

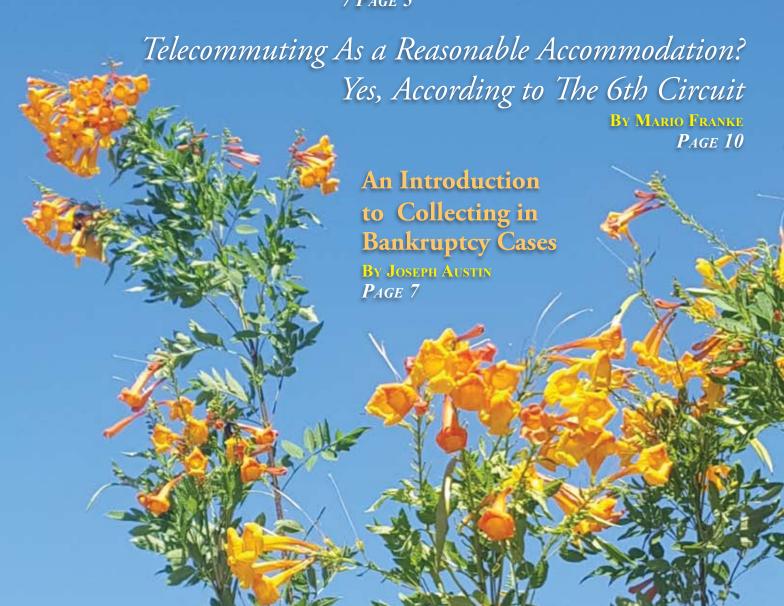
ELPASO An Update of Events and Information BAR JOURNAL

October 2018

Let's Engage and Take Ownership in Our Barl

By Jeanne "Cezy" Collins

/ PAGE 5





MEDIATION Works

221 N. Kansas, Ste. 609 El Paso, TX 79901 www.antcliffmediation.com (915) 533-1221 Chris Antcliff is an efficient and effective neutral whose goal is to assist litigants and their counsel along a reasonable path to resolution of their dispute.

His 20 years of legal experience coupled with his service as a former **District Court Judge** and former **Justice on the 8th Court of Appeals** ensures that all voices are heard during the conflict resolution process as he strives to help the parties craft their own agreements.

Schedule your mediation today: antcliffmediation.com/calendar





State Bar of Texas Awards
Award of Merit
Star of Achievement
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

Jennifer VandenBosch, President
Daniel Hernandez, President-Elect
Janet Monteros, Vice President
Judge Laura Strathmann, Treasurer
Monica Perez, Secretary
Mark Dore, Immediate Past President

2018-2019 Board Members

Judge Anne Berton Merwan Bhatti Judge Penny Hamilton Gabriel Perez Danny Razo

Dana Irwin Carmona

Sylvia B. Firth

Abe Gonzalez

Noemi Lopez Carlos Madrid

Patricia Baca

Jessica Kludt

Andrea Moran

Daniel Ordonez

Charles Ruhmann

Editorial Staff:

Jennifer VandenBosch, Daniel Hernandez, Janet Monteros, Nancy Gallego

Ex-Officios

SBOT District Director, El Paso Young Lawyers Association, El Paso Women's Bar Association, Mexican-American Bar Association, Federal Bar Association, ABOTA, El Paso Bar Foundation, Family Bar Association, Probate Bar Association, Paralegal Association

Executive Director

Nancy Gallego

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



What is strength?

- 1- The quality or state of being physically strong
- 2- The capacity of an object or substance to withstand great force or pressure.

We as lawyers fit both definitions.

Physically strong describes many of us, the marathon runners we have in our midst, the tri-athletes, the ultra runners, the bicyclists, the list can go on and each one of those individuals

is strength.

But in our day to day jobs, it is our ability to withstand great force or pressure that sets us aside and makes our profession loom large above the rest. Our society looks to the lawyer to solve the problems that others have created. Our society looks to lawyers to fix the problems we have done to ourselves. Our society looks to lawyers to help in bad times.

If we fail, jokes are made about us.

If we succeed, jokes are made about us. My father loves to tell my 11 year old daughter lawyer jokes.

What does it mean to forge?

- 1- to make or produce something, especially with some difficulty
- 2- to suddenly and quickly more forward
- 3- to make an illegal copy of something in order to deceive
- 4- a working area with a fire for heating metal until it is soft enough to be beaten into different shapes

As lawyers, we forge in our careers in each one of those ways. Sometimes we envision our offices as the working area that is on fire and we are the object beaten into a different shape rather that the file we are attempting to put together – but we survive. Everyday there is the potential to suddenly and quickly move forward – at a moment's notice we are trained to meet with people, file notices, request hearings. Few and far between are those of us making an illegal copy for gain, but it happens. But the majority of the time, the forge that we do is the making or producing of something with some difficulty. That is the cases we work on, trying to get the best outcome possible for our client.

So the question is how do we "Forge Our Future." My answer is we use our strength to show society, our community, what we are made of and how we can help. In the upcoming year, I would like us as the legal community to reach out and take the steps needed to help others.

How do we achieve this – Get Involved. We get involved with our schools, with law fairs, with training for each other, with the mock trial competition, we should offer up our knowledge for the benefit of others.

There will be many opportunities this year for you, take one and help me Forge Our Future.

Jennifer VandenBosch

President

EL PASO BAR ASSOCIATION

OCTOBER BAR LUNCHEON

Tuesday, October 9, 2018

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

Guest Speaker will be

Carlos Enriquez Magaña of the Juarez Bar Association

He will speak on the comparison of the Mexican Legal Profession with the Texas Legal Profession.

Approved for .75 hours of MCLE including Ethics

Door prizes will be given out

Please make your reservations by Monday, October 8, 2018 at 1:00 p.m. at ngallego@elpasobar.com

EL PASO BAR ASSOCIATION NOVEMBER BAR LUNCHEON

Tuesday, November 13, 2018

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

Salute to Veterans

To all our attorneys who are Veterans, your lunch will be free for today, but please RSVP to us at ngallego@elpasobar.com

Today's is sponsored by: Texas Certified Development Company, Inc.

Door prizes will be given out

Please make your reservations by Monday, November 12, 2018 at 1:00 p.m. at ngallego@elpasobar.com

Let's Engage and Take Ownership in Our Bar!

By Jeanne "Cezy" Collins
Candidate for President of the State Bar of Texas

am proud to be selected to run for State Bar President Elect. If you have read Ballard Shapleigh's article "All The Presidents Were Men," El Paso has had only two Bar Presidents, both serving before the Bar became unified in 1939, and the latest serving from 1915-1916. It's time for El Paso to make its debut in this century!

Here are the reasons I am running: increased relevance to us, effective communication with us, and lawyer professional and personal well-being.

Relevance

The Bar needs to re-examine and redefine its relevancy. Because Texas is so diverse, the Bar's relevancy varies based on numerous factors such as geographic location and practice area, among many others. At each stage of my career, I have experienced the relevance of the Bar in different ways as an attorney at El Paso Legal Assistance Society, an Assistant

El Paso County Attorney, a partner at Kemp Smith, and now General Counsel at EPISD.

Based on these experiences I will advocate for the following:

Continued commitment of the Bar to the loan forgiveness program for legal services lawyers and advocate law schools to do the same.

Expand the Texas Opportunity and Justice Incubator across the state to provide opportunity for young lawyers to build a practice and to serve the underrepresented.

Increase the Bar's relevance to those that serve our federal, state, and local governments.

Support the Texas Minority Counsel Program to increase opportunities for minorities and women by providing networking opportunities, client development, and CLE.

Support sections and divisions of the Bar to increase relevancy and resources to us in our many practice areas.

Increase transparency to build community in the Bar and buy-in to solutions to issues



Jeanne "Cezy" Collins

facing us.

Educate the public on the rule of law and due process related to forced separation of families of our immigrant communities.

My experience in working with the El Paso Women's Bar Association, Texas Women Lawyers, the National Conference of Women's Bar Associations, and the El Paso Bar Association, all voluntary bars which must constantly examine their relevance to attract and keep members, will provide unique insight for us in the quest for relevance. We need to feel and be relevant to increase participation and to take ownership in the Bar.

Effective Communication

The Bar still struggles to effectively communicate with us. I will work with the Bar to create a tool kit for local, specialty, and minority bar associations to communicate the benefits of membership and to listen to lawyer concerns. In this way, the Bar can enlist us to

communicate membership benefits (and there are many that most of us are unaware of) and learn our perspectives on how the Bar must serve us.

