015. If you are willing to volunteer for some period of time (you do not need to attend for the entire four (4) hour block, you can attend and help for one or two hours), your help will be greatly appreciated by all the people who receive our help. We are desperately in need of attorneys who can counsel and give legal advice to our fellow El Pasoans in areas such as family law, consumer law, probate law, immigration, real rstate, criminal law, general contract law, and many other areas. All lawyers are welcome. If you can volunteer, please contact Nancy Gallego at the El Paso Bar Association office, Laura Enriquez, George Andritsos, Jessica Kludt, Judge Laura Strathmann or me.

I promise you will feel good by providing your service in helping others in need.

Myer Lipson, President

DATE CHANGE

El Paso Bar Association
October Bar Luncheon
Thursday, October 29, 2015

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

Guest Speaker will be
the Chief Justice of the
5th Circuit Court of Appeals,
Carl Stewart

Approved for 1/2 hour of Participatory Ethics

Door prizes will be given out

Please make your reservations by Tuesday, October 27, 2015 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

Please make sure you RSVP as we anticipate a very large turnout for this luncheon.

El Paso Bar Association
November Bar Luncheon
Tuesday, November 10, 2015

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

Annual Salute to Veterans

Door prizes will be given out

Please make your reservations by Monday, November 9, 2015 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

Advance Sheet, 1560 A.D.

By Charles Gaunce

Placita in Curia Admirallitatis
(Pleas in the Court of Admiralty)
File 31, Number 206

Jonson c. Bannister
Allegation of a custom that is the ship be lost,
The mariners lose their wages

"That the marrynors gonners and other ministers whosoever in eny ship or vessel laboring and travayling upon the seaes shall as well abide beare and suffer thadventure and losse of theire wages and salarie if the shippe or vessel wherein they sayle and serve by misadventure of the seaes or tempest do perishe in that viage as the ownars and ladars shall and must in like case beare suffer and sustayne thadventure of theire sayed ship, and goods."

We have all suffered through the interminable discussion of *Rylands v. Fletcher* in our torts class, detailing the development of the dangerous activity rule as developed from a claim of nuisance and expanding later into a cause of action known as strict liability in tort. And this line of development is frequently presented to the struggling law student as a new approach to liability based on the enterprise's ability to better bear the risk of loss.

Consider the allegation set forth above: If a ship is lost at sea, regardless of the cause, the sailors are not entitled to receive their wages because the owners of the ship have lost so much. I suppose it makes the working stiffs aboard the ship an insurer of the success of the voyage, and from the owner's point of view that is probably a good thing as it tends to keep the sailors from selling the cargo at any convenient port other than the port of destination.

That Admiralty would adopt such a harsh rule is probably not surprising as the Admiralty had its own special problems in dealing with pirates, such as in 1549 when Lord Seymour of Sudeley was impeached and hanged as the Lord High Admiral. His offenses included an allegation (apparently proved) that he connived at piracy and that he seized wrecked goods and refused to restore them to their owners.

But consider the situation from the seaman's view. As early as 1300 the British Navy engaged in the practice of impressing able-bodied men between the ages of 18 and 55 from British merchant ships, and this was simply a legal recognition that many of those impressed had found themselves unwitting complements to the merchant ship's crew as a result of an evening's entertainment at a coastal drinking establishment where too much of a good thing was had. Once aboard ship, any objections could be punished by death as a mutiny. So you served on the ship hoping to eventually make your way back to what was once considered home, only to discover that if you participated in any activity that resulted in a loss of cargo (such as sailing on the ship), you were not entitled to your wages for that transit. Strict liability indeed!

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

CALENDAR OF EVENTS

October 2015

Friday, October 2
Law with Libertas Seminar
Monday, October 5
Red Mass
Tuesday, October 6
EPBA BOD Meeting
Monday, October 12
EPBA Office Closed – Columbus Day
Wednesday, October 14
EPALP Monthly Meeting
Thursday, October 15
EPPA Fall Seminar
Thursday, October 15
EPPA Monthly Meeting
Thursday, October 29
EPBA Monthly Luncheon
Hon. Carl Stewart, speaker

November 2015

Tuesday, November 2
EPBA BOD Meeting
Saturday, November 7
ATJ Legal Fair
Tuesday, November 10
EPBA Monthly Luncheon
Salute to Veterans
Wednesday, November 11
EPBA Office Closed – Veterans Day
Wednesday, November 11
EPALP Monthly Meeting
Saturday, November 14
EPLP Veterans Clinic
Thursday, November 19
EPPA Monthly Luncheon
Thursday, November 26
EPBA Office Closed – Thanksgiving Day
Friday, November 27
EPBA Office Closed – Day after Thanksgiving

December 2015

Thursday, December 10
EPBA Joint Association Holiday Party

Upcoming Events: February 2016

Thursday, February 11
20th Annual Civil Trial Practice Seminar
Las Vegas, NV
Friday, February 12
20th Annual Civil Trial Practice Seminar
Las Vegas, NV
Saturday, February 13
20th Annual Civil Trial Practice Seminar

Before *Brown*: Heman Marion Sweatt, Thurgood Marshall and the Long Road to Justice

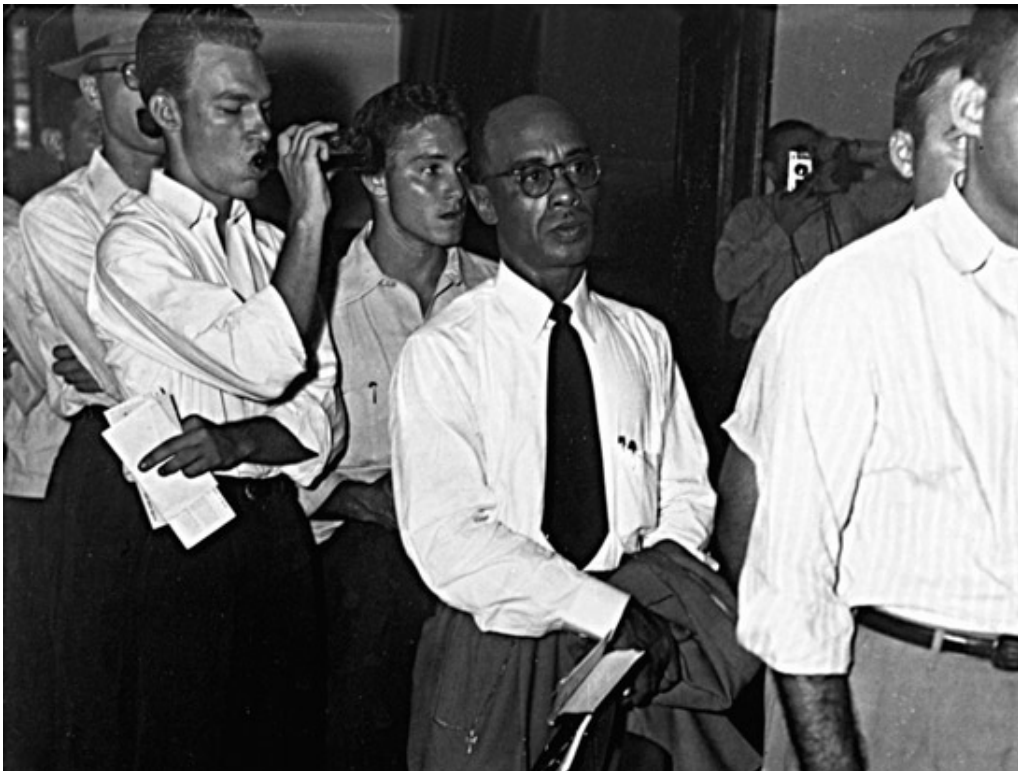
Reprinted with permission of the Journal of the Texas Supreme Court Historical Society, Spring 2012 Vol. 1, No. 3

By Gary M. Lavergne

Notes by the editor of the Texas Supreme Court Law Journal: The following article by Gary M. Lavergne is drawn from his book by the same name that looks at Sweatt v. Painter*, the 1950 case that sought to desegregate the University of Texas Law School. The book was written with the cooperation of former Chief Justice Joe R. Greenhill, who represented the State of Texas. As Lavergne notes, the Court's answers to Sweatt's questions about the "factually undeniable inequality of separate, segregated institutions that perpetuated Jim Crow in Texas and across the nation" pointed the way to the end of segregation four years later in* Brown v. Board of Education.

