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An Update of Events and Information

El Paso Bar Journal

February/March 2013

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President's Page

This Bar's For You!

Writing this President's page is one of the many privileges I have enjoyed over the last few months. And if you are one of the El Paso Bar Journal's *avid* readers, you may have noticed that each issue has featured one of our local affiliate Bar Associations. This month we are featuring the El Paso Women's Bar Association (EPWBA), timed to coincide with Women's History Month celebrated in March. So in this page, I wanted to talk about several topics related to recognition of women's contributions to our profession. There are so many topics I might address and our Journal editor, Clinton Cross, keeps encouraging me to write them as longer pieces . . .maybe one day.

Please consider supporting the wonderful programs of the EPWBA. Its service projects are related to improving education, providing good role models for children and increasing opportunities for and trying to make better the lives of children. Project FUTURE is specifically coordinated to benefit youth in the foster care system. The EPWBA's projects show a commitment to staying involved in the local community with a vision to improve the lives of all those it tries to help. These efforts also improve the perception of all lawyers by members of the public.

I could talk about Equal Pay Day to be "celebrated" (not sure what there is to celebrate) on April 9th, 2013. I definitely could write a few pages regarding the Gender Bias CLE I'm preparing with Dan Hernandez and Gina Palafox to be presented at the Civil Practice Seminar on February 15, 2013.

But I am overwhelmed with sadness over the loss of our friend Duane Baker. I have read several facebook posts describing Duane as a giant in the legal community, a man of integrity and honor, a great lawyer, a dedicated family man, an intellectual. Duane was all those things and more. On the other hand, our friend Duane was stern, zealous and stubborn. Yes, one could also say he was cantankerous at times. And yet I also remember how easily Duane the Litigator would come out of the courtroom and with eyes twinkling share his last movie experience, usually a kid movie he'd seen with family.

As a lawyer, having Duane as a fellow lawyer in the case always gave me comfort. I don't remember if we were ever adversaries or co-counsel, but usually our positions were aligned (he for a police officer, me for the County). I always knew that Duane would know the answer to anything complicated and that he'd never make me feel bad for asking. As a judge, I can say that despite not agreeing with all my rulings--sometimes he adamantly disagreed--Duane was always respectful and the consummate professional.

Recently, I had gotten to know Duane on another level. He served on our Board for the last couple of years and I am reminded of our conversation when he was thinking about resigning last year. If you knew Duane, you know what little patience he had for long meetings over sometimes insignificant matters. I had sat next to him and across from him during several Board meetings and knew he was often exasperated and not

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Cover photo of Justice Guadalupe Rivera, Chief Justice Ann McClure and Justice Yvonne Rodriguez by Assistant Federal Public Defender John P. Calhoun.

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finding his service a good use of his time. So when he said he really didn't think he should stay on (being too kind to say what he really thought), I said, "Duane, you're leaving me?" He stayed on, coming to meetings, expressing his frustration, leading our Bar.

One of my last memories of Duane include visiting with him and his wife Isabel at the Joint Holiday Party. I remember a happy Duane.

But what I remember most is Duane fulfilling his role as a steward of the Bar Association and his complete respect for the judiciary. He reminded us that the Bar has a role to protect the judiciary. My fellow Board members will know that he did that without forgetting the responsibilities we have as Board members.

Duane Baker went to bat for the Association; he went to bat for the profession and the judiciary; he went to bat for me.

I will miss you Duane.

Judge Maria Salas-Mendoza,
President

El Paso Bar Association
February Bar Luncheon
Tuesday, February 12, 2013

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

Guest Speaker will be

Larry Duncan,

CEO, El Paso Children's Hospital

Door prizes will be given out

Please make your reservations by Monday, February 11, 2013 at 1:00 p.m.
at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

El Paso Bar Association
March Bar Luncheon
Tuesday, March 12, 2013

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

Guest Speakers will be

Candidates for President-Elect of the State Bar of Texas

Larry Hicks, El Paso and E.A. "Trey" Apffell, III, League City

Door prizes will be given out

Please make your reservations by Monday, March 11, 2013 at 1:00 p.m.
at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