Lawyer Professional and Personal Well-Being

Serving on the Board of Disciplinary Appeals highlights for me the need to focus on some of the most prevalent and recurring violations of the Disciplinary Rules of Professional Conduct. Targeted and free ethics CLE programs in these areas must be provided to improve the profession and protect the public. Increased resources in law office practice management, especially in technology, would benefit us and the quality of legal services we provide. The Bar should offer practice management consulting services like it does for advertising review.

Statistics show increasing numbers of lawyers struggle with addiction, depression and anxiety disorders, and experience suicidal thoughts. The Texas Lawyer

Assistance Program is at the forefront of addressing these issues. TLAP should be viewed as a service and not a place of last resort. The Bar needs to help TLAP educate local grievance committees to understand the depth of lawyer well-being issues and the benefits of TLAP.

If elected, I will work with the Bar to find ways to increase its relevance to us, to effectively communicate with us, and to address our professional and personal well-being. I think my unique background and experience will position me to help the Bar to engage lawyers to be part of these solutions and to take ownership in our Bar. Most importantly, I'd like to make El Paso proud. If you want to join my campaign, please contact me at cezy.collins@gmail.com or my cellphone (915) 269- 8479.

¡Vamos El Paso! Cezy.

JEANNE "CEZY" COLLINS is General Council for the El Paso Independent School District.

Attorney's Fees: A Few Thoughts

By CLINTON F. Cross

ne of the most troubling problems for our profession is the issue of attorney's fees. Should attorney's fees be "fair"? How does one determine a "fair fee"?

When I was in law school, I had to write a seminar paper about how much it cost the parties and the government to try an automobile accident case. The case was tried three times with the jury first awarding damages of approximately \$30,000, then \$60,000, and finally \$90,000.

That raises some questions about the fairness of our system. But that's not the point of this commentary. My topic is attorney's fees.

The case (*Love v. Newspaper's, Inc.*) involved an accident on Bastrop highway between a Black soldier racing back from Austin to his army base in San Antonio early one morning, the people

However, legal services

are a unique kind of

product. They are not

like widgets or even

hamburgers. A legal

service is often more like

a chess game, a painting

or a piece of music.

in the car he ran into, and a newspaper boy who drove out from a cull-de-sac onto the highway on that foggy morning. There was one other party who had all the money but was not involved in the accident (except, as it turned out, legally), the local newspaper.

I had to determine the cost of the litigation assuming

only one trial (there were three) by all the parties, including the taxpayers. When I finally caught up with the soldier's lawyer in the courthouse, here's what happened:

Cross: "Excuse me, sir, but I need your help. I'm writing a seminar paper for one of my law school classes and I have been asked to determine how much it cost to resolve a dispute over liability and damages in one of your cases, *Love v. Newspapers, Inc.* I understand you represented the soldier who ran into the car carrying the Love family. For the first trial, I need to know how much you charged your client.

Lawyer: "Charge my client? Hell son, when you get out of law school you'll learn you don't charge 'em, you just git all you can out of them!"

Cross: "Well, sir, how much were you able to get out of him?"

Lawyer: "I was real lucky. I milked that N—just like a cow. He was laid up in sick bay and every time he got paid I just went to see him and picked up his check."

I was offended by his racist and disrespectful comments about his client and by his comments about how he arrived at his claim for attorney's fees.

In my old age I have come to believe that, although unartfully stated, the lawyer's comments about attorney's fees raise some provocative questions.

To begin with, is there is any such thing as a "fair price" for attorney's fees requiring the delivery of unique knowledge or skills? The concept of a "fair price" has been around for a long time, existing in the Middle Ages, and exists today in some situations and statutes, such as the Texas Deceptive Trade Practices Act which prohibits an "unconscionable act or practice," but it has been undermined by the notion that "the law does not question the adequacy of

consideration." In other words, most of the time parties are free to make whatever deal they think is fair. If they make the deal, then they are stuck with it.

However, legal services are a unique kind of product. They are not like widgets or even hamburgers. A legal service is often more like a chess game, a painting or a piece of music. Problem is, most clients have

no experience shopping for lawyers and they aren't skilled at evaluating their attorney's work product. As a result, absent some scheme that appears to provide order to something that can't be made orderly, the client ends up having to pay a fee he or she doesn't think is fair.

At some time in the past which I have not researched, lawyers apparently cooked up two systems to justify their fees: the contingent fee system and the "fee for service" system.

The contingent fee system is pretty straight forward. I don't feel the need to comment on it.

The "fee for service" system tries to justify the fees by reducing attorney's fees to the widget or hamburger model, with which people are familiar, but overlooks the fact that attorney's fees are not widgets or hamburgers. Arguably, the better lawyers charge higher fees because they are more experienced or skillful than those who charge less, but that is not always true. Good marketplace salesmen are not always the best salesmen in the courtroom or at drafting documents. And old lawyers are

not always better than young lawyers.

The "fee for service" model also encourages some lawyers to "churn the file" (filing motions, taking depositions, scheduling court hearings) that are not necessary to run up the hourly fees. The system favors the attorney's interests, but not the client's interests. Clients wants their problems resolved as quickly and inexpensively as possible.

Before we decide to "kill all the lawyers," consider the pressures on many lawyers who want to help their clients as much or perhaps more than they want to help themselves.

For instance, there are lawyers who want to help people who need an attorney but have limited funds. They cannot afford any fee or even a nominal fee. The lawyer who reaches out a helping hand suffers an economic loss. He or she must make up the income loss from those who can afford to pay more.

Is it "fair" to the lawyer's other clients, who unknowingly pay more for the lawyer's services than they might have otherwise paid?

Is it "fair" to ask the lawyer to perform these services because it is the right thing to do and then condemn the lawyer for charging his or her other clients more money than the lawyer might have otherwise charged if he or she had not added the free or reduced fee work to his or her overhead?

A client is stuck with agreeing to a system that seems to justify fees that in fact cannot be objectively justified and with accepting what the lawyer claims needs to be done to resolve his or her problem. A lawyer is stuck with trying to balance his or her interests and the client's interests and perhaps some other subjective factors.

In their practice a lawyer often faces an important moral question: if you can get away with "getting all you can out of your client," why not ask for it, or "churn the file"? The law rarely questions the adequacy of consideration. Perhaps "churning" is just doing a really thorough job.

Or maybe you are gouging the client or "churning" when you don't need to just because you can.

What's in your conscience?

CLINTON CROSS is an retired assistant county attorney and the former editor-in-chief of the El Paso Bar Journal.

An Introduction to Collecting in Bankruptcy Cases

By Joseph Austin

In 2017, 2,158 bankruptcy cases were filed in El Paso, a 2% increase from the 2,115 bankruptcy cases filed in 2016. Bankruptcy filings in El Paso have been fairly consistent over the last few years ranging from 2,895 in 2009, to 2,031 in 2015. The great majority of these cases were filed by individuals. Recent bankruptcy filings by individuals are no longer the result of financial catastrophes, such as unemployment or medical crises. Rather, they are more often explained by low income and excessive use of credit.

Trying to collect on behalf of a client in bankruptcy can be difficult and at times a waste of resources. In fact, creditors will often receive a notice of bankruptcy and simply write off the entire debt. However, money is lost because some creditors will not take the basic steps to understand a debtor's bankruptcy and look at the possibility of collecting. This brief article will provide basic tips and starting points when analyzing a debtor's bankruptcy and evaluating how much a creditor can collect in bankruptcy.

After a Bankruptcy Petition is Filed

The instant a bankruptcy case is filed, an "automatic stay" comes into effect. 11 U.S.C. § 362(d). The automatic stay is one of the primary benefits of bankruptcy for the debtor. Any lawsuits, foreclosure actions, demands, repossessions, and other collection actions are "stayed," or stopped by the filing. The automatic stay is like an injunction, prohibiting creditors from taking action against the debtor or the debtor's property. The automatic stay was enacted to give the debtor breathing room.

Notice of a debtor's bankruptcy is sent to all creditors. 11 U.S.C. § 342. The notice provides creditors with important dates, including the date for the meeting of creditors, and key deadlines in the debtor's case. The first date of interest is the date for the meeting of creditors. The debtor must appear at a meeting of creditors for an examination under oath. 11 U.S.C. § 341. Creditors may attend the meeting, and can ask questions about the debtor's acts, conduct, or property, or other matters affecting administration of the estate or the debtor's right to a discharge.