Notes by the editor or El Paso Bar Journal: El Paso attorneys Gerald J. Smith and Glenn Sutherland attended law school with Heman Sweatt when segregation was still the law of the land. Sutherland sat next to him in his law school classes. The culture of segregation created many inexplicable ironies. When growing up Sutherland attended a church that solicited money to send missionaries to Africa but at home the church denied Blacks the right to worship in their temple with Whites. When attending law school Sutherland went to lunch with Sweatt and some other law students at a restaurant where they were greeted by Black waiters who were prohibited from serving Blacks. More important than these ironies, of course, segregation closed the doors of educational opportunity to millions of minority Americans.

When the Sweatt case reached the United States Supreme Court, Justice Tom Clark--a graduate of the University of Texas School of Law--urged his fellow justices in an unpublished memo to overrule Plessy. *Although the Supreme Court hesitated, the Supreme Court's decision in* Sweatt *first opened those doors of educational opportunity to racial minorities. After* Sweatt *there could never again be two schools in the United States of America that were equal in the eyes of the law. In the field of education,* Sweatt *(not* Brown*) overruled* Plessy. *It's an important case.*



Heman Marion Sweatt

The Merriam-Webster Dictionary defines "social science" as "a branch of science that deals with the institutions and functioning of human society and with the interpersonal relationships of individuals as members of society."[1] Sociology can be considered the study of human society in all its forms and, of course, this vast domain encompasses dozens of subject areas. Clashes between two of those social sciences frequently take place in courtrooms. The 1950 U.S. Supreme Court case *Sweatt v. Painter*, 339 U.S. 629, provides a wonderful example of the battle between history and sociology for preeminence in the American judiciary. History is embraced by the "Originalists," while sociology is embraced by the "Activists."

Glenn Sutherland (a few years ago)

During an interview for my book *Before Brown: Heman Sweatt, Thurgood Marshall and the Long Road to Justice*, retired Texas Supreme Court Chief Justice Joe Greenhill, who represented the state as Assistant Attorney General in *Sweatt*, told me that at the time of the litigation both he and Thurgood Marshall thought they were "arguing *Brown*."[2] To represent his client, Greenhill took the historical approach and researched the original intent of

Congress as it related to school segregation and the passage of the Fourteenth Amendment of the U.S. Constitution. The product of his inquiry easily represented the best legal work presented by the Attorney General's office in the entire record of the *Sweatt* litigation.

In his briefs and oral arguments Greenhill reminded the Court that in 1862, Congress segregated schools in the District of Columbia—the only political jurisdiction in which it had complete control—and they remained segregated throughout the Civil War and Radical Reconstruction and were still segregated in 1950 as *Sweatt* was being argued. He pointed out that the civil rights guaranteed by the Fourteenth Amendment and the Civil Rights Act of 1866 never included school integration. He further showed that during the May 1866 debates over the Fourteenth Amendment, Congress donated land to segregated Negro schools, and in July of that year they addressed the method of tax support.[3]

Greenhill's brief also reported that in the late 1860s and early 1870s, when the Radical Republicans held tight control over Congress, Massachusetts Senator Charles Sumner had made repeated attempts to insert the integration of schools in legislation, but had been defeated each time. Congress was able to require the southern states to ratify the Fourteenth Amendment in order to be readmitted to the Union, but no evidence existed that school desegregation was connected with that compliance. Indeed, eleven of the northern and border states that ratified the Fourteenth Amendment maintained white and non-white school systems—as did all the former Confederate states.

To reinforce his client's history-based Originalist view, Greenhill added legal precedent. He pointed out that at least five state courts outside the south had ruled that the Fourteenth Amendment did not mandate integrated schools.[4] During oral arguments he listed precedent supporting states' rights. He noted that *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), held that "the education of the people in schools maintained by taxation is a matter belonging to the respective states." *Chesapeake & Ohio Railway Co. v. Kentucky*, 179 U.S. 388 (1900) upheld the constitutionality of racially segregated intrastate commerce. In *Berea College v. Kentucky*, 211 U.S. 45 (1908), the Supreme Court denied a challenge to a 1904 Kentucky law making it illegal to educate white and black students in the same institution. He also presented Chiles v. Chesapeake, 218 U.S. 71 (1910), which upheld regulations of a private carrier that segregated passengers by race.[5]

Thurgood Marshall

Joe Greenhill

Acting as an advocate duty-bound to zealously argue his client's case, Greenhill argued that the law supported Texas' defense of segregation at the University of Texas Law School. For seventy-five years after the Civil War and Reconstruction Congress had done nothing to attach school desegregation as a condition for any service or money provided by the federal government: Greenhill showed that to be an historical fact. He went on to cite federal regulations explaining how money should be divided among the races, such as the "A&M" money provided for in the Morrill Acts, and housing units paid for by federal funds.[6]

Alexander M. Bickel, U.S. Supreme Court Justice Felix Frankfurter's law clerk, validated Joe Greenhill's research and conclusions later during the 1952 term. After months of researching the Fourteenth Amendment's legislative history, Bickel reported that it was "impossible" to establish any connection between school desegregation (and any other racial separation) and Congress' intent in enacting the Fourteenth Amendment. He added that Congress had not foreseen the abolition of school segregation.[7]

Greenhill's documentation and logic compelled Thurgood Marshall to concede that the history and intent of the Fourteenth Amendment could be used to support either side of the school integration argument. So, as Heman Sweatt's attorney, Thurgood Marshall limited his argument to the undeniable assertion that Congress intended the amendment to guarantee full citizenship rights to African-Americans—a fundamental civil right Texas sought to deny Sweatt and other African-Americans.[8]

History might not have been on the side of Thurgood Marshall, but sociology was. The Sociological Approach, largely the brainchild of Thurgood Marshall's assistant Robert L. Carter, argued that a comprehensive measure of educational equality should include available social and cultural capital (the accoutrements of privilege). Racial separation in schools meant that whites had access to a social network not available to African- Americans, producing a false sense of superiority in whites and an equally false sense of inferiority in African- Americans. Sociological research supported the notion that segregation thus harmed African-Americans. As a result, inequality could never be remedied by merely duplicating and separating inanimate objects like buildings, books, teacher-pay, and money. Since separation of the races was per se harmful to African-Americans, separation made equality impossible, so the only logical and constitutional remedy was the end of segregation and the integration of schools.[9]

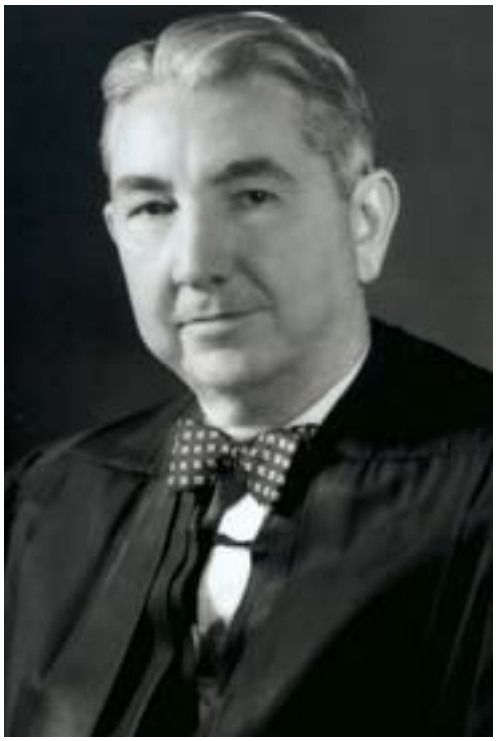
Criticism of the Sociological Argument in court was not limited to segregationists such as Attorney General Price Daniel of Texas. In his memoirs, Robert Carter recalled that, "[t]he proposed use of social scientists' testimony came under fierce attack from the outset. A number of the most influential members of the NAACP's advisory committee on legal strategy scorned social science data as without substance, since it was not hard science, proved by tests in the laboratory, but merely the reactions of a group of people." Professor Thomas R. Powell of Harvard, a pre-eminent lawyer and political scientist at the time, called the idea of presenting sociological studies in

court the "silliest thing he had ever heard of."