CALENDAR OF EVENTS

PLEASE NOTE: Please check the Journal for all the details regarding all above listed events. If your club, organization, section or committee would like to put a notice or an announcement in the Bar Journal for your upcoming event or function for the month of April/May 2013, please have the information to the Bar Association office by Friday, March 8, 2013. In order to publish your information we must have it in writing. WE WILL MAKE NO EXCEPTIONS. We also reserve the right to make any editorial changes as we deem necessary. Please note that there is no charge for this service: (915) 532-7052; (915) 532-7067-fax; nancy@elpasobar.com - email. If we do not receive your information by the specified date please note that we may try to remind you, but putting this journal together every month is a very big task and we may not have the time to remind you. So please don't miss out on the opportunity to have your event announced.

February, 2013

Tuesday, February 5
EPBA BOD Meeting
Tuesday, February 12
EPBA Monthly Luncheon
Thursday, February 14
17th Annual Civil Practice Seminar
Las Vegas
Friday, February 15
17th Annual Civil Practice Seminar
Las Vegas
Saturday, February 16
17th Annual Civil Practice Seminar
Las Vegas
Monday, February 18
EPBA Office Closed
President's Day
Thursday, February 21
FBA Brown Bag CLE
Thursday, February 21
EPPA Monthly Luncheon

March, 2013

Tuesday, March 5
EPBA BOD Meeting
Tuesday, March 12
EPBA Monthly Luncheon
Saturday, March 16
EPLP/EPPBA Wills Clinic
Thursday, March 21
FBA Brown Bag CLE
Thursday, March 21
EPPA Monthly Luncheon
Friday, March 29
EPBA Office Closed
Good Friday

Upcoming Events:

Monday, April 1
EPBA Office Closed
Cesar Chavez Day

Saturday, May 4
Law Day Dinner

BE OUR COVER:

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

Banking on Justice

By Carlos Cardénas

In 1984, the Supreme Court of Texas created the Interest on Lawyers' Trust Accounts (IOLTA) Program as a means of providing funds for legal aid. For many years, the system worked as it was intended, and played a major role in the funding of the state's legal aid system.

Fast-forward 28 years and the picture has changed drastically. Due to historically low interest rates, the revenue generated from the program continues to plummet. In 2007, IOLTA revenue was $20 million; in 2012, it is projected to total only $4.4 million—a decline of more than 75 percent. As a result, low-income Texans are forced to face serious, complicated and sometimes life-threatening civil legal issues on their own.

Fortunately, more than 70 Texas banks have helped to address the problem by becoming Prime Partner banks. Prime Partner banks voluntarily pay higher interest rates on IOLTA accounts, helping close the gap in funding. These banks have increased IOLTA revenue by millions throughout Texas. In El Paso, First Savings Bank is a member of the Prime Partner program.

Funds from the Prime Partner program help the Texas Access to Justice Foundation provide

Texas IOLTA Prime Partners

assistance to Texas families seeking justice for an abused child, receiving health benefits for an elderly person, or getting a family back in their home when faced with a foreclosure or eviction.

We encourage you to contact your bank and ask them to join the Prime Partner program to help those in our community that need legal asssistance. To learn more about how you can help recruit Prime Partner banks, contact Betty Balli Torres at the Texas Access to Justice Foundation, 512-320-0099, ext. 105, or at bbtorres@teajf.org.

With the support of the legal community and in partnership with banks, we'll continue to close the gap in funding for legal aid. Banking with a Prime Partner is banking on justice.

CARLOS CARDÉNAS Is an El Paso attorney specializing in personal injury law. He is presently a member of the Texas Access to Justice Commission.