The automatic stay is one of the primary benefits of bankruptcy for the debtor. Any lawsuits, foreclosure actions, demands, repossessions, and other collection actions are "stayed," or stopped by the filing.

The first notice also may contain the deadline for filing proofs of claim. A proof of claim is a document filed to the bankruptcy court registering your claim against the debtor's bankruptcy estate. The deadline for filing proofs of claim can also be found in Bankruptcy Rule 3002.

The three most common bankruptcy filings are under Chapter 7, 11, and 13 of the Bankruptcy Code.

Chapter 7 is a liquidation bankruptcy for a business entity or an individual. The debtor does not repay his, her, or its debts. The only debts a Chapter 7 debtor remains liable for are (1) debts that arise after the bankruptcy filing, (2) debts that are secured by property the debtor wishes to retain, and (3) any debts held "nondischargeable" either by court order or by provisions of the Bankruptcy Code at Section 523 or 727. Certain debts that are nondischargeable include student loans, taxes, and child support.

Chapter 11 bankruptcy cases are business reorganizations, and may also be filed by an individual with a business. Chapter 11 is the only bankruptcy choice for a corporation or partnership that desires to stay in business and

reorganize its debts.

Chapter 13 is a "reorganization" bankruptcy for individuals who have regular incomes. Chapter 13 cases are the most common cases filed in El Paso, and are gaining increased use nationwide. Chapter 13 cases accounted for approximately 72% of all cases filed in El Paso in 2017. The popularity of Chapter 13 can be attributed to the debtor's ability to pay attorneys' fees and filing fees in monthly installments and to keep his or her property (even if it is not exempt), restructure debt, and to achieve a broader discharge than is available under Chapter 7.

Types of Claims in Bankruptcy

Generally, claims can be classified as administrative, secured, and unsecured. Administrative claims are generally costs and expenses incurred in preserving the estate, and include the debtor's attorneys' fees. Administrative claims are usually paid prior to payment of general unsecured claims. Secured claims are debts secured by liens on property of the estate. The most common example is a car lender. The creditor with a claim secured by property that is worth more than the debt (over-secured claim) is entitled

to reasonable attorney's fees and post-petition interest. In Chapter 7 cases, the Bankruptcy Code establishes a list of priorities (including a first priority for administrative claims) for unsecured claims. An unsecured claim is a debt that is not secured by collateral – such as a vehicle or another piece of property. Credit card and medical debt are examples of unsecured debt where the creditor will likely receive pennies on the dollar on the creditor's unsecured claim.

Seeking Relief from Bankruptcy Court

To take action while the automatic stay is pending (such as to foreclose on a lien on collateral or continue a previously filed lawsuit) creditors may obtain relief from the automatic stay by filing a motion for relief from stay with the Court. 11 U.S.C. § 362(d). A motion for relief is asking the bankruptcy court to lift the automatic stay— take away the protections of bankruptcy (the automatic

stay)—and allow a creditor to proceed as if the bankruptcy never happened. This allows for a creditor to repossess a vehicle in severe default, or foreclose on a house deeply behind in arrears. Usually, motions for relief from stay can be filed at any stage in the case (although a creditor may be bound if a Chapter 11, 12 or 13 plan that addresses the basis for the motion has already been confirmed.

A motion for relief from stay will be granted if the creditor can show (i) it is not adequately protected or (ii) there is no equity in the collateral and the collateral is not necessary for an effective reorganization. See *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.,* 108 S. Ct. 626 (1988). Adequate protection issues involve collateral that is depreciating or is being expended in the debtor's business. Adequate protection usually takes the form of periodic payments and a replacement lien on post-petition property.

In the event the automatic stay is lifted, the

subject property is removed from the protection of the automatic stay. The creditor remains obligated to comply with all statutory and contractual notice requirements as it would have had the bankruptcy case not been filed. It is critical to pay attention to case deadlines and pleadings filed throughout a debtor's case to monitor any impact on a creditor's claim.

This article was designed to introduce some basic bankruptcy issues that commonly arise with creditors. The Bankruptcy Code, Bankruptcy Rules, and case law contain numerous other provisions, rules, remedies, and law that can affect a creditor in any given fact situation. A basic understanding of the laws of bankruptcy will significantly increase a creditor's likelihood and amount of recovery through the bankruptcy courts.

JOSEPH AUSTIN is an Associate at Kemp Smith, LLP and a graduate of Texas Tech University School of Law.

Estate planning expert and Texas Tech University professor Dr. Gerry Beyer will be guest speaker

state planning expert and Texas Tech University professor Dr. Gerry ■ Beyer will be guest speaker at the El Paso Estate Planning Council October meeting on October 10, 2018 at the El Paso Club. His topic "Cyber Estate Planning and Administration" will focus on dealing with electronic passwords, social media, and other online assets in the estate planning process. As the first holder of the Governor Preston E. Smith Regents Professorship, he is the recipient of dozens of outstanding and distinguished faculty awards including the Chancellor's Distinguished Teaching Award, the most prestigious university-wide teaching award at Texas Tech. Professor Beyer was also the recipient of the 2012-2013 Outstanding Researcher Award (Law) and the 2015 President's Academic Achievement Award.

Recognized as a state and nationally recognized expert in estate planning, Professor Beyer was inducted into the National Association of Estate Planning Councils' Hall of Fame. He is a highly sought after lecturer and presents dozens of continuing legal education presentations



Professor Dr. Gerry Beyer

each year for many state and local bar associations, universities, and civic groups.

"We are extremely honored to have

Professor Beyer come to El Paso and speak to us about a very important and misunderstood topic" said Susan Eisen, Master Gemologist Appraiser, ASA, Council vice president and chairperson of the event. "With so many passwords and usernames in our lives, we need to be sure there is access in case of illness or death without layers of red tape" she said.

Professor Beyer is the editor of the most popular estate planning "blawg" in the nation which for the past six years was named to the ABA Journal's Blawg 100 and was awarded ABA Blawg 100 Hall of Fame status in December 2015. He has authored and co-authored numerous books and articles and has won awards three times from the American Bar Association's Probate & Property magazine for his writing. He is currently the Editor-in-Chief of the REPTL Reporter, the official journal of the Real Estate, Probate and Trust Law Section of the State Bar of Texas.

Seating is limited and reservations can be made on *www.epepc.org/events*. For more information, please contact *www.epepc.org* or call 915-584-0022.

Boot Camp Seminar Series

he El Paso Bar Association brought back the Boot Camp Series and over the past month lawyers in our community have given their time to the rest of us, imparting their knowledge.

The Boot Camp Series is successfully underway. Jessica Kludt provided insight in the area of probate. Ron Banerji directed us to some obvious issues for appellate work. Danny Razo taught us the more we know about immigration law, the more we realize we don't know about immigration law. Connie Flores gave helpful pointers about what to do if you or a client are in a car collision. And Edy Payan rounded out the group, so far, with all the latest happenings when someone is arrested here in El Paso County. Next up will be the Judge's Corner.

The El Paso Bar Association plans on presenting round two of the Boot Camp Series, hopefully allowing you to fill in a few needed hours of CLE or if you diligently show up to all of the presentations and the luncheons you just might be able to complete your yearly requirements. Please join us and suggest a topic for round two.

Photos Courtesy of Jennifer VandenBosch



Auto Collision 101





Connie Flores



Immigration Law 101



Danny Razo



Edy Payan



Criminal Law 101

Telecommuting As a Reasonable Accommodation? Yes, According to The 6th Circuit

By Mario Franke

Ithough federal courts have been reluctant to find that the ADA may require an employer to work at home, a recent Sixth Circuit decision has found that such a request was reasonable under the circumstances of that case. As an everincreasing number of employers voluntarily adopt telework policies and telework gains increased acceptance, one can likely assume that federal courts will become more amenable to the notion that telework constitutes a reasonable accommodation.

Mosby-Meachem v. Memphis Light, Gas & Water Division, 883 F.3d 595 (6th Cir. 2018).

The Sixth Circuit affirmed a jury verdict in favor of an employee who sued her employer for refusing her request for telecommuting as a result of pregnancy complications. Accordingly, telecommuting may constitute a reasonable accommodation under certain circumstances.

As a result of pregnancy complications, the plaintiff, in-house counsel, was placed on bed rest for ten weeks. The plaintiff requested to be allowed to work either from her hospital bed or from home.