Carter and Marshall responded that if segregation was to be directly attacked, as they were doing for the first time in *Sweatt*, it had to be proven to be an unreasonable and irrational practice, and that its sole purpose was to subjugate one race to another—a harmful public policy that violated the Equal Protection clause of the Fourteenth Amendment of the Constitution.[10]

Both Price Daniel and Joe Greenhill argued that sociological evidence had been appropriately ignored by Texas courts because, if such data were to be evaluated at all, it was the job of state and local legislators and executives to do so. It was not the job of any court to formulate policy for a state. The question before the SupremeCourt, as Joe Greenhill and Price Daniel presented it, was whether Texas had the right, as a state, to control its schools. They argued that Texas' defense of its position was supported by the federal and Texas constitutions, history, case law precedent, and the social order of the time.[11]

Chief Justice Fred Vinson wrote the *Sweatt v. Painter* opinion for a unanimous Supreme Court. He made clear the Court was not yet ready to address the inherent constitutionality of racial segregation with a sweeping ruling: "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? *Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court"* (emphasis added).



Justice Tom Clark

Chief Justice Vinson then added that *"much of the excellent research and detailed argument presented in [Sweatt] is unnecessary to [its] disposition"* (emphasis added). So, neither the NAACP's activist Sociological Argument nor Joe Greenhill's originalist historical research regarding Congressional intent was dispositive.[12] Instead, Chief Justice Vinson avoided choosing between the social sciences and implicitly overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), by emphasizing the undeniable reality of an honest comparison of the educational resources available at the University of Texas Law School in Austin and the new, separate law school the Legislature had just approved for African-Americans in Houston: "Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."[13]

In *Sweatt*, neither history nor sociology prevailed, nor even mattered, because the makeshift law school in Houston the State of Texas provided for Heman Sweatt was so obviously unequal in educational resources and opportunities when compared with the University of Texas School of Law in Austin. Even before *Brown*, undeniable evidence of obviously unequal treatment violated every concept of justice, even the "separate but equal" justice meted out by *Plessy*. In *Sweatt*, the U.S. Supreme Court dared ask the question earlier courts failed to address: the factually undeniable inequality of the separate, segregated institutions that perpetuated Jim Crow in Texas and across the nation. The Court's answer to *Sweatt's* questions pointed the way to the Court's end to segregation four years later in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

(Endnotes)

1 See Merriam Webster Dictionary Online, "social science," at m-w.com, http://www.merriam-webster.com/medical/social%20science (checked Feb. 17, 2012).

2 The author's interview with Joe Greenhill, the former First Assistant Attorney General in the Sweatt case, and later Chief Justice of the Texas Supreme Court, on September 9, 2005.

3 See the Joe Greenhill Papers, provided to the author in November of 2005, and Joe Greenhill to Bill Pugsley, November 20, 2003. Texas Wesleyan University Law School.

4 The states were Ohio (1870), New York (1872), Pennsylvania (1873), California (1874), and Indiana (1874); Joe Greenhill, an oral history interview by H. W. Brands, for the University of Texas Law School, dated February 10, 1986; Michael J. Klarman, "Why Brown v. Board of Education was a Hard Case," The Judge's Journal, vol. 43, no. 2 (Spring 2004), pgs. 6-14; ibid.

5 Joe Greenhill very kindly provided this author with a copy of his U.S. Supreme Court briefing in Sweatt v. Painter (1950).

6 Joe R. Greenhill, oral history interview by H. W. Brands for the University of Texas Law School, February 10, 1986, http://www.houseofrussell.com/legalhistory/sweatt/docs/goh.html (checked Feb. 17, 2012); Milton R. Konvitz, "The Extent and Character of Legally-Enforced Segregation, Journal of Negro Education, vol. 20, no. 3 (Summer 1951), pgs. 425-435.

7 Michael J. Klarman, "Why Brown Was a Hard Case," Judges' Journal, vol. 43, no. 2 (Spring 2004), pgs.6-14.

8 John Q. Barrett, "Teacher, Student, Ticket," Yale Law and Policy Review, vol. 20, no. 2 (2002), pg. 316.

9 Mark V. Tushnet, The NAACP's Legal Strategy, Chapel Hill: University of North Carolina Press, 1987, pg. 119; For a brief discussion of human and cultural capital in the context of college admissions see my commentary, "College Admissions as Conspiracy Theory," first published in Chronicle of Higher Education Review, November 9, 2007, http://www.garylavergne.com/CollegeAdmissionsConspiracyTheory- Lavergne.pdf.

10 Robert L. Carter, A Matter of Law, New York: New Press, 2005, pg. 99; Thurgood Marshall, "Tribute to Charles H. Houston, Amherst Magazine, in Mark V. Tushnet, Thurgood Marshall, Chicago: Lawrence Hill, 2001, pg. 501. In this article Marshall called Thomas Powell an "old mossback."

11 Gale Leslie Barchus, The Dynamics of Black Demands and White Responses for Negro Higher Education in the State of Texas, 1945-1950, Master's thesis, University of Texas at Austin, 1970, pgs. 60-64.

12 Sweatt v. Painter, 339 U.S. 629, 631 (1950).

13 Id. at 633.

"A Fair Day's Pay for a Fair Day's Work"

The Evolving Fair Labor Standards Act

-- Part 2 --

By David L. Kern *

FLSA collective action litigation is very different than other types of employment litigation because fundamentally different ground rules apply. In most employment litigation, employees bear the burden of proof to show that discrimination, or retaliation, has occurred. Plaintiffs also have certain burdens of proof in FLSA collective actions. *See* discussion *infra*. However, in FLSA overtime pay litigation, employers also have significant burdens of proof on many key issues.

Liability in wage and hour class actions often turns on whether an employer has properly claimed an exemption from overtime pay requirements. Employers are not required to pay overtime to employees properly classified as exempt. However, as noted in Part 1 of this series, absent an exemption or exception, FLSA requires employers to pay their employees overtime pay. 29 U.S.C. §207(a)(1). *Thibodeaux v. Executive Jet Int'l, Inc*., 328 F.3d 742, 749 (5th Cir. 2003). Thus, when employers misclassify non-exempt employees as exempt, they incur liability for back overtime wages to those misclassified employees.

One would naturally think that employees would have to prove they were misclassified as exempt to recover back overtime wages. However, the opposite is true. The burden of proof to establish entitlement to FLSA exemptions rests on the shoulders of employers, not on employees. *See, e.g., Walling v. General Industries, Co*., 330 U.S. 545 (1947); *Blackmon v. Brookshire Grocery Co*., 835 F.2d 1135, 1137 (5th Cir.1988); *Singer v. City of Waco*, 324 F.3d 813, 820 (5th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004); *followed in Billings v. Rolling Frito-Lay Sales, LP*, 413 F. Supp. 2d 817, 820 (S.D. Tex. 2006). *See also Bondy v. City of Dallas*, 77 Fed. Appx. 731, 732 (5th Cir. 2003).

In fact, defendant/employers in FLSA collective action litigation must prove that they have met all the statutory and regulatory elements of any claimed FLSA exemptions. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974)(exemptions under FLSA are affirmative defenses on which employer has burden of proof); Idaho Sheet *Metal Works v. Wirtz*, 383 U.S. 190, 206, 209 (1966)(same); *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392 (1960)(same); *Mitchell v. Kentucky Fin. Co*., 359 U.S. 290, 295 (1959)(same). *See also Singer v. City of Waco,* 324 F.3d 813, 820 (5th Cir. 2003) ("We have held that the employer bears the burden of proving that it qualifies for an exemption under the FLSA.") *See also Vela v. City of Houston,* 276 F.3d 659, 666 (5th Cir. 2001); *Smith v. City of Jackson, Mississippi,* 954 F.2d 296, 298 (5th Cir. 1992); *Marshall v. Mama's Fried Chicken,* 590 F.2d 598, 599 (5th Cir. 1979); *Karr v. City of Beaumont,* 950 F. Supp. 1317, n. 4 (E.D. Tex. 1997) ("[T]he application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.").

Moreover, like other affirmative defenses, FLSA exemptions must be properly pled or they are waived. S*ee, e.g., Magana v. Commonwealth of the Northern Mariana Islands,* 107 F.3d 1436 (9th Cir. 1997) (holding exemption from overtime requirements was unavailable to defendant because not properly pled as an affirmative defense). *See also Donovan v. Hamm's Drive-Inn*, 661 F.2d 316, 317-18 (5th Cir. 1981) (exemption waived by failure of employer to plead it). And the employers' burdens of proof and pleading obligations in FLSA collective action litigation do not stop there.