EPBA/County Holidays
The El Paso Bar Association and the El Paso County Courthouse will be closed on the following dates:
Monday, February 18, 2013 –
President's Day
Friday, March 29, 2013
Good Friday
Monday, April 1, 2013
Cesar Chavez Day

ATTENTION LAWYERS
2013 Legal Directory

The El Paso Legal Support Association is currently working on updating the **2013 Legal Directory** that will be coming out soon. If you are a new lawyer in El Paso, your address has changed or you wish to add an email address to your listing, please notify Jerri Boone as soon as possible at **jebo@kempsmith.com.**

Classifieds

Experienced Attorney desires office sharing, work overflow, arrangement with small or medium size law firm. Have general practice experience, civil litigation, family law, bankruptcy, and federal agency law. If interested, contact Attorney JJ at 915/203-0006.

Central Office Space for Lease: Office Space available, receptionist, runner, conference rooms, parking, etc. No lease or deposit required Call Bob Earp or Larry Schwartz at 542-1533.

The Long Arm of the Attorney General's Office of Texas:

The Early History and Current Highlights of the El Paso Branch of the Office of the Attorney General of Texas

By Charles Skinner

If today your client has a child support problem, needs help from the Crime Victim's Compensation Fund, or has a consumer problem, you might send your client to the Texas Attorney General's office for help. There's a Regional Office downtown.

It wasn't always that easy. Prior to 1973 there were no regional state Attorney General offices anywhere.

What is the history of the Texas Attorney General's Office? What is the history of the El Paso Regional Office and what does it do?

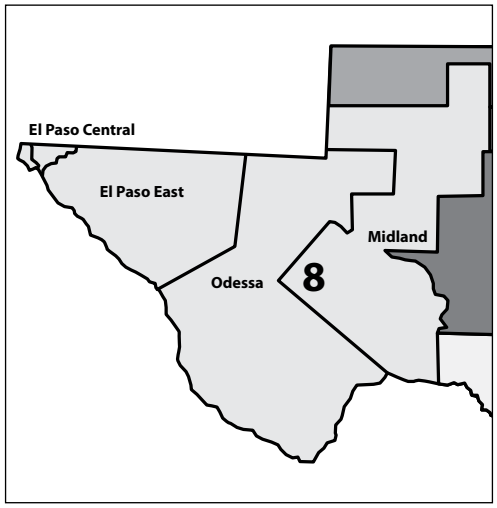
In 1836 the Republic of Texas established the Office of the Attorney General. The President of the Republic appointed the Attorney General. In 1850 the State Constitution was amended, and the office became an elected one. The Texas Constitution of 1876 made the Attorney General one of seven officers who collectively constituted the State's executive department.

The Attorney General acts as both an enforcer of the law and a protector of the public, and the office has broad powers in both litigation and giving legal advice. The Attorney General must represent and defend those interests whenever the interests of Texas' state government are involved in civil law.

As we all know, Texas is a big state. El Paso is half way between Los Angeles and Galveston, and almost equidistant are the cities of Denver and Austin. The State Attorney General's responsibilities stretch throughout this vast region, creating unique law enforcement challenges.

In 1973 Attorney General John Hill recommended opening regional offices throughout the state. The decision to open these offices and the fight to make them part of the legal landscape of Texas was controversial.

W. Barton Boling was already a fixture in the El Paso legal community in the early 1970s. In 1965, Governor John Connally appointed him District Attorney; he completed the term and was thereafter elected to the position. In September of 1971, Attorney General Crawford Martin asked Boling to join the office. Attorney General Martin said "I can get all the new lawyers that I want, but what I really need is experienced trial lawyers." Boling accepted and moved to Austin.



Office of the Texas Attorney General Child Support Division – Region 8

In 1972, John Hill defeated Crawford Martin in the Democrat primary, largely due to the taint of the Sharpstown stock fraud scandal, where every candidate even remotely connected to the scandal was defeated. After taking office, Attorney General Hill wasted no time advocating reform. At the urging of his Anti-Trust and Consumer Division Chief, Joe K. Longley, Hill persuaded the Texas Legislature to amend the Business & Commerce Code by adopting the Deceptive Trade Practices Act. Attorney General Hill also saw consumer protection as a way for the office to connect to the public. "The idea of the regional offices was to get the Attorney General personnel closer to the public," according to Longley.