Her employer denied her request and, instead, placed the plaintiff on a medical leave during which she received sick pay and short-term disability pay. The employer justified the denial by asserting that her physical presence at the office was an essential function of her job and that her requested accommodation created confidentiality concerns.

Although the employer's legal department had a written policy that set expectations that its lawyers be physically present in the office during working hours, many lawyers telecommuted in practice. The plaintiff was well-aware of this practice, since she had telecommuted for two weeks in the prior year while she was recovering from neck surgery. Notably, however, the employer's legal department did not have a formal written policy regarding telecommuting. Following the birth of her baby, the plaintiff returned to work from medical leave.



The plaintiff filed suit alleging pregnancy discrimination in violation of the Tennessee anti-discrimination statute as well as failure to accommodate and retaliation in violation of the ADA. A jury found in favor of the employer on her pregnancy discrimination and retaliation claims but found in favor of the plaintiff on her disability discrimination claim. The jury awarded the plaintiff compensatory damages, and she was also awarded back pay. The employer appealed.

On appeal, the employer argued that the plaintiff was not a qualified individual with a disability as that term is defined by the ADA because she could not be physically present at the office. The determination of whether the physical presence of the plaintiff was an essential function was very fact-specific.

There was some evidence, including a written job description and testimony, suggesting that in-person attendance was an essential function of the plaintiff's position. However, the job description was based on a 20-year-old questionnaire that did not reflect advancements in technology and included tasks that she had not performed in many years. Moreover, there was evidence that the plaintiff could and had performed the essential functions of the job remotely.

The Sixth Circuit highlighted evidence that the employer had predetermined that it was not going to permit the plaintiff to work from home before anyone had even spoken with the plaintiff. Specifically, members of the employer's ADA committee testified that they would never grant an accommodation request to telecommute regardless of the circumstances. According to the Sixth Circuit, that was a failure to engage in the interactive process required by the ADA.

The Sixth Circuit also noted that the plaintiff asked to telecommute for a finite period of time, making her accommodation request inherently reasonable. The Sixth Circuit also distinguished prior precedent by noting that in prior cases the requesting plaintiff had not previously worked remotely, and also that in those cases the facts demonstrated that being physically present was indeed an essential function of the particular job. The Sixth Circuit upheld the jury's verdict.

Lessons for Employers from *Mosby-Meachem* Opinion

Mosby-Meachem highlights the importance of the ADA-mandated interactive process; an employer may be penalized for having inflexible rules and pre-determined results in these situations. During this process, employers should gain a thorough understanding of the employee's physical and/or mental limitations and each request must be reviewed on an individualized basis. The interactive process should be well-documented in order to avoid unfounded accusations of disability discrimination.

Mosby-Meachem also demonstrates that courts will look at prior implementations of the requested accommodation, and also to any lack of enforcement/compliance of any telecommuting policies that an employer may have. Notably, workplace policy must be enforced in order to be taken into account during a legal dispute. The plaintiff in Mosby-Meachem had previously taken advantage of her requested implementation and so had her colleagues—despite a written policy mandating physical presence. This made it extremely difficult for the employer to argue that her requested accommodation was unreasonable.

In addition, Mosby-Meachem teaches us the importance of regularly reviewing and updating job descriptions. A job description where work-site attendance is an essential job function may demonstrate the job requires teamwork, supervision of others, providing or receiving on-site training, on-site meetings, and other face-to-face interactions with employees or customers.

What should Employers Do to Prepare for

Accommodation Requests?

In addition to the lessons above, employers should consider the following to ascertain whether an accommodation request for telecommuting is reasonable:

- The employee's job description which delineates the current and accurate essential functions and duties of the job;
- Whether the job requires teamwork, supervision of others, providing or receiving on-site training, or requires on-site meetings;
- Whether the job requires the use of equipment, materials, or information that cannot be removed from the regular workplace or duplicated elsewhere due to confidentiality or other considerations;
- Whether there already exists a telecommuting policy, and whether there exists compliance or lack of compliance of such policy criteria;
- Whether there exists a past practice to permit employees to telecommute;

- Whether other employees in the same position (or with similar duties) have been permitted to work from home; and
- Whether the request for an accommodation to work from home is for a finite period.

Before taking the aforementioned factors into consideration, the employer should ascertain if the request for telecommuting will accommodate the employee's stated disabilities/limitations. The employee should be able to delineate to specific problems in the workplace that are addressed by telecommuting accommodation. An employer is permitted to choose an alternative but equally effective accommodation that will permit the employee to work on-site. However, as seen Mosby-Meachem, the jury and the Sixth Circuit did not believe that the employer's chosen accommodation of providing the plaintiff a leave of absence to accommodate her pregnancy complications was sufficient. This is a stern warning for all employers.

MARIO FRANKE, is Of Counsel, Dickinson Wright PLLC

EL PASO BAR ASSOCIATION DECEMBER BAR LUNCHEON

Tuesday, December 11, 2018

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

Guest Speaker will be

James Ehler, Regional Counsel for the Office of Chief Disciplinary Counsel.

Approved for .50 hours of Participatory Ethics by the SBOT

We will also be honoring our 50 year attorneys:

Francis Ainsa Clinton Cross William Elias Frazier Gorel Jesus Hernandez Odell Holmes James Kirby Read
David Rosado
Paul Sergent

Door prizes will be given out

Please make your reservations by Monday, December 10, 2018 at 1:00 p.m. at ngallego@elpasobar.com

How Civilization Came To El Paso

All The Presidents Are Men...Still

By Ballard Coldwell Shapleigh

This reprises and updates an article first submitted for the October 2007 issue of this Journal, and commemorates the nomination of Jeanne "Cezy" Collins as a candidate for President of the State Bar of Texas and the other Presidents who have a strong connection to El Paso. -Editor's Note.

The Devil's Dictionary defines a "presidency" as the greased pig in the L field game of American politics. In 2007, the presidency of the State Bar of Texas slipped through the fingers of El Paso's Mark Osborn of the Kemp Smith firm. However, in 2011 an El Paso native, who now splits time between Beaumont and Houston, did manage to grab the elusive office of State Bar President.

His name is Bob Black. Black was born, raised and, with the exception of law school, educated entirely in El Paso attending Eastwood High School and UTEP on a debate scholarship. (See the October/November 2011 issue of the Bar Journal at page 15 for Erich Morales' "A Conversation with Bob Black.")

For 110 years, indeed until the election of Harriet Miers in 1992, all of the Presidents of the State Bar of Texas, formerly known as the Texas Bar Association, were men. Since Miers' election, five more women were elevated to the office.

This year lawyers across the state will have the opportunity to vote for yet another El Pasoan as President of the State Bar. She is a lawyer with 28 years experience who presently labors in the legal vineyard as general counsel for the El Paso Independent School District. She also counts prior experience with the Kemp Smith law firm and the El Paso County Attorney's Office. Her name is Jeanne "Cezy" Collins.

That's the good news. The bad news is that all the Presidents from El Paso are men, still. The last time an El Paso lawyer served as President was 103 years ago, 24 years before the State Bar of Texas even began its formal existence in 1939. His name was John L. Dyer, Jr. (1873-1929), for whom Dyer Street in northeast El Paso is named.

Dyer was the 35th President, of what was then known as the Texas Bar Association, from 1915 to 1916. His father began practicing law

in Waco in 1869, and was described in The Bench and Bar of Waco and McLennan County 1849-1976 as a "born lawyer who took to the law as naturally as a duck takes to water." Of Dyer and his father, one State Bar publication expressed that he "was one of the best known lawyers in Texas and Dyer (Jr.) attained a standing equal to that of his father."

Dyer was born in Waco in 1873. He never attended law school but received his legal

training as a night student in the office of his father's firm and by acting as a deputy district clerk in McClennan County. He was admitted to the bar in 1897.

subsequently appointed city attorney for two years during Mayor Ben F. Hammett's administration from 1901 to 1903. He also served one year on the El Paso School Board in 1909. Dyer moved to Los Angeles in 1925 and continued his practice there until he died in 1929. He is buried in El Paso's Alameda Evergreen Cemetery.

William Henry Burges, Jr. (1862-1946), for whom Burges High School is named, served

as the 29th President



OCTOBER 2018

relief for his severe asthma after graduating from the University of Texas law department. He was Phi Beta Kappa and Order of the Coif and served on the Board of Regents for the University of Texas in 1911 14. His career is the subject of a 1982 book by J.F. Hulse entitled Texas Lawyer: The Life of William H. Burges.