Successful plaintiffs in FLSA collective action litigation are entitled to an award of liquidated damages. In most circumstances, this means that they will receive an additional amount as liquidated damages which is equal to their back pay award. To avoid the imposition of a liquidated damages award to successful plaintiffs, a defendant/employer must prove that its violations of the FLSA were done in good faith. *See, e.g., Mireles v. Frio Foods, Inc*., 899 F.2d 1407, 1415 (5th Cir. 1990). To meet this burden, the employer generally would need to show that its FLSA violations were committed in reliance on favorable Department of Labor guidance, or bad advice from counsel, or something similar. This can be a very difficult burden for an employer to meet.

Employers seeking offsets against back pay owed to plaintiffs also have the burden of proof on those offsets. For example, an employer has the burden to prove any claimed deductions from and credits against back pay due. *See, e.g., Brennan v. Veterans Cleaning Serv*., 482 F.2d 1362, 1370 (5th Cir. 1973). Deductions and credits also have been held to be affirmative defenses which are waived if not properly pled. *See, e.g., McLaughlin v. McGee Bros. Co.,* 681 F. Supp. 1117, 1133 (W.D.N.Y. 1988) (the right to exclude discretionary bonuses from regular rate of pay calculations is an affirmative defense which is waived if not pled). Similarly, claims of entitlement to sleep time and meal time exceptions provided in Department of Labor regulations also are affirmative defenses which an employer must plead and prove. *See, e.g., Johnson v. City of Columbia*, 949 F.2d 127, 129-30 (4th Cir. 1991); *Rotondo v. City of Georgetown*, 869 F. Supp. 369, 373 (D.S.C. 1994).

Naturally, Plaintiffs also have burdens of proof in FLSA collective action litigation. To begin with, Plaintiffs have the fundamental burden of proving that there has been a violation of the FLSA. "The party asserting a wage claim bears the burden of proving by a preponderance of the evidence all elements necessary to establish a violation of the FLSA." *McMillian v. Foodbrands Supply Chain Services, Inc*., 272 F. Supp. 2d 1211, 1217 (D. Kan. 2003) (denying defendant's motion for summary judgment due to fact issues as to elements of *prima facie* case). Plaintiffs joining more than one employer as a defendant in a case also have the burden of proving joint employment. *Martinez-Mendoza v. Champion Int'l Corp*., 340 F.3d 1200, 1209 (11th Cir. 2003).

In an "off-the-clock" case (i.e., a case involving unpaid and unrecorded working time), plaintiffs also have the burden of proving the employer actually, or constructively, knew that employees were working unrecorded overtime hours. *Bailey v. County of Georgetown*, 94 F.3d

152, 157 (4th Cir. 1996). As a practical matter, however, it is often not difficult for plaintiffs to prove "off-the-clock" work is occurring through corroborating testimony, or physical evidence, or both. For example, in the *Bull* case cited below, the federal employees were required to take home and launder dirty canine training towels on their own time without pay while "off-the-clock." Given the absence of washers and dryers at the workplace, the employer could not explain how clean training towels could be available at the workplace without the officers performing this work while "off-the-clock." In addition, at trial there was corroborating testimony from supervisors who themselves laundered training towels "off-the-clock" and without pay when they were canine enforcement officers.

"Off-the-clock" work practices are often so engrained in the culture of an employer that there is ample corroborating testimony from a wide variety of co-workers and supervisors that illegal pay practices are in effect. Examples of such supporting evidence can be found from a variety of employee paperwork sources such as: daily logs, vehicle logs, expense accounts, project reports, paperwork employees work on at home, and the like. *See, e.g., AFSCME v. State of Louisiana Dep't of Health & Hospitals*, 2001 WL 29999 (E.D. La. 2001) (in the absence of employer time records, an employee's work records were sufficient to support his claims for unpaid overtime). *See also Chao v. Vidtape, Inc*., 196 F. Supp. 2d 281 (E.D.N.Y. 2002) (the testimony of 21 employees concerning their unpaid hours worked was sufficient to create a "just and reasonable inference" to support the off-the-clock overtime claims of the 66 employees in the plaintiff class).

Two years is the normal FLSA statute of limitations for plaintiffs asserting back wage claims. However, this two year period can be expanded to three years under certain circumstances explained below. In practical terms, this means plaintiffs usually can only reach back two years (from the date each plaintiff opts-in to a collective action) to recover unpaid wages. However, this two year period is expanded to a three year reach back when plaintiffs in an FLSA collective action are able to show an employer's violations of the FLSA were willful, i.e., that the employer either knew or showed reckless disregard for whether its conduct was in violation of the law. *See, e.g., McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988); *Reich v. Bay, Inc.,* 23 F.3d 110, 117 (5th Cir. 1994); *Karr v. City of Beaumont,* 950 F. Supp. 1317, 1325 (E.D. Tex. 1997). *See also Singer v. City of Waco*, 324 F.3d 813, 822 (5th Cir. 2003) (holding plaintiffs' evidence sufficient to support a finding of willfulness); *Bull v. U.S.,* 68 Fed. Cl. 212 (Fed. Cl. 2005) (same).

When plaintiffs prove willfulness, not only is the two year reach back expanded to three years, but a finding of willfulness also precludes the employer from establishing a good faith defense. As a result a full award of liquidated damages to the plaintiffs becomes mandatory. *See, e.g*., *Tyler v. Union Oil Co.,* 304 F.3d 379, 399 (5th Cir. 2002) (willfulness ruling also requires a finding that employer is not in good faith resulting in mandatory liquidated damages award). *See also Bull v. U.S.*, 68 Fed. Cl. 212 (Fed. Cl. 2005) (same).

Part 3 of this series will explore significant coming changes to the Department of Labor's regulations governing the "white collar exemptions" from FLSA's overtime pay requirements for those classified as executive, administrative and professional employees. Stay tuned.

* **DAVID L. KERN** received his law degree from the University of Texas Austin in 1983 and has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 1993. David's fellow lawyers have recognized him in Texas Super Lawyers for ten consecutive years (2006 - 2015). For more than twenty years he has conducted a nation-wide practice in the representation of classes of current and former employees in wage and hour class actions. He can be reached at dkern@kernlawfirm.com.

Upcoming Holidays:

Monday, October 12, 2015
– *Columbus Day*

Wednesday, November 11, 2015
– *Veteran's Day*

Thursday, November 26, 2015
– *Thanksgiving Day*

Friday, November 27, 2015
– *Day after Thanksgiving*

El Paso Association of Legal Professionals

October Monthly Meeting
Wednesday, October 14, 2015
El Paso Club, 201 E. Main, 18th Floor 12:00 Noon
Guest Speaker: Steven James who will speak on Consumer Law

November Monthly Meeting
Wednesday, November 11, 2015
El Paso Club, 201 E. Main, 18th Floor
12:00 noon
Guest Speaker: Michelle Blumenfeld

Spotlight on a Court Reporter

Sharon Cardon

By Clinton F. Cross

Whether taking depositions or trying a case, the court reporter is a silent but important player in the legal process. Court reporters listen to lawyers all the time. Maybe we should listen to court reporters once in awhile. Ed.

CROSS: Tell me about your childhood.

CARDON: I was born in El Paso at Southwestern General Hospital on December 22, 1950. My mother was Guin Stowell Cardon and my dad was William A. Cardon, Jr., who was a Realtor in El Paso for a billion years. I went to Hughey, Ross and Burges. All great schools, but I learned absolutely nothing except how to type really fast. It would take too long to talk about my childhood, Clint, and most of it I can't remember anyway – too much fun in Juarez.

CROSS: When did you decide to pursue a career in court reporting?

CARDON: My stepmother, Marjorie Martin Cardon was the official court reporter for Judge Berliner and she made it sound really interesting. She was a Gregg writer, meaning she used a pen, not a machine. Another reason I was thinking court reporting would be good for me and that I might be able to do it is because, as I previously said, I was the fastest typist in my class and math was not required in any way, shape or form to become a court reporter. I didn't have to take one math class in court reporting school so I was sure I would succeed. One day I decided I'd go to court with Margie and watch what went on. It was a divorce. About 30 minutes into the case, I fell asleep. But that didn't stop me from pursuing a career in court reporting.