In January of 1973, Attorney General Hill contacted Boling and told him that he wanted to open offices in Dallas, Houston, and San Antonio and in El Paso. He asked Boling if he would head the El Paso Regional Office.

Unfortunately, the Legislature had not approved any money for the creation of these offices. Boling called County Attorney George Rodriguez Jr. who agreed to allow the Attorney General to use a spare office and spare storage room across the hall from the County Attorney's Office in the basement of the County Courthouse. He told Boling that the County could provide the Attorney General free office space, but the Attorney General would have to pay for telephone service.

At the time, Clinton Cross was a staff attorney for the El Paso Legal Assistance Society (EPLAS), having been hired in 1969 by Fred Weldon at the recommendation of Sam Houston Clinton. Sam Houston Clinton later served three consecutive terms as an Associate Justice on the Texas Court of Criminal Appeals.

In 1972, Joe Longley, called Cross and asked him to join the Attorney General team. Cross accepted, and was deputized as an Assistant Texas Attorney General in January, 1973.

The Regional Office of El Paso had two initial divisions: The Criminal Law Division (which represented law enforcement and agencies) and the Consumer Protection Division. While primarily working in the Criminal Division, Boling was responsible for office administration and representing the office in other matters assigned to him. Cross prosecuted civil deceptive trade practice cases.

The first office, which Cross shared with the secretary for the Regional Office, was little more than a glorified broom closet. The Regional office remained split in that fashion until 1975, when the Regional Office moved to the County Annex Building on Alberta Street next to Thomason Hospital (now University Medical Center of El Paso). That office space was laid out sufficiently to allow for both Boling and Cross to have their own offices, a separate third office, a reception area for two legal secretaries, and a small law library room.

At first the Regional Office was chronically under-equipped in terms of what a functional

law office needed at that time. Ana Cortinas, one of the early secretaries, tells a story where, during the construction of Texas Tech, one of the older typewriters was placed on a pile of rocks in the construction area and a photograph was taken, captioned as the Regional Office in El Paso, and sent to the Austin head office. That at least convinced the Austin office to offer the Regional Office more equipment, but sometimes that equipment had to be physically retrieved from Austin by someone going there to get it.

The senior staff from Austin would routinely travel to meet with the Regional Office heads and meet with local law enforcement, the District Attorney, County Attorney, and the local press about what the hot topics were in consumer protection. According to Longley, this raised the Attorney General's profile and the public learned they could go to the local office for help.

In 1976, Cross was ready to move on to other employment and he resigned from the Regional Office. Cross was replaced by Richard P. Mesa as the Consumer attorney for the Regional Office. Mesa is remembered by Cortinas as being a very meticulous, very organized, highly detail oriented member of the office. Mesa stayed for a few years, and then left for the private sector, later to become a Federal Magistrate Judge, retiring on December 31, 2012. When Mesa left the office he was replaced by David Ferrell, who had previously worked for the Office of the Attorney General in Lubbock. A few years later, Ferrell created the first computer system in the Regional Office and taught the secretarial staff to use word processing software. Initially the staff fought using the system, but then it became the best thing to happen to the office. The use of these systems increased the efficiency of the Regional Office.

In 1979, after Mark White was elected Attorney General, Boling left the Regional Office and returned to Austin to head the Criminal Law Enforcement Division. When White ran for Governor and Jim Mattox was elected Attorney General in 1983, Boling returned to the El Paso Regional Office where he remained until his retirement in 1993.

In 1985, the Texas Family Code was amended with §231.001 which transferred child support enforcement from the individual county attorneys and the Texas Department of Public Welfare (DPW) to the Office of the Attorney General under the Mattox administration. Attorney General Mattox kept the prior regional enforcement structure used by DPW and largely superimposed the existing DPW for indigent structure onto the then existing regional offices, including the El Paso Regional Office. Under the Mattox administration, David Richards, the Executive Assistant Attorney General, began a policy of hiring large numbers of former legal aid lawyers to staff the Regional Offices.