Burges was later joined in El Paso by his brothers and fellow lawyers, Richard and Alfred Rust. Richard was associate counsel for the U.S. during the 1911 Chamizal arbitration hearings. Will Burges helped to found the El Paso Bar Association and accumulated the largest law library in the Southwest, and an immense personal library consisting of 16,000 volumes at his death most of them dealing with history and literature. Most of these volumes and papers were donated to the El Paso Public Library and to UTEP by the daughter of his brother Richard, Jane Burges Perrenot.

The sixth president of the state-wide Bar Association was Thomas J. Beall (1836-1921), for whom Beall Elementary School is named. He served as president from 1886 to 1887, but did not live in El Paso at the time. Beall was born in Georgia in 1836. His family moved to Marshall, Texas in 1851. He received his law degree from Cumberland University and returned to Marshall to practice law.

Beall served as a captain in the Confederate army during the Civil War, taking part in the Battles of Vicksburg as well as most of the final battles that led up to the surrender of Richmond. He returned to practice law in Texas, establishing the firm of Davis and Beall in Bryan, Texas shortly after the war, and continued as Davis, Beall and Kemp, in El Paso in 1876. In 1880, he moved to Ft. Worth and then back to El Paso in 1881. In 1884, he returned to Ft. Worth for three years as an attorney for the Santa Fe Railroad. It was during this period that he served as Bar President. He died in El Paso in 1921.

One other State Bar President connected to El Paso is Cullen Smith

of Waco, father of attorney Risher Smith Gilbert who was the 98th President from 1978 to 1979.

BALLARD C. SHAPLEIGH is an Assistant District Attorney



El Paso Association of Legal Professionals

Legal Directory now available for purchase

The El Paso Association of Legal Professionals is happy to announce that the 2017-2018 Directories are now available.

Cost of the directories is \$12 each. Cash or cash only. No credit cards please.

Please make checks payable to EPALP

Please contact Rachel Scott at rachel@expressrecords.net or Yvette Castillo ycas-tillo@kempsmith.com to make arrangements to purchase a directory.

Monthly CLE Meetings

Our regular monthly education meetings are held the second Wednesday of each month at the El Paso Club located on the 18th Floor of the former Chase Bank Building downtown. Please join us for lunch and CLE for only \$17.

Speaker Schedule

October 8, 2018 Janet Monteros, Separation of Powers

Special presentation for Court Observance month

November and December are reserved for our charity speaker

March is our Annual Boss of the Year/Legal Professional of the Year Award Presentation.

Must be an EPALP member to submit a nomination.

EL PASO BAR ASSOCIATION JANUARY BAR LUNCHEON

Tuesday, January 8, 2019

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

Guest Speaker will be

Eric Vinson, Executive Director, State Commission on Judicial Conduct Approved for .75 hours of Participatory Ethics by the SBOT

Door prizes will be given out

Please make your reservations by Monday, January 7, 2019 at 1:00 p.m. at ngallego@elpasobar.com



Mediations - Aggressive and creative

Arbitrations - Evidence based awards

HardieMediation.com

Bill Hardie

Scott

Hulse

See our online calendar

Wells Fargo Bank Plaza / 915.845.6400 / info@hardiemediation.com

ScottHulse PC, is seeking two associate attorneys:

1 for its Estate Planning, Probate, and Asset Protection section with 0-3 years of experience and 1 for its Litigation section with 1+ years of experience.

This is an opportunity to be an integral member of the region's leading estate planning and litigation practice teams, which provide a full spectrum of services to clients in West Texas and Southern New Mexico.

1. The Firm's estate planning attorneys have represented clients with a broad range of issues, with a focus on high net worth clients. Most clients are farmers, ranchers, business

owners, or professionals. The firm also represents private and corporate fiduciaries and beneficiaries in both probate and trust administration matters, including disputes.

2. Our litigation attorneys have represented clients in a myriad of matters, including antitrust, commercial, labor and employment, workers' compensation, insurance defense, healthcare and medical malpractice defense, trademark infringement, property and landlord-tenant claims, and creditors' rights, to name a few.

Both candidates will work directly with shareholders of the sections. The associates who are hired for these positions will be challenged and rewarded by an accelerated learning track with immediate hands-on client contact. ScottHulse is committed to attracting, developing, and retaining a diverse workforce of highly talented professionals and to providing an

attainable path to shareholder status.

Both positions are in El Paso, Texas, one of the most dynamic growth markets in North America. If you want to work in a respected law firm in a major, emerging city, where you can build your career and family for the long-term, while enjoying work/life balance and great quality of life, this is an excellent opportunity.

Outstanding academic credentials and excellent written and oral communication skills are required. Texas licensure is required. New Mexico licensure is a plus. Bilingual (English/Spanish) skills and ties to the Borderplex Region are desirable.

To apply, please email your resume, writing sample, and law school transcript with the subject line "Estate Planning Associate Attorney" or "Litigation Associate Attorney" to careers@scotthulse.com or apply online.

ScottHulse PC I The Value of Commitment Equal Opportunity Employer

Why Our Legal System Is Respected Most Of the Time

By CLINTON F. CROSS

First published in the September, 2011 El Paso Bar Journal

A. Introduction

Our legal system, as it has evolved in the United States, is imperfect. Every school child recites the pledge of allegiance day after day, which concludes with a promise of "justice for all" only to find out that justice is sometimes out of reach. For instance, the well intentioned "discovery reforms" adopted by many states after World War II had the unintended consequence of increasing costs and attorney's fees. The cost of litigation has denied many people access to justice, angered the consuming public, and has most recently resulted in significant statutory changes that affect the ability to litigate.

There is an ongoing political debate about how far appellate courts should go in reconciling demands for change with established rules. When appellate courts appear to "make law" rather than "interpret" the law for any reason, such as "civil rights" or "law and order," their opinions are sometimes met with disrespect. "John Marshall has pronounced its decision;" President Andrew Jackson once said, "let him enforce it." After Brown v. Board, "Impeach Earl Warren" was a popular political slogan in many parts of the country. Roe v. Wade remains controversial. Another problem is the presence of drug laws that are ignored by many, including "respectable" citizens. Widespread disobedience of the law undermines respect for the rule of law. Finally, there are now television commentators like Nancy Grace and her clones who, for the purpose of entertaining millions of viewers, preside in the name of "court tv" over popular legal "reality shows." These commentators assume both the role of judge and jury and "try" defendants in the court of public opinion without any respect for the presumption of innocence, rules of evidence, or the burden of proof required in criminal cases. When the "bad person" seems to win, respect for due process of law and our time honored rules designed to protect the innocent are put in jeopardy.

B. Why the system is Respected

In spite of these and other problems, the

The judge's perceived authority is closely associated with the height of his or her bench. The higher the bench the more authority the judge appears to have. Elected judges have more power than associate judges, and at least here in El Paso they sit on benches that are higher than the benches of associate judges. Also as a general rule (perhaps depending on when the courthouse was built), benches in federal courthouses are higher than benches in state courthouses.



Courtrooms resemble churches

system has great strengths, and its preservation is essential to maintenance of the rule of law and civilization as we know it in the United States. The well-known teacher Irving Younger claimed the system is in fact usually successful at fairly and accurately resolving disputed issues because it permits cross-examination. "Cross-examination is the signal feature of the common law trial," he said. "It distinguishes a trial in our system from a trial under any other system. It is the greatest engine ever invented for the discovery of truth."

Of course, lawyers do brag about winning cases they shouldn't have won (otherwise, why brag?). Because the system usually works,

lawyers who defeat the system by getting unjust results become famous and make lots of money. By definition, their work is the exception.

1. The Influence of Religion

The notion that the "good guy" should prevail for doing the right thing and the "bad guy" should lose for doing the wrong thing reflects our religious past. The legal system tries to get people to do the right thing, and discourages people from doing the wrong thing. Although we humans have often failed in our effort to "do good," we cannot afford to quit trying. Most people continue to respect the effort.

CONFLICTS? RESOLUTIONS!

Solving Problems--Closing Cases

Patricia Palafox

Bilingual Attorney Mediator-Arbitrator



Celebrating 22 years of Professional mediation & Arbitration; 38 years of Legal Representation

TEXAS and NEW MEXICO
State & Federal Civil Cases
Employment • Personal Injury
Medical Malpractice
Family Law • School Law
Construction Contracts
General Business Law

Mediation, Negotiation and Arbitration Training

Harvard Law School

The Attorney-Mediators Institute

Texas Wesleyan University School of Law

The National Mediation Academy, Inc.