I graduated from Burges in 1969 and almost immediately, it seems, was headed to Abilene, Texas, to become a court reporter. Abilene and I didn't fit very well so my boyfriend at the time, Brannon Rasberry, and I decided to head to the big city of Plainview, Texas, and finish our court reporting education there. Plainview was a lovely town, the school was good and the people were friendly.

We both graduated in 1971 and moved to Birmingham, Alabama, where Brannon was offered a job, but I wasn't... that's another story altogether, called "we don't want no women working here." Anyway, I did work while I was there, as a proofreader and transcriber, and eventually was actually able to work in the court as a substitute court reporter. Wowwee.

Back then we had to read from the stenographic notes and type the transcript onto paper. I hated the jobs with five attorneys who all wanted a copy 'cause I had to use carbon paper. Nobody today knows how aggravating it is to correct five copies one by one with an erasure when you type "teh" instead of "the." I think my neighbors thought really bad things were going on at our house 'cause I'm sure they could hear me screaming at the typewriter – like it was doing something wrong.

CROSS: After you got out of school, how did you get started?

CARDON: After living in Alabama for four months, I couldn't stand the humidity and when mosquitoes were bigger than my thumb, I knew I had to get back to the desert. Brannon and I came to El Paso, even though he was from Sweetwater (the water isn't sweet in Sweetwater), and opened up a freelance court reporting firm. At that time there was only one other firm in town, Mr. Jimmy Braden, and I don't think he was too excited about the competition. After freelancing for a while, Brannon became an official with Judge Koehler and then opened and operated Brannon Rasberry & Associates for many years. He sold his firm to our son Justiss. Justiss is now Rasberry & Associates and Sharon Cardon & Company, also. He has some wonderful court reporters working with him and I am so proud of them and so honored to be able to work with such professionals.

CROSS: I understand you actually taught court reporting for a few years here in El Paso. Tell me about that.

CARDON: I did teach for six years at EPCC. What a rewarding experience it was, too. Court reporting is such a challenging and interesting job so I thought it would be equally challenging and interesting to teach it. Being able to write what is being said as it is said onto that little bitty machine always fascinated me and I wanted my students to be as enthusiastic about court reporting as I was. Court reporters were transitioning to Computer Aided Transcription. I was still dictating my transcripts and hadn't taught myself the theory I was teaching. One night in class I came upon a "conflict" meaning the word wouldn't translate accurately on the computer unless you write it differently than its homonym, i.e., your and you're. I honestly told my students that it was a conflict, but I didn't know how to fix it. From the back of the room comes a voice, "Well, if you don't, then who does?" That night I promised myself and my students that I would find a way to write conflict free and I started teaching myself how to write with as few conflicts as possible while I was still working every day as a court reporter. That was fun... NOT. The student who asked the question became one of my dearest friends and a court reporter as well. She was my mentor in grammar and punctuation and pushed me to become a better court reporter than I ever would have become had she not asked that question. Janet Vanderveer will live in my heart forever.

CROSS: Did you ever work for a court? For whom? When?

CARDON: Yes. I became second string, if you will, for Judge Jerry Woodard. His court was criminal and it was very busy. When Judge Paxson came to the bench, I was his court reporter. I worked with Judge Brunson Moore and substituted throughout the courthouse and in federal court as well. But the judge I enjoyed working for the most and whom I greatly respect is Judge D. Clark Hughes. He was and is my hero.

CROSS: Today, you have your own firm. How is that different from working for a court?

CARDON: I don't have my firm anymore. I quit court reporting in 2005 due to a condition in the nerve going to my thumb and sold my business to my son, Justiss Cardon Rasberry. I am working with Justiss and his reporters as a scopist and proofreader. (I guess you go full circle if you live long enough.) Freelancing is different than court work only in your day-to-day activities. As a freelancer, you most often hear one side of the case. I've often finished depositions and wished I could be a fly on the wall in the trial to see if the juries still think

exactly the opposite of the way I think. In court you may or may not have to produce a transcript; depositions are always produced and need to be done timely. Not always an easy task when you're really busy.

CROSS: As a court reporter, you get to observe attorneys at work preparing their cases for trial by taking depositions. There has been some concern by bar leaders and others that lawyers sometimes put on an aggressive and discourteous show for their clients when taking depositions. Have you observed that kind of behavior here in the enlightened city of El Paso?

CARDON: Yes, I have observed some pretty unprofessional behavior whether the clients were present in the proceedings or not present. It's very disconcerting taking a record when the attorneys are arguing and talking over each other and interrupting and just generally being disrespectful of each other and the record. We can only take one person talking at a time and the record is only as good as the attorneys make it. I wish young attorneys could take a class about making a record given by court reporters so they can understand what they need to do to accomplish having a record they can be proud of later when it's shown on the Big Screen to a jury and may later go up on appeal.

CROSS: What, if anything, can be done to discourage that kind of behavior?

CARDON: You got me on that one. Maybe a class; maybe a spanking. I don't know. I wish I had a videotaped deposition of Mr. John Grambling. What a lesson that would be for some attorneys on how to act and how to protect your record. When a witness said, "This," Mr. Grambling would be sure to say, "Let the record reflect the witness is pointing to his left knee." Even if you have a video of the witness, you still have to make clear for the written record what you and they are talking about. "This" "That" "Here" "There" are only words. Put on the record what they are referring to.

CROSS: Any advice for young court reporters who have recently graduated and are beginning their careers?

CARDON: Read. Read. Read. The Gulf War is not the Golf War. It's not "for all intensive purposes." And for all intents and purposes, you must listen, ask questions and STOP the attorneys and the witnesses if they are speaking over each other or have said something you can't hear or understand. You may irritate somebody, but your record will be correct and you will be proud of your work. You have a very important job, little court reporter, your transcripts will be forever. They will be read by the most learned people in the United States. Be proud of your chosen profession, it is an honorable one. Don't guess at a word if you've never heard it before. It's okay to ask the attorney, the witness, fellow court reporters. They'll be glad to help you in your continuing education. Harry Tom Petersen was a brilliant speaker and a lovely human being. He said in one of his final arguments a word I was unfamiliar with – now don't laugh at me – the word was "untoward." I didn't know where to start to find whatever it was he said so I finally humiliated myself and called him and read what he said prior to and immediately after that word without saying the word cause I had no idea what it was. He was so gentle and so kind and didn't make me feel like a moron at all and he even spelled it for me. I love "untoward" now and use it often.

So, attorneys, no more untoward behavior when taking depositions, please, it's really hard on the court reporter. You wouldn't act like that if your mother was in the room, I hope, so pretend she is and act accordingly.

CLINTON F. CROSS is a retired Assistant El Paso County Attorney.

The Ethical Prosecutor: The Loyal Servant of Justice

By Oscar G. Gabaldón, Jr., CWLS

"It is the lawyers who run our civilization for us -- our governments, our business, our private lives. Most legislators are lawyers; they make our laws. Most presidents, governors, commissioners, along with their advisers and brain-trusters are lawyers; they administer our laws. All the judges are lawyers; they interpret and enforce our laws. There is no separation of powers where the lawyers are concerned. There is only a concentration of all government power -- in the lawyers."

Fred Rodell, *Woe Unto You*, Lawyers

Such prosecutors know that they are held to a higher standard because of their governmental role, and they will not compromise steadfast values and principles, such as the timely disclosure of evidence that is supportive of an individual's innocence.

Precisely because of the prodigious and far-reaching influence lawyers exert on many facets of civilized societies, the expectation that lawyers should be "the ultimate professionals" is not only a sensible expectation, but it is a desirable ethical standard for every lawyer that graces the revered halls of justice. Among the family of lawyers those that serve the public interest as government lawyers have the added distinction of having to adhere to certain duties and responsibilities that differ from those of traditional lawyers. An intelligent and ethically-balanced approach must be consistently taken by government lawyers in their zealous advocacy of the government's interests, especially because of the government's apparent superior position in relation to those that may challenge it. This is especially the case with those government lawyers that serve in traditional prosecutorial roles.