Prior to 1985, individuals trying to get help with family violence and child support payments were limited to private remedies. Further, there was no reciprocal enforcement of child support orders and as a result collection of child support could become very onerous. With the implementation of Title IV-D of the Social Security Act, and the subsequent implementation of §231 making the Office of the Attorney General the designated Title IV-D enforcement agency, the Attorney General and the Regional Offices gained broad powers of enforcement of child support orders and have largely assumed the previous private remedy role as being in the public interest. The first attorneys assigned to the Child Support Division of the Regional Office included Carter Beckworth, Roberto Ramos, Imelda Garcia and Laura Warren.

In 1987, the Attorney General Mattox approached the Texas Legislature to transfer a $4 million surplus of funds at the Department of Human Services to the Child Support Division of the Attorney General's Office, and then leveraged that $4 million to acquire $9 million in federal funds. With this $13 million, Attorney General Mattox was able to deputize more lawyers to prosecute child support cases. Attorney General Mattox also convinced the Texas Legislature to redirect any future revenue generated by the Child Support Division back into that division in order to guarantee future access to federal matching funds. By doing so, Attorney General Mattox laid the groundwork for what is arguably now the best Child Support program in the nation.

In 1987 the Regional Office moved to 6090 Surety Drive. At that location and during that time, the Regional Office had a first floor corner suite, complete with three lawyer offices, two secretarial areas and a separate room for a law library. During this period, safety of office personnel and staff became a bigger issue. While there had been previous threats of violence when the office was housed at the County Courthouse, one day at Surety Drive the staff arrived and found a bullet hole in one of the windows to the corner office.

The Child Support Division is currently operated out of two public offices, one located at 1540 N. Zaragoza road and the other located at 6090 Surety Drive, with a Child Support Division administrative office, and the regional Attorney General Medicaid Fraud Division. These offices serve El Paso, Hudspeth and Culberson counties, as part of Region 8 which covers 21 counties. In fiscal year 2012, the Office of the Attorney General collected $3 billion in child support payments, and for the past three years Texas has been ranked first in child support collected, even though it has a smaller caseload than other states. Without the local offices providing support to the statewide Office of the Attorney General, enforcing and collecting this level of child support would be impossible. The two El Paso offices alone distributed over $134.6 million in fiscal 2012. Debra Morgan was appointed as the Senior Regional Attorney for the Regional Office in 1996; a position she still holds. Her staff includes Special Litigator Brent Stephens, Shane Keyser as attorney for the HEROES project, Managing Attorney Deborah Lozano and Assistant Attorneys General Elizabeth Edwards, Marina Chavez, Daniel Kaufmann, Jorge Diaz, Phyllis Gonzalez, Linda Perez-Kahn, and Viviana Patino.

In 1998, the main Regional Office moved from Surety Drive to its current location at 401 E. Franklin Avenue, Suite 530. Assistant Attorney General Jim Daross, who has been with the office since October 2000, manages the office. Assistant Attorney General Richard Bischoff, investigator Pat Acosta, Office manager Lucy Jaime, and complaint analyst Gloria Frontierro complete the staff.

The Regional Office has turned part of its focus to litigating consumer cases for predatory lending against banks, beginning with Household International in 2002. That case had national implications, and the Regional Office management recognized that they would have to work with Attorney Generals from other states in order to best protect Texas residents. They have been involved with the litigation of major cases against Ameriquest, Countrywide and GMAC. The early Ameriquest case alone led to a $400 thousand fund for administrative purposes and future investigations. The El Paso Regional Office has been intimately involved with a state foreclosure prevention working group investigating cases against Bank of America, JPMorgan Chase, Citicorp, GMAC (Ally), and Wells Fargo to name only a few.

Daross and Bischoff of the Regional Office were the Texas negotiators in crafting the $25 billion national mortgage settlement. Throughout the 16 months of negotiations and along with attorneys from 7 other states and the Department of Justice, they negotiated and crafted the settlement. For Texas, the team

recovered over $411 million in benefits for Texas homeowners and the state. Specifically, as part of the settlement by the mortgage companies, Texas received $10 million dollars in civil penalties which was paid to the Supreme Court fund to provide legal services for the indigent. For his efforts in negotiating the settlement, Daross received the Department of Justice Attorney General's Award for Distinguished Service, the second most prestigious honor award presented by the DOJ and the first time it has been presented to non-DOJ personnel.