38 Years of Legal Representation



Thank you for your support and trust over the years

8001-E North Mesa, PMB 345 El Paso, TX 79932 Phone: 915-833-6198 Fax: 915-833-7305 palafoxpatricia@sbcglobal.net

For hundreds of years formal European law was a subset of religion. The residue of this history is reflected in many ways: in our substantive law, in our legal procedure, in our courthouse architecture. Latin was the language of the Roman Catholic Church, the universal moral and religious language of Christian European civilization. Reflecting this reality, English courts recorded their legal opinions in Latin. The continued use of Latin phrases in our legal vocabulary (such as, mens rea, bone fide, corpus delecti, de novo, ab abnitio, res ipsa loquitur, per curiam, pro se, mandamus, in rem, pro tanto, inter vivos, ipso facto, in locus parentis, in camera, ex parte, primae facie, quid pro quo, habeus corpus, forum non conveniens, res gestae, mandamus, res judicata, and stare decisis) is a testimonial to this history.

Reflecting the past, courthouses today continue to resemble churches, at least courtrooms do. The judge's bench is similar to the preacher's pulpit. The benches behind the "bar" resemble pews in a church. The well of the courtroom is a special if not a sacred space, so perhaps for that reason not available for sanctuary. The judge wears a priestly robe, a symbol of moral authority.

When deciding cases the judge consults texts, similar to religious texts, to determine whether or not one party or another has done the right thing or perhaps whether or not a defendant should go to prison (i.e., Hell). The American court structure is similar to that of the Catholic Church, with Supreme Court justices, who are, like the Pope, at the top of a hierarchy of parental figures, and who are never wrong unless they decide they once were, probably a long time ago.

Courtrooms are like churches; appellate courts are like monasteries. Justices of our appellate courts retreat into cloistered libraries, study ancient as well as modern texts, and write opinions designed to govern a world as it should be.

2. The Parent-Child Relationship

Courtroom etiquette recreates the parentchild relationship, with the judge acting as a parent and the parties experientially reliving their childhood. Courtroom etiquette promotes respect for authority. Within structured limits, lawyers are permitted to act like teenagers, to test limits, to question authority.

We remember our childhood and how our parents controlled our desire to explore. Most of us could not wander around the house at will, or go outside, without regard to our parent's wishes. When we explored life inappropriately our parents restricted our use of the phone, the television, the car, or even our movements, giving us "time out" or sending us to our room.

The more we grew *up*, the less our parents *seemed* to know. Our parents made mistakes. We began to wonder whether or not they always told the truth. We realized that Santa Claus was not really the jolly old man who we had been led to believe he was.

When we became teenagers we felt we needed to cut the "psychological umbilical cord" and become more independent. At some point we may have begun to question our parent's values. It is probably true that, as was written in a recent ballad, "every generation questions the one before."

We may be tall today, but we were short when we were children. We retain our childhood memories, and our memories are refreshed by courtroom protocol. The courtroom, like a home, is a special place. It has boundaries. Only parties, witnesses, jurors, court staff and lawyers who have passed the bar exam are permitted to pass into the well of the courtroom and participate in courtroom business. All other intruders are in effect trespassers.

Within the courtroom, the judge sits on a bench, like a parent higher than everyone else in the room. The judge controls all the space in his or her courtroom, as our parents controlled our space in our childhood homes. "May I be excused, your honor," means "Can I go outside and play now, judge?"

The judges treat parties to litigation like children, not allowing them to speak unless spoken to, and then not allowing them to answer any question but the question asked. Attorneys are required to stand when they question the judge's rulings. Judges claim lawyers rise out of respect for the court. But when they "stand up" to the court they are almost as tall as the judge, and they sometimes act like teen-agers.

In the criminal system, judges try to control misbehavior in the ways that are similar to the methods they use to modify their own children's behavior. When adults misbehave or explore life inappropriately the judge may "ground" them by making them wear ankle bracelets, or send them to jail ("go to your room"), or in some other fashion restrict their freedom of movement.

The judge's perceived authority is closely associated with the height of his or her bench.

The higher the bench the more authority the judge appears to have. Elected judges have more power than associate judges, and at least here in El Paso they sit on benches that are higher than the benches of associate judges. Also as a general rule (perhaps depending on when the courthouse was built), benches in federal courthouses are higher than benches in state courthouses.

If one wants to appeal, one must appeal to a higher court. This court usually has a higher bench than the lower court, even when the appeal is *de novo*. In traditional appeals, where the court is reviewing possible trial court error, the appellate court is usually located on a higher floor of the courthouse that the lower court.

"A man's education," Justice Oliver Wendell Holmes once said, "begins with his grandfather's." Both trial court judges and appellate justices research, read, and study the opinions of their intellectual and spiritual ancestors who, when in the past faced with similar problems, wrote opinions about how to resolve those problems. Indeed, our judges, our judicial parents, are required to research and think about how *their* judicial parents solved similar problems, and they are required to honor their ancestors' opinions unless there are compelling reasons to disrespect them.

C. The Past, the Present and the Future Meet in the Courtroom

Courtroom culture reflects of the larger community that it represents, in effect a microcosm of the family dynamic that it recreates. If the height of the judge's bench reflects society's attitude about authority, then the height of the bench in courthouses should change in time as cultural values change. Assuming this hypothesis is correct, judge's benches being constructed in today's

courthouses should be more often lower today than they were a few decades ago. After all, in today's family culture co-operative parenthood has replaced one man rule. In most homes, not just homes parented by single parent mothers, "time out, let's talk" has replaced "spare the rod, spoil the child."

Although committed to traditional values, our legal system permits critics to constructively "question authority." We honor, for example, the civil rights movement that in many ways dramatically changed our American culture. In 2004 the American Bar Association celebrated Law Day by focusing on the U.S. Supreme Court decision in *Brown v. Board of Education*. In Texas, courthouses are named after cultural heroes like Heman Sweatt and Albert Armendariz. Sr.

D. Conclusion

We should show respect for the judicial process itself and for the judicial institutions that implement the "rule of law." A lawyer can question a judge's rulings, but he or she should not in a proceeding before the court question the judge's competence or integrity. The biblical commandment that one should "honor one's mother and father" applies to all judges in our home-land. Perhaps that is why lawyers constantly repeat the phrase, your honor: "Your Honor, may I approach... Your Honor, may I be excused." Personal attacks on opposing counsel that have little or nothing to do with the merits of the case before the court are also discouraged.

In 1992 Richard Neely, former Chief Justice of the West Virginia Supreme Court, commented, "The church cannot compel its adherents to obey; it can only elicit obedience. Similarly, the judiciary cannot really compel obedience to its orders, as the current drug and

crime epidemic amply demonstrates, and must, like the church, rest in the last analysis on the awe and esteem in which it is held. But it must always be remembered that judges are first, last, and always lawyers, so the prestige of the judiciary can never be greater than the prestige of the legal profession as a whole. If judges are priests, lawyers are the deacons, acolytes, and vestry of the temple of the law."

If judges are the priests of our secular priesthood they should appear to respect the deacons and acolytes (lawyers) who appear in their churches (courtrooms). When the lesser members of the secular priesthood (again, lawyers) misbehave, or when they violate important moral, ethical or procedural rules, our secular priests (judges) can counsel them in their vestries (chambers). In serious cases of misconduct, the judges, or other members of our secular priesthood, may resort to more effective remedies designed to address the problem.

How can we best confront some of the other problems facing the justice system? How do we provide better justice for more people at an affordable price? How should we most responsibly respond to widespread usage of drugs in our society, in blatant disregard of existing law? How should we respond to commentators like Nancy Grace, who try defendants in the media without the benefit of the protections afforded by the law?

For lawyers who care about the profession, these problems and others pose serious challenges in the years ahead. Hopefully, working either individually or in bar associations or community groups, we can make some progress

CLINTON CROSS is an retired assistant county attorney and the former editor-in-chief of the El Paso Bar Journal.