The primary goal of prosecutors of mediocrity is a conviction. On the other hand, prosecutors of excellence possess an intense yearning and drive for seeking justice, not simply a conviction. Such prosecutors know that they are held to a higher standard because of their governmental role and they will not compromise steadfast values and principles such as the timely disclosure of evidence that is supportive of an individual's innocence. In accordance with the case of *Brady v. Maryland*, these prosecutors know and respect the fact that the timely disclosure of mitigating evidence favoring an accused is an ethical and legal dictate. They recognize that a timely disclosure of evidence that serves to lessen the punishment of an accused is not only an altruistic pursuit, but it is the ethically and legally right thing to do.

Since the prosecutor represents the government, which is the sovereign, the prosecutor often has access to auspicious resources in the prosecution of cases. The government, unlike private individuals and nongovernmental entities, generally possesses powers, privileges and certain protections that often help tilt the pendulum in its favor. It is for reasons such as these that the prosecutor must exercise delicate, thoughtful and honest care in the use of his or her discretionary governmental powers to better minister justice; failing to do this is tantamount to outright unethical, dishonorable and inexcusable behavior.

In the celebrated case of *Berger v. United States*, 295 U.S. 78 (1935), the United States Supreme Court declared that "The prosecutor is the representation not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Evidently, the Supreme Court makes it unequivocally clear that the prosecutor role is unlike any other in the legal profession. The prosecutor's exercise of discretion, as well as the prosecutor's focused attention to assure that fairness permeates throughout the discovery phase, trial phase, and the entire legal process, are all critical considerations of the highest regard to be kept in mind in the quest for justice to prevail. In the process, however, the prosecutor must not forget that victims also have rights and that victims too are in need of justice and in need of supportive services such as those offered by victims' assistance programs. By the same token, the prosecutor should never become blind to the fact that justice for the defendant is also exceedingly worthy of the prosecutor's purview and attentiveness.

In the end, prosecutors, like other lawyers, must conscientiously wrestle with carefully balancing the scales of justice in such a way as to minimize the risk of aimlessly stumbling down the road in the pursuit of false gods, such as "the god of winning for the sake of winning" or "the god of winning for the sake of feeding a starving ego" rather than for the sake of allowing justice in its plain and purest form, to triumph in splendor and reign unperturbed. This requires the prosecutor to meticulously examine all sides of the puzzle in order to embark on the best course of action that will not elude justice or give a false sense of justice, but rather a course of action that will truly attain undefiled justice.

In *The Lawyers Myth*, Rennard Strickland and Frank T. Read wrote:

"At the most pragmatic level, lawyers are society's professional problem solvers. Lawyers are called upon to make distinctions, to explain how and why cases or experiences are alike or different. Lawyers are expected to restore equilibrium, to be balancers. Every discipline, every profession, every job, and every calling has a cutting edge. At that cutting edge, lines are drawn. Lawyers and judges are society's ultimate line drawers. On one side of the line, the conduct, action, or inaction is proper; on the other side of the line, it is not."

OSCAR GABALDÓN is an assistant City Attorney and former 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).

Focus on a Judge:

Norbert Garney

By Clinton F. Cross

CROSS: Tell me about your childhood.

GARNEY: I was born and raised in Houston, Texas. My mother was a homemaker, and my father worked for Oil Center Tool, an oilfield equipment company. He was a specifications writer for what are called in the business, "Christmas Trees." When I was a kid and told my friends what he did, I would get the inevitable question "Does your Dad work for Santa Clause?"

CROSS: What are "Christmas Trees"?

GARNEY: "Christmas Trees" are flow regulators that sit on top of a well-head.

CROSS: Siblings?

GARNEY: There were four of us boys, I am the eldest. I lost two of my younger brothers. Florian drowned as a result of a surfing accident near Corpus Christi. It was Spring Break, 1973. He was only 20 years old. Patrick died of leukemia in 2000, several months after I was appointed as a magistrate judge. He was 45. Mark, my youngest brother, recently retired from the Air Force with the rank of full Colonel. He was a JAG officer. I always enjoyed annoying him by saluting him with my left hand.

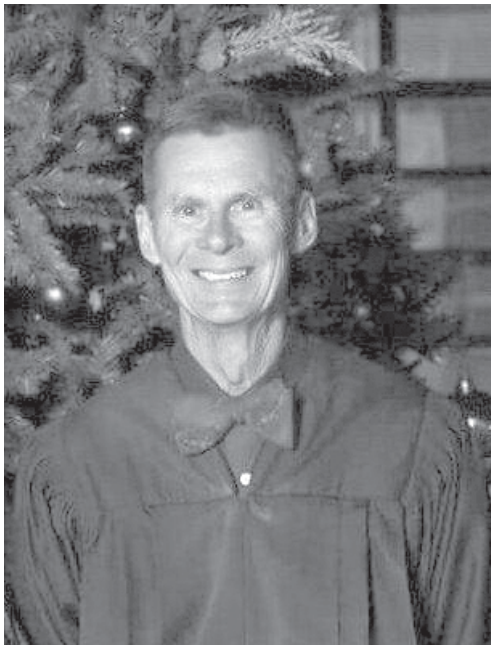
CROSS: School?

GARNEY: I graduated from St. Thomas High School in Houston. It was an all-boy Catholic school. I then attended the University of St. Thomas and graduated with a degree in Philosophy. After that I went to nursing school at the University of Texas, Houston where I got a Bachelor of Science in Nursing.

CROSS: How did you pay for all this education?

GARNEY: I worked at many part-time jobs. For instance, I worked as a pest control fumigator in a rice mill. I came to hate the smell of rice from all that dust. I worked as a mail sorter for the U.S. Postal Service, salesman for Gerber's Baby Foods, bagged groceries, janitor, construction, any job I could get. I have had so many jobs I cannot remember what they were.

CROSS: After you got your nursing degree, what did you do?



Norbert Garney
(a few years ago)

GARNEY: I mostly worked in pediatric ICU, in Denver General Hospital and then at Lubbock General Hospital while attending law school.

CROSS: Why law school?

GARNEY: I was getting close to 30 and started thinking "did I really want to be working nights in my 40s and 50s?" In that line of work you inevitably lose children. It was heartbreaking. Early burnout, I guess.

CROSS: Where did you attend law school?

GARNEY: Texas Tech University, graduated in 1982.

CROSS: Then what?

GARNEY: I moved to El Paso. My first job was as Justice Bob Schulte's briefing clerk at the 8th Court of Appeals. I then joined the District Attorney's office. After two years as an Assistant District Attorney, I went into private practice and did some medical malpractice plaintiff's work.

After a while, I hung my shingle, and was drawn to criminal law. Odd, since I did not enjoy it at all in law school. Eventually I became Board Certified in Criminal law. I also took the New Mexico bar. I have defended my fair share of death penalty cases.

In 1997 I went to Las Cruces where I worked for District Attorney Susana Martinez, who is now Governor Martinez. I really enjoyed that. I worked there for a year and in August of 1998 was hired as an Assistant U.S. attorney here in El Paso.

CROSS: Of all these jobs, which one did you like the best?

GARNEY: I thought I had died and gone to heaven when I became an AUSA.

CROSS: Then what happened?

GARNEY: I discovered there are different levels of heaven. A new magistrate judge position was created in 1999. At the time I had no interest in the position. However, I was encouraged by members of the defense bar to apply for the position. That was quite a compliment when you stop and think about it. As I recall there were about 75 or so applicants, and ultimately, I was very fortunate to be chosen.

CROSS: How did that happen?

GARNEY: One of my favorite sayings is "If you want to be struck by lightning, you have to play golf in the rain." I happened to be at the right place at the right time. And I don't even golf.

CROSS: Looking back on it, how do you feel about your experience as a magistrate judge?

GARNEY: It has been, by far, the happiest time in my legal career. I liken it to what it must feel like to be a professional baseball player, and stepping on to Wrigley field. It has been amazing.

CROSS: Any advice for your replacement?

GARNEY: When I was appointed, I received three pieces of great advice. "Even the kindest bear has to deliver a paw from time to time;" "It is not what you say but what you don't say that makes a good judge;" and "Being a judge exaggerates your good qualities as well as your

bad." All of that turned out to be so true.

CROSS: How do you interpret those pieces of advice?