Working for the Regional Office has even become a multi-generational family employment. Ana Cortinez, as noted above, was one of the first secretaries hired by the Regional Office. Her daughter was the second staff employee hired by the child support division and is still employed with the Regional Office. Some employees of the Regional Office have had multiple employments with the office. Clinton Cross was employed by the Office twice. Bart Boling was placed at the Regional Office several times. Gloria Frontierro, another of the early secretaries, is currently the complaint analyst at the Franklin office after several years in different employment.

Longley best sums up the influence that the Regional Office concept has had on Texas: Forty years of experience has taught us it was a huge, overwhelming success. They were close to the people and the cities where these offices were located loved the concept. The Press could always call the local Attorney General and ask 'Hey, what's cookin?' Time has shown the Regional Office concept to be a fantastic idea.

CHARLES SKINNER is an attorney in El Paso, Chair of the EPBA Local Rules and Judicial Liaison Committee and a member of the EPBA Ethics Committee.

Texas Attorney General actions under the deceptive trade practices act

By Jim Daross

I. INTRODUCTION

The Office of the Attorney General (OAG) has been engaged in a variety of efforts for many, many years to protect Texas consumers. The OAG has used its authority as the State's lawyer to investigate entities which would mislead or deceive Texans, to file suit for injunctive relief and restitution to consumers who have lost money to deceptive actors, to educate consumers about consumer fraud issues, and to advocate for changes in the law and business practices on issues affecting consumers.

II. STATUTORY AUTHORITY

The primary enforcement tool used by the Consumer Protection Division of the OAG is the Texas Deceptive Trade Practices - Consumer Protection Act ("DTPA")[1] which in Section 17.46(a) declares that "[f]alse, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[2] The DTPA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[3] Provisions used frequently by OAG are:

a. "Laundry List"

Section 17.46(b) lists 27 acts or practices, known as the "laundry list," of acts or practices that are specifically denominated as being *per se* "false, misleading, and deceptive." Actions by individuals for recovery under Section 17.50 are limited to the laundry list, breach of a warranty, an unconscionable act or breach of Chapter 541 of the Insurance Code.[4] State action can be brought for violations of the laundry list, but the OAG can proceed also under the much broader Section 17.46(a).

The 27 acts or practices are *per se* violations because "[i]f any of those listed acts or practices is found to have happened, it is by law an unlawful deceptive trade practice because Section 17.46(b) makes its unlawful."[5] Under Sec. 17.46(a), by contrast, the State must still prove and obtain a finding (1) that the act or practice occurred, and (2) that it was a deceptive trade practice.[6] A finding of harm is not necessary; however, because the OAG brings this type of action in the public interest and on behalf of consumers, harm is presumed.[7]

b. Injunctive Relief

Section 17.47(a) of the DTPA states "Whenever the consumer protection division has reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, and that proceedings would be in the public interest, the division may bring an action in the name of the state against the person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such method, act, or practice."[8]

Because the purpose of the DTPA is nearly identical to the Federal Trade Commission Act, the DTPA provides:

> It is the intent of the legislature that in construing Subsection (a) of this Section in suits brought under Section 17.47 of this subsection the courts to the extent possible will be guided by Subsection (b) of this Section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [9]

DTPA petitions requesting injunctive relief are typically verified by the OAG investigators using the "reason to believe" standard, not personal knowledge. Further, the State is not required to post a bond upon obtaining injunctive relief, as private litigants must do for a TRO or temporary injunction.[10]