OCTOBER 2018

Local Bar Associations Announce

2018-2019

Executive Board Officers and Directors

EL PASO BAR ASSOCIATION

Jennifer VandenBosch, President
Daniel Hernandez, President-Elect
Janet Monteros, Vice President
Judge Laura Strathmann, Treasurer
Monica Perez, Secretary
Mark Dore, Immediate Past President

2019
Judge Anne Berton,
U.S. Magistrate
Judge Penny
Hamilton, Criminal
Law Magistrate
Gabriel Perez
Merwan Bhatti
Danny Razo

2020 Dana Irwin Carmona Sylvia B. Firth Abe Gonzalez Noemi Lopez Carlos Madrid

Board of Directors

2021
Patricia Baca
Jessica Kludt
Andrea Moran
Daniel Ordonez
Charles Ruhmann

MEXICAN-AMERICAN BAR ASSOCIATION, EL PASO CHAPTER

Nora Artalejo, *President*Aldo Lopez, *President-Elect*Merwan Bhatti, *Treasurer*Judge Laura Strathmann, *Secretary*

Board Members
Daniel H. Hernandez
Ruben Ortiz
Roger Montoya
Alberto Mesta
Robert Edwards

EL PASO WOMEN'S BAR ASSOCIATION

Selina Saenz, President
Christina Sanchez, President-Elect
Daisy Chaparro, Vice President
Lynne Brooks, Treasurer
Adriana Leal, Secretary
Alyssa Nava, Immediate Past President

EL PASO YOUNG LAWYERS ASSOCIATION

Linda Rivas, President

Daisy Chaparro, President-Elect

Andrew Cavazos, Vice President

Jordan Scruggs, Secretary

Michael Gomez, Treasurer

Monica Perez, Immediate Past President

Board Members

Saul Anaya Cris Estrada
Claudia Aranda Gaby Marquez
Devin Arnold Ruben Nunez
Raymond Baeza Monica Perez
Richard Clifton Shannon Rhoads
Kirk Cooper Carlos Tristan
Jeep Darnell Evette Ugues
Donald Davie

Local Bar Associations Announce

2018-2019

Executive Board Officers and Directors

FEDERAL BAR ASSOCIATION, EL PASO CHAPTER

Board Members

Shane Wagman, President
Sherilyn Bunn, Vice President
Merwan Bhatti, Secretary
Daniel Ortiz, Treasurer:
Phil Countryman, National FBA Delegate

Kamie Smith Josh Herrerra Rebecca Reyes Priscilla Castillo Mara Blatt Mallory Rasmussen Nicole Bombara Elena Esparza Ruben Nunez Robert Almonte

The Jencks Case

BY CLINTON F. CROSS

First published in the October, 2004 Bar Bulletin / Republished with additions and edits

Tencks, an El Paso McCarthy era case, is an important part of our legal history. Briefly, the facts that give rise to the litigation were as follows:

In 1951 the Bayard, New Mexico local of the International Union of Mine, Mill and Smelter Workers ("Mine-Mill") struck a local mining company, demanding better working conditions. The strike was eventually successful, but only because of the participation of the striker's wives.

Prior to the strike, the House Un-American Activities Committee began investigating Communists in Hollywood. Some witnesses, later known as "The Hollywood Ten," refused to answer the question, "Are you now, or have you ever been, a member of the Communist Party?" These witnesses were convicted of contempt of congress, and sent to prison. After they were convicted, they could not find work: they were "politically unemployable." In the search for Communists, many other producers, actors and writers also lost their jobs.

During the Bayard strike, Paul Jarrico, a politically unemployable screenwriter, met Clinton Jencks, one of the union leaders. Jarrico decided to make a movie about the strike. Herb Biberman, one of the "Hollywood Ten," agreed to produce the movie. The movie was



Rosaura Revueltas

filmed in Silver City, New Mexico. During the filming, the press began to publicize the fact that "communists" were making a movie near Los Alamos about the "Mine-Mill" strike. The film was called *Salt of the Earth*.

To prevent completion of the movie (which was considered "subversive"), the government attempted to deport Rosaria Revueltas. Revueltas was a famous Mexican movie actress who was playing a key role in the film. In the immigration proceedings, Jo Calamia represented Rosaria Revueltas. She was ultimately deported, but the film was completed.

The Taft-Hartley Act, enacted before the strike began, required labor leaders to sign

a "non-Communist" affidavit, or lose the bargaining benefits provided by the statute. Clinton Jencks traveled to El Paso and signed such affidavit. Shortly before filming of *Salt of the Earth* was completed, the FBI arrested Jencks for false swearing.

The government prosecuted Jencks in Judge R.E. Thomason's court. Holvey Williams (who later served as a justice on the El Paso Court of Civil Appeals) prosecuted the case on behalf of the government. Williams relied on the testimony of informants, and particularly the testimony of one Harvey Matusow. Jenck's attorneys requested production of Matusow's witness statements prior to cross-examining them, but the government refuse to comply. The court refused to require the U.S. government to produce the statements. The defendant objected to the court's ruling, claiming it impaired the defendant's right to effectively cross-examine the witness. Jencks was convicted.

Matusow then recanted. Judge Thomason responded by holding Matusow in contempt of court (for lying in court when he recanted) and sentenced him to three years in jail.

CLINTON CROSS is an retired assistant county attorney and the former editor-in-chief of the El Paso Bar Journal.

SENIOR LAWYER INTERVIEW

BILL MOUNCE

By Clinton F. Cross

First published on Oct/Nov 2010 El Paso Bar Journal Republished here with corrections and additions

Bill Mounce died on June 17th, 2018.

William J. Mounce was the "Mounce" in the firm of Mounce, Green, Myers, Safi, Paxson & Galatzan, PC. He was born in a small town in the Texas Panhandle, and attended college on a football scholarship. Recommended for employment by Dean Page Keeton of the University of Texas Law School, Mounce came to El Paso in 1957 to work for the firm of Hardie, Grambling, Sims and Feuille.

On November 14, 1964, William Mounce argued a case before the United States Supreme Court. *City of El Paso v. Simmons*, 379 U.S. 497 (1965). If today in the comfort of your home or office you would like to listen to that argument on the internet, go to: www.oyes.org, then go to "Search" and type in "*City of El Paso v. Simmons*."

CROSS: Tell me about your parents; your childhood

MOUNCE: I was born in McLean, Texas, about 70 miles east of Amarillo. My father, Hal Mounce, was a cotton ginner. I had three brothers. Two are still alive.

CROSS: Where did you go to school?

MOUNCE: I went to grade school and high school in McLean. I went to New Mexico A & M (now New Mexico State) on a football scholarship and majored in physical education.

CROSS: After graduation, what did you do? MOUNCE: I coached football at New Mexico State for one year. Then I joined the 82nd Airborne Division. I was stationed at Ft. Bragg, North Carolina and Watertown, New York. Although the Korean War was going on, the President kept the 82nd in reserve in the United States in the event of a serious threat to our nation's security were to develop. So I never got to go to Korea.

CROSS: Where did you go to law school? MOUNCE: I went to the University of Texas.

I had a lot of fun in law school. A friend, Bob Alvis, and I rented a house by Lake Austin. We bought a motorboat, and then suddenly we had a lot of friends.

CROSS: How did you do?

MOUNCE: I was a Quizmaster. I made Law Review. And in 1957 I graduated.

CROSS: How did you end up in El Paso? MOUNCE: One day during my senior year

Dean Page Keeton called me into his office and asked me to interview with the El Paso firm of Hardie, Grambling, Sims, and Feuille. At the time Thornton Hardie was a member of the Board of Regents of the University of Texas and the firm needed a lawyer to help represent the El Paso Natural Gas Company. Apparently the Dean thought I could help them.

I was the ninth lawyer in the firm, and the only associate. My starting salary was \$300 a month.

CROSS: Do you remember any judges or lawyers when you first came to town that particularly impressed you?

MOUNCE: Ben Howell was Vice President of El Paso Natural Gas Company. He also served on the Texas State Board of Education, and argued cases before the United States Supreme Court.

John Grambling, a firm partner, was honest and hard-working. Judge Morris Galatzan was a judge, and very impressive. He later joined our firm.

Besides representing the Gas Company, I also tried as many cases as I could—usually insurance defense cases. I remember Jack Luscombe, giving me a pretty good run for my money now and then.

CROSS: Any particularly interesting cases?

MOUNCE: I argued a case before the United States Supreme Court in 1964 that may be of



William J. Mounce

interest to your readers. The case involved a suit to establish title to land that had been sold by the Texas State Land Board in 1910. The purchaser failed to pay in accordance with the terms of the sale. State law allowed for reinstatement, but in 1941 the law was amended limiting reinstatement rights to five years from the forfeiture date. The land was forfeited in 1947, and Simmons thereafter took quitclaim deeds to the land. He then filed for reinstatement and tendered payment for the land more than five years later.