GARNEY: One can't help but get annoyed or frustrated on occasion. When that occurred, I tried to have an avuncular approach and watch what I say. Didn't always succeed, but I tried. Sometimes you just have to deliver that paw. However, in taking that swipe, I tried not to be nasty about it. Judges are given so many opportunities to say things that are best not said. I am sure that I let a number of things slip out over the years that I shouldn't have.

CROSS: You will retire November 30, 2015. What next?

GARNEY: My girlfriend Tammy and I recently built a beautiful home in Cloudcroft. We will spend as much time there as we can. We love cruising. We have cruised all over the world. Alaska, Tahiti, the Caribbean, Egypt, Turkey, many places in Europe, Central America, as well as trans-Atlantic crossings. There are still many places left to see. I want to get to Asia and Australia. Tammy is a very successful and busy CPA, so we will have to plan around her schedule to do more of that. Next spring after tax season, we are going to cruise the Suez Canal. In the meantime, I love to fish. I will be taking as many fishing trips as possible, Alaska, deep sea, lakes, gulf coast, wherever I can go.

CROSS: Anything about you that people might be surprised to know?

GARNEY: Many people still don't know that I am an R.N. I am an avid canoeist. In 1970 I finished the Michigan AuSable River Canoe Marathon in 10th place. I had my pilot's license and flew Cessna 150s and hot air balloons. I write regularly to a pen pal in the federal pen. I'll bet that will surprise a lot of people.

CLINTON F. CROSS is a retired Assistant El Paso County Attorney.

Access to Justice Legal Fair

Saturday, November 7, 2015
9:00 a.m. to 1:00 p.m.

Valle Verde Campus
El Paso Community College,
919 Hunter

If you can volunteer for the clinic, please contact Nancy at *ngallego.epba@sbcglobal.net*

A Red Mass is a Mass celebrated annually in the Catholic Church for Judges, Attorneys, Law School Professors, and Students. The Mass request guidance from the Holy Spirit for all who seek justice, and offer the opportunity to reflect on what Catholics believe is the God given power and resposibility of all legal profession

THE EL PASO ST. THOMAS MORE SOCIETY
CORDIALLY INVITES YOU TO JOIN IN
THE DIOCESAN CELEBRATION OF THE

2015 RED MASS

MOST REV. MARK J. SEITZ, D.D.
BISHOP OF EL PASO
PRINCIPAL CELEBRANT

ST, PATRICK CATHEDRAL OF EL PASO, TEXAS
1118 N. MESA 79902•OCTOBER 5, 2015 AT 5:15 P.M.
Reception to follow in the St. Patrick Cathedral Multipurpose Center
Judges will gather for vesting in the St. Patrick School Cafeteria at 4:30 p.m. and will participate in the Procession

On Judging Judges

By Clinton F. Cross

There is an acrimonious debate raging in El Paso over proposals to judge judges. The effort is commendable. Somehow, judges need to be held accountable.

The difficulty lies in devising a fair and accurate process for evaluating a judge's work. How can it be done?

Can we evaluate judges using statistical data? Since judges preside over so many different kinds of cases, numbers can deceive. It is not possible to compare a murder case with a divorce case or with a products liability case or a hot check case and so on and on. Apples are not oranges or grapes or pears.

Can we evaluate judges by the amount of time they spend working? If so, simply requiring judges to clock in and clock out when they "work" might seem to provide an answer to our expectations. Then again, appearances could be misleading.

In addition, "spending time" working is not the only thing that matters. Judge's "work" requires the possession of a variety of diverse skills. A judge may put in lots of hours at work but not possess those skills.

What kinds of skills help a judge do a good job?

Clearly, a judge needs to be familiar with the law. A judge's performance in law school is usually a matter of ancient history and therefore no longer relevant. A Court of Appeals judge once told me his knowledge of the law after he took the bar exam would have been helpful in his capacity as an appellate judge, but by the time he got elected he'd forgotten it all.

A criteria for evaluating a trial judge or an intermediate appellate judge might be his or her reversal history. In short, the judge should try to anticipate a higher court's opinion and then decide accordingly. This information is available, but it focuses on only one of many factors to be used in evaluating a trial judge's performance.

Another criteria for evaluating a trial judge might be his or her "judicial demeanor." "Judicial demeanor" includes the willingness to respect all parties in the courtroom, a capacity to diffuse acrimony in the midst of conflict, the ability to facilitate dispute resolution without displaying bias towards any of the parties and many other things.

In some courts, such as family courts, child abuse and neglect courts, drug courts, and mental health courts, a judge's skill in connecting with and inspiring parties or offenders in his or court may be critical in evaluating the success or failure of rehabilitating parties or offenders.

The judge's role is complex and difficult to measure objectively. Properly evaluated, numbers may matter. But judging judges is not just a numbers game.

There are very few citizens who interact with judges at work. Even when they vote, they do not know a great deal about the candidates. Today, many lawyers practice in specialized fields and even they do not know many of the judges who practice in other arenas. How many probate lawyers can name all the judges who preside over criminal cases in the El Paso County courthouse? How many civil lawyers can name all the judges on the Texas Court of Criminal Appeals?

So how can "we the people" evaluate judges and hold them accountable?

I submit that the best judges of a judge's work would be the lawyers who practice in a judge's court day after day and week after week. A confidential bar poll of those lawyers should provide reliable information about that judge's work. Some judges, of course, might disagree since such a system might seem to empower lawyers when judges sometimes feel a need to control lawyers.

Can the County Commissioner's devise a system for evaluating judges that is fair, impartial, unbiased and reliable? If so, will "the people" respect the evaluation when they go to the polls?

Unfortunately, the current dispute is beginning to look more and more like a mud fight. Unless the County Commissioners can devise a truly fair, impartial, unbiased and reliable process for evaluating judges that the public will respect, the unfortunate consequence of the current acrimonious debate may be a loss of respect for both the Commissioners Court and the judiciary without any concomitant benefit to the community. To return to the metaphor of the mud fight, the problem with mud fights is that everyone ends up getting covered with mud. That´s a messy outcome.

CLINTON F. CROSS is a retired Assistant El Paso County Attorney.

New Directions for the El Paso DRO

By Judy Branham

The Domestic Relations Office (DRO) provides a variety of services to the El Paso Community. Our mission is to efficiently and effectively ensure compliance with family court orders. We endeavor to maximize the functionality and funding of this office while minimizing the impact to families that need our services. DRO provides case monitoring, facilitation, evaluation, probation, education/cooperative parenting classes, customer service, and legal services to individuals who might otherwise not have access to them.

It is hard to believe that it has been a year since being selected as the new Executive Director. My career began in the Office of the Attorney General coordinating efforts between the State and Texas Counties. During my travels and meeting with county officials, I always found myself surrounded by hard working, dedicated individuals, that wanted to make their community better. When leaving the State, I was employed by Dallas and Travis Counties in their Domestic Relations Offices. I found being on the front line and seeing the faces that we were helping was so rewarding and humbling. Being allowed to continue this effort in El Paso County is yet another new experience with wonderful people and diverse cultures. With this new opportunity to make a real difference, I discovered areas of the DRO in which I felt changes could move the office forward in a positive way. I have been so very fortunate to have received the support and encouragement by Executive Management and Commissioner's Court to complete some of the new initiatives that were identified. The following are a few examples:

•We have a new focus from primarily legal enforcement to one that includes facilitation and coordination in an attempt to resolve issues outside of the courtroom. I felt it was critical to provide a more balanced enforcement approach that includes the same ability to receive access and possession (visitation) enforcement services in the same manner in which we provide child support enforcement services. Both services are provided without a fee. If court action is required for compliance, then the assessment of attorney fees would be requested of the court against the party out of compliance. For Contested Custody Evaluations, our office has begun contacting the representative attorneys in an effort to discuss the results of the evaluation prior to writing a report. It is an opportunity for parties to reach an agreement without the necessity of a written report and further court hearings.