For the private litigant, the factors for injunctive relief include pleading a wrongful act, a probable and irreparable injury to the Plaintiff that would result before judgment can be rendered, a likelihood of ultimate success on the merits, and an equitable result after the interests of all parties are weighed. However, the State does not have the same burden. The Texas Supreme Court has said the State does not have to prove immediate and irreparable

injury when seeking injunctive relief pursuant to an authorized statute, and that a balancing of the equities is not required when the State seeks injunctive relief pursuant to an authorized statute.[11]

c. "Class Action" Status

The State, and not the individual consumers, is the real party in interest in suits brought by the the OAG.[12] Actions filed by the attorney general under Section 17.47 qualify as de facto class actions, and because of that fact, the statute of limitations is tolled during the period in which the individuals are participants in the attorney general's suit.[13]

d. Consumer Status

An aggrieved individual must meet the statutory definition of "consumer" to bring a private cause of action against a business defendant.[14] This issue is not applicable where the cause of action is brought by the Attorney General.[15] Further, the fact that a consumer has signed a waiver is not a defense to a DTPA action by the State.[16] The DTPA also makes it clear that the consumer protection division acts in the name of the State and does not represent persons to whom the consumer protection division requests that the court award relief.[17]

e. Restitution

In a suit brought by the OAG, the Court "… may make such additional orders or judgments as are necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal which may have been acquired by means of any unlawful act or practice [under the DTPA]."[18] A private litigant may recover "economic damages and damages for mental anguish" for which the defendant's conduct was a "producing cause" and upon which the consumer relied to his detriment.[19]

In its most literal sense, restitution means restoring property or money taken from the consumer.[20] The Idaho Supreme Court explained how restitution assures future compliance: Businesses faced only with the possibility of a prospective injunctive order would have little incentive to avoid commercial practices of dubious legality. Only a substantial likelihood that defendants who have engaged in unfair or deceptive trade practices will be subject to restitutionary orders will deter many with a mind to engage in sharp practices.[21] Further, it is not necessary for the State to show that anyone was actually harmed by the offending practice. In DTPA cases, harm is presumed.[22]

While damages may not include any damages incurred beyond a point two years prior to the institution of the action by the consumer protection division,[23] a plain reading of this provision makes clear that the legislature distinguished "actual damages" from "restitution" (i.e., the restoration of money or property acquired by means of an unlawful act or practice). This distinction makes sense because, historically, damages and restitution have been two distinct remedies, the former imposed by courts of law and the latter ordered by courts of equity. In any case, these two remedies are mutually exclusive, since "damages" are based on recovery of benefits under a contract, while "restitution" is based on rescission or avoidance of the contract. By its own terms, Section 17.47(d) makes the two-year limitation applicable to "damages" only. Therefore, the two-year limitation does not apply to requests for restitution since it is an axiom of statutory construction that the express mention of one thing implies the exclusion of the other.[24]

Although private litigants must show that the defendant's conduct was a producing cause of their damages,[25] and that they relied upon that conduct to their detriment,[26] there is no requirement for the State to show producing cause under Section 17.47--just a violation and a reason to believe the action is in the public interest. The words "producing cause" simply do not appear anywhere in Section 17.47. Similarly, the State need not prove reliance by consumers to obtain a restitution order.[27] Indeed, evidence of the effect of the conduct on these individuals is not even admissible.[28]

f. Civil Penalties

In addition to injunctive relief and restitution, "the trier of fact may award, a civil penalty to be paid to the state in an amount of: (1) not more than $20,000 per violation; and (2) if the act or practice that is the subject of the proceeding was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred, an additional amount of not more than $250,000."[29]

g. Limitations

"The state in its sovereign capacity, unlike ordinary litigants, is not subject to the defenses of limitations, laches, or estoppel."[30] Thus, the two-year statute of limitations found in Section 17.565 does not apply to state actions for restitution and civil penalties under Section 17.47.[31] This policy is also reflected in the Texas Civil Practices & Remedies Code, which exempts the State and other governmental entities from application of most limitation periods.[32]

h. Attorney's Fees

In addition to penalties, in any case in which the State is entitled to recover a penalty or damages, the Attorney General is entitled, on behalf of the State, to reasonable attorney's fees and court costs.[33] The attorney's fees which the State may recover under Texas Government Code Section 402.006(c) are calculated under market value method to the State for legal work performed by an assistant attorney general (i.e., the usual and customary rate charged by practicing attorneys of his or her level of experience in the locality).[34]

i. Pre-suit Notice

Unlike the 60-day notice requirement in the DTPA, for individual litigants, the OAG has to have prior contact with the defendant prior to instituting court action, but such prior contact is