The State sold the land to the City of El Paso in 1955, and the City filed suit to determine title. The Court of Appeals held that the 1941 law impaired the obligation of contracts. The Supreme Court reversed, and held that the State statute impaired no protected right under the Contract Clause.

CROSS: Your family?

MOUNCE: I married Romaine Roche, who was at the time Ben Howell's secretary. Her father was Bill Roche, a local attorney. Her brother, also named Bill Roche, is also an attorney. We have two children, Hal Mounce and Kathy Bennett.

CLINTON CROSS is an retired assistant county attorney and the former editor-in-chief of the El Paso Bar Journal.

Las Siete Partidas

By N. Jessica Lujan

Las Siete Partidas is available for review in the El Paso County Law Library.

It is important to note the long-standing cultural traditions, minds, and documents that have affected jurisprudence in Texas because these artifacts of the past hold those in the legal profession to the highest standards of integrity and virtue in the present.

One such work is *Las Siete Partidas*, a beautiful doctrinal letter that is commonly regarded as the most significant law code of the Middle Ages. King Alfonso X of Castile commissioned the compilation and synthesis of various laws into *Las Siete Partidas*. The Code was first published in 1256, but needless to say, it remained an integral part of Spanish and Mexican law well through the nineteenth century.

This article discusses how the Spanish and Mexican legal culture, through *Las Siete Partidas*, influenced the Texas Supreme Court. "Judges, justices, and arbitrators do not render decisions in a factual and legal vacuum... their responses reflect the interaction of many factors including cultural heritage and geographic location." A study of the various cultural heritages that impacted the current legal system in Texas features the rich influence of *Las Siete Partidas*.

Las Siete Partidas is broken into seven parts, and each of the seven parts begins with a letter of King Alfonso's name. This structure alludes to Aristotle's teachings that all things are created and divided in seven manners. Seven was a very important number at that time, and still is: seven heavens, seven days of the week, seven liberal arts, seven wonders of the ancient world, etc. Seven was perceived to be a number of God and Las Siete Partidas is "a book for the service of God and the common benefit of nations." First Partida, Title 1.

The Code begins by explaining its structure and organization, and then states that "these laws are ordinances to enable men to live well and regularly according to the pleasure of God, and also, as is proper, to live a good life in this world..." Such is the calling we as attorneys or officers of the court have, to "enable men to live well and regularly."

From its inception, Las Siete Partidas influenced Texas law in many ways, particularly

in the area of procedure, property law, water land law, and family law. Much of the Southwestern United States was under Spanish (and later, Mexican) rule until the fourth and fifth decades of the 19th century. Texas' present legal system is based on common law, which was "adopted" (but not entirely) as the law of the Republic of Texas in 1840, and Castillian law.²

A study of jurisprudence of the

Texas Supreme Court requires the inclusion of Hispanic culture because "Spaniards, Mexicans, and Tejanos, each a non-English-speaking group, played a significant role in shaping the Texas Supreme Court's jurisprudence."³

Spanish law has influenced our jurisprudence in many ways, such as:

First, Spaniards living in Texas had to resolve disputes between themselves without the benefit of trained lawyers. As a result, Spaniards were never committed to technical pleadings. Texans for the most part abandoned the English "forms of action" and instead adopted "notice pleading."

Second, Spaniards did not have a divided court system. Texans followed suit by abandoning "courts of equity" and "courts of law."

Third, Las Siete Partidas protected debtors by not allowing creditors the right to deprive them of the tools of the trade they needed to carry on a business. Early Texans liked this concept. The Texas exemption statutes track the spirit of the protections first set out in Las Siete Partidas.

Fourth, Spanish community property law was retained.

Fifth, Spanish law relating to land title, mineral rights, and contracts, although never fully adopted by Texas courts, has often influenced judicial debate.

Finally, some aspects of Spanish family law have been adopted.

Texas judges still cite *Las Siete Partidas* as authority for their arguments, sometimes for the majority view and sometimes in dissent. Although these cases are too numerous to mention here, one example may be of interest. Justice Eva Guzman of the Supreme Court of Texas, referenced *Las Siete Partidas*



D. Alonso X (The Wise)

when she stated in a dissenting opinion that, "Given the historic presumption of the public's right to use the dry beach, dating back to the days before the Republic, it is hardly definitive that an ordinary grant of the nature of the Jones and Hall grant automatically extinguished all public use of the shore, even when title shifted." *Severance v. Patterson*, 370 S.W.3d 705, 746 (Tex. 2012).

Justice Guzman probably relied on the section of *Las Siete Partidas* that states, "Every man can build a house or a but on the sea shore which he can use whenever he wishes... and so long as he is working there or is present no one else should molest him so that he cannot use and be benefited by all these things." Third *Partida*, Title 28, Law 4.

In the end, the noble ends of *Las Siete Partidas* are visible in today's laws and policies and are promulgated by attorneys and officers of the court. As we celebrate the 800th anniversary of *Magna Carta*, and its influence on American jurisprudence, we should also remember King Alfonso, his noble commitment to the law, and his everlasting contribution to the Texas' legal system through *Las Siete Partidas*.

N. JESSICA LUJAN is an Assistant City Attorney in Escondido, California and a graduate of the University of San Diego Law School. When in El Paso she clerked for Judge Maria Salas-Mendoza.

Footnotes

1. David A. Furlow, The Loan Star Republic's Supreme Court Wove the Fabrics of Texas Law from the Threads of Three Competing Legal Traditions (Part 1: Material Differences in Legal Culture), available at http://www.texascourthistory.org/documents/TSCHS_Joumal_Fall_2013.pdf (September 19, 2014 at 11:30 AM).

2. Richard R. Orsinger, 170 Years of Texas Contract Law-Part 1, available at http://www.texascourthistory.org/documents/TSCHS Joumal_Fall_2013.pdf (September 19, 2014 at 11:30 AM).

3. David A. Furlow, *The Loan Star Republic's Supreme Court Wove the Fabrics of Texas Law from the Threads of Three Competing Legal Traditions (Part 1: Material Differences in Legal Culture)*, available at http://www.texascourthistory.org/documents/TSCHS_Journal_Fall_2013.pdf (September 19, 2014 at 11:30 AM).



As a professional in the legal field, you know how important it is to have quick, easy access to your litigation records. That's why, at Express Records, we make available all records for your case right at your fingertips, 24 hours a day, 7 days a week.

And we don't stop there. At Express Records, we also know that you require dependable, experienced, reliable solutions. Unlike many other companies, we focus solely on records retrieval services, providing you with the highest dependability in on-time records retrieval and delivery.

So go ahead, let us start working for your next case.

Call 915-584-9890 to get started today.

EXPRESS Services

- « Research and Verification of Records
- « Notice of Intent to Take Deposition by Written Questions
- « Subpoena Duces Tecum
- « Business Records Affidavits
- « Courthouse Research/Filings
- « Mobile Notary and Mobile Scanning



Located in El Paso, Texas. Visit us online at www.expressrecords.net



FOCUS ON WHAT MATTERS GECU INVESTMENT & TRUST SERVICES*

GECU Investment and Trust Services is here to help prepare you for what matters most. We can help get you closer to your financial goals and get you ready for what comes after.

GECU Investment and Trust Services is your partner for ...

- 401(k) rollovers**
- Retirement planning
- Financial management
- Insurance services
- Estate planning, settlement and guardianship***
- Trust management and administration***

Visit gecu.com/invest, or call 774.1765, today for your no-cost, no-obligation appointment.

Securities sold, advisory services offered through CUNA Brokerage Services, Inc. (CBSI), member FINRA/SIPC, a registered broker/dealer and investment advisor. CBSI is under contract with the financial institution to make securities available to members. Trust services available through MEMBERS Trust Company, a federal thrift regulated by the Office of the Comptroller of the Currency. Not NCUAN/NCUSF/FDIC insured, May Lose Value, No Financial Institution Guarantee. Not a deposit of any financial institution. CBSI is a registered broker/dealer in all 50 states of the United States of America.

ou sustes or me unried states of America.

Prior to requesting a reliveer from your employer-sponsored retirement account to an individual retirement account (IRA), you should consider whether the rollover is suitable for you. There may be important difference in features, costs, services, withdrawal options, and other important aspects between your employer-sponsored retirement account and an IRA effects of the properties are relief to a consist or attorneys. For information regarding your specific tax situation, please consult a tax professional. For legal questions, including a discussion about estate planning, please consult your attorneys.



FR-2229436.1-0818-0920

gecu.com/invest



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