•Parents that find themselves in the court system are confronted with unexpected costs and short timeframes for the payment of fees. To alleviate this, I placed an emphasis on finding alternatives to allow some of the financial burden to be shifted away from Parents and towards State and Federal funding. We have focused our efforts at maximizing the funding through existing contracts with the Office of the Attorney General (OAG). Through these contracts, the DRO not only receives funding, but we are able to provide enhanced services to the community utilizing the resources available to the OAG. There is Child and Medical Enforcement through the Integrated Child Support Services Contract, Community Supervision (Probation) Services for those ordered into the program by the IV-D courts, Access and Possession Facilitations, and Customer Service. In Fiscal Year 2015, $5,619,135 was collected and disbursed to families from our enforcement efforts through the ICSS program. There are over 400 parents currently placed on Community Supervision by the IV-D Courts and 75% to 80% have begun making their child support payments. Our work in Access Facilitation has significantly increased parenting time for those that previously were unable to exercise their rights. Most of these contracts generate revenue that is on a case basis. So, as the programs grow, so does the revenue.

• Our Department is growing and thanks to the support of many County Divisions, we will have an enhanced space that is designed to better support the work flow and match our reorganization. We created a call center and are more efficiently sharing resources and have streamlined processes.

I am very fortunate to have worked with many Domestic Relations Offices around the State and have been encouraged to recommend ideas that have proven effective in other offices. We will continue our efforts to improve the delivery of services and I invite you to give us any suggestions you might have.

Kindest Regards,
Judy Branham

JUDY BRADHAM is Executive Director of the El Paso Domestic Relations Office. She graduated from St. Edwards University in 2006 with a Bachelor of Arts degree in Organizational Communications.

23rd Annual El Paso Criminal Law Seminar

The Inn of the Mountain Gods, Ruidoso, New Mexico
(www. innofthemountaingods.com)
DATE: November 20 and 21, 2015
MCLE: 12.0 Hours Texas and NM MCLE Credits (applied for), includes 2 Hours Ethics
COST: $300.00 for attorneys licensed 3 years or more, as of the date of seminar; $200.00 all others
No charge for full-time judges

COURSE DIRECTORS: Judge Julie Gonzalez, Jaime Gandara, Mike Gibson, Greg Anderson, Maureen Franco, and Judge Yahara Lisa Gutierrez

ACCOMMODATIONS: A block of rooms has been reserved for November 19, 20, and 21, 2015, at the Inn of the Mountain Gods, 1-800-545-9011, Ext. 7660. Room prices are $99.99 plus tax if you inform the reservation desk that you are with the El Paso Criminal Law Seminar. To assure a stay at the Inn, make your reservations on or before 3:00 P.M. OCTOBER 19, 2015. Your room will not be guaranteed until payment is received. For more information call Jaime Gandara at (915)546-8185, Greg Anderson at (915)595-1380, Judge Julie Gonzalez at (915)546-2145, Mike Gibson at (915)532-2977, Judge Yahara Lisa Gutierrez at (915)546-2102, or Maureen Franco at (915)534-6525.

REFUND POLICY: A full refund of your seminar registration fee will be provided until NOVEMBER 12, 2015, after that you will receive a flash drive containing all seminar materials but no refund.

MATERIALS: Only pre-paid registrants will be assured materials at the seminar. "At the door registrants" will be provided materials on a "first come first served" basis only while materials are available. "At the door registrants" who do not receive materials at the seminar will have a flash drive, containing the materials, mailed to them within two weeks after the seminar.

TENTATIVE SCHEDULE OF EVENTS

Friday, November 20		
Topic	Speaker	
Registration	IOTMG Convention Center Coffee, Cokes, & Water	8:30-9:00 A.M.
Opening Remarks	**Mike Gibson,** Moderator Attorney, El Paso	8:55-9:00
Recent Decisions	**Steve Hughes**	9:00-10:00
Eighth Court Of Appeals	Justice, Eighth Court Of Appeals El Paso	
Legislative Update	**Joe Moody** Texas House Of Representatives District 78, El Paso	10:00-11:00
Break	Coffee, Cokes, And Water	11:00-11:10
Criminal Law Updates	**Tom Darnold**	11:10-12:10
Court Of Criminal Appeals	Appellate Chief, District Attorney's Office El Paso	
Lunch	On Your Own	12:10-1:30 P.M.
Federal Pretrial Release	**Mike Torres**	1:30-2:30
Update	United States Magistrate Judge Western District Of Texas, El Paso	
Sex Offender	**Eric Hanshew**	2:30-3:30
Registration	Assistant Federal Defender Western District Of TExas	
Break	Coffee, Cokes, And Water	3:30-3:45
Sex Trafficking	**Patrick Lara** Attorney, El Paso	3:45-4:45
Expunction/Order For Non-Disclosure	**Jaime Gandara** El Paso County Public Defender	4:45-5:45
Adjourn	**Mike Gibson**	5:45
Saturday, November 21		
Social	Coffee, Cokes, And Water	8:00 A.M.
Ethics	**Bill Cox**	8:00-10:00
	First Assistant Public Defender, El Paso, Texas **Selena Solis** Assistant Federal Defender Western District Of Texas	
Break	Coffee, Cokes, And Water	10:00-10:15
Significant Decisions: Scotus And Fifth Circuit	**Donna Coltharp** Assistant Federal Defender Western District Of Texas	10:15-11:15
Break	Coffee, Cokes, And Water	11:15-11:30
Current Issues In Texas Criminal Law	**Barbara Hervey** Judge, Texas Court Of Criminal Appeals	11:30-12:30
Defending Sex Crimes	**Charles Roberts** Attorney, El Paso	12:30-1:30 P.M.
Closing Remarks	Mike Gibson	1:30

SEMINAR REGISTRATION FORM

Name: _____ Phone Number ( ) _____-_____
Fax: _____e-Mail Address: _____
Mailing Address: _____, _____, _____
Please Indicate Your Choice Of Format For Your Materials:
_____flash Drive Only _____binder Only

$200.00_____ Attorney Licensed Less Than 3 Years
$300.00 _____ AtTorney Licensed 3 Or More Years
No Charge_____ Full Time Judge

Make Check Payable To:
El Paso Criminal Law Group, Inc.
To Ensure Credit on opening day of the Seminar,
Please return payment and Registration Form
No later than November 14, 2015
To:
El Paso Criminal Law Group, Inc.
Attn.:Elena Aguilar
525 Magoffin Avenue, Room 361
El Paso, Texas 79901

Two young men with a secure future.

PROFILES IN *Trust*

"Financial decision making is tough for anyone to navigate."

A trust created for the benefit of brothers Teo and David, 10 years ago, was an investment in their future. Since Teo and David began high school MEMBERS®Trust Company has managed their portfolio and provided guidance and support through the proper investment of their trust funds. To this day, the trust continues to serve their educational and future needs. Teo has a Masters degree in Computer Engineering and David will graduate in 2016 with a degree in Finance. Both attend Texas Tech University in Lubbock.

MEMBERS®Trust Company has a personal interest in you, your family, and the well-being of your financial future. They understand that securing a financial future for your loved ones is intimidating, but as Teo and David Hall experienced, they treat you like family and guide you every step of the way.

MEMBERS® Trust Company isn't just working for shareholders, they're working for the Hall brothers, and others like them. Call today to speak one-on-one with a trusted advisor.

Brothers David A. Hall and Teo D. Hall, ages 22 and 24

Trust & Investment Services

MEMBERS *Trust Company*

915.774.4741
7227 Viscount Blvd.
El Paso, Texas 79925
MEMBERS® Trust is located at the GECU Branch on Viscount

Our Trust Team...

Linda Ontiveros -Senior Trust Officer
Judy Monteleone - Vice President and Trust Officer
Ercilia Short - Trust Administrator

This testimony reflects the real life experience of a MEMBERS® Trust Company client. Individual experiences may vary. Nondeposit investment products available through MEMBERS® Trust Company are not deposits of or guaranteed by the trust company, a credit union or credit-union affiliate; are not federally insured or guaranteed by the NCUA, FDIC or any other government agency; and are subject to investment risks, including possible loss of the principal amount invested. MEMBERS® Trust Company is a federal thrift regulated by the Office of the Comptroller of the Currency. For legal or tax advice, please consult your attorney and/or accountant.

EL PASO BAR ASSOCIATION
500 E. San Antonio, Rm. 1204
El Paso, Texas 79901
(915) 532-7052

20th Annual Civil Trial Practice Seminar

February 11, 12 & 13, 2016

Venetian Casino and Resort
Las Vegas, Nevada

Hotel Room Reservation information and Seminar Registration information will appear in the next issue. You can also check our website www.elpasobar.com for updates