Footnotes

1 Tex. Bus. & Com. Code Ann. §§ 17.41 *et seq.* (West 2011).
2 Tex. Bus. & Com. Code Ann. § 17.46(a) (West 2011).
3 Tex. Bus. & Com. Code Ann. § 17.44(a) (West 2011).
4 Tex. Bus. & Com. Code Ann. §§ 17.46(d), 17.50(a) (West 2011).
5 *Spradling v. Williams,* 566 S.W. 2d 561 (Tex. 1978).
6 *Spradling ,* 566 S.W.2d at 564; *State v. Vavro,* 259 S.W.3d 377 (Tex. App. – Dallas 2008, no pet.).
7 *United States v. Odessa Union Warehouse Coop*, 833 F.2d 172, 175176 (9th Cir. 1987).
8 Tex. Bus. & Com. Code Ann. § 17.47(a) (West 2011).
9 Tex. Bus. & Com. Code Ann. § 17.46(c) (West 2011); See also 15 U.S.C.A. §45(a)(1) (West 2006).
10 Tex. Bus. & Com. Code Ann. § 17.47(b) (West 2011); Tex. R. Civ. P. 684.
11 *State v. Texas Pet Foods*, 591 S.W.2d 800, 805 (Tex. 1979).
12 *State ex rel. Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198 (La.App. 4 Cir. 1988); *State ex rel. Stephan v. Brotherhood Bank & Trust Co.*, 8 Kan.App.2d 57, 649 P.2d 419 (Kan.App. 1982, pet. den.).
13 *Bara v. Major Funding Corp.*, 876 S.W.2d 469, 47273 (Tex. App.Austin 1994, writ denied).
14 Tex. Bus. & Com. Code Ann. § 17.50 (West. 2011); *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980).
15 Tex. Bus. & Com. Code Ann. § 17.46(a), 17.47(a) (West. 2011).
16 Tex. Bus. & Com. Code Ann. § 17.42(e) (West 2011).
17 Tex. Bus. & Com. Code Ann. § 17.47(h) (West 2011).

not required "if, in the opinion of the consumer protection division, there is good cause to believe that [defendant] would evade service of process if prior contact were made or that such person would destroy relevant records if prior contact were made, or that such an emergency exists that immediate and irreparable injury, loss, or damage would occur as a result of such delay in obtaining a temporary restraining order."[35]

j. Notice of Class Action

Any consumer who files an action under Section 17.50 of the DTPA must give notice of the suit to the OAG, which may intervene in the suit.[36]

k. Assurance of Voluntary Compliance

In an appropriate case, the OAG may allow a defendant to enter into an assurance of voluntary compliance (AVC), rather than filing suit and seeking a judgment.[37] If an AVC is used but later violated, the AVC is prima facie evidence of a DTPA violation in a subsequent suit.

l. Pre-Litigation Discovery

The DTPA gives the attorney general effective prelitigation discovery tools to investigate deceptive trade practices and compel testimony, production of documents, and other things from prospective defendants and witnesses. For example, documentary material may be subpoenaed by civil investigative demand,[38] a defendant may be compelled to submit a report in writing and an examination of merchandise, or a sworn statement of any person may be taken.[39] Intentionally evading either of these, or secreting or destroying documents or things requested, is a misdemeanor subject to a fine up to $5,000 or a year in jail.[40]

m. Settlement Procedures

The abatement, mediation and settlement procedures in the DTPA and Chapter 42 of the Civil Practices and Remedies Code do not apply to an action by or against a governmental unit.[41]

n. Post Judgment Relief

If the State obtains a judgment for restitution that remains unsatisfied three months after the judgment becomes final, the OAG may request and the Court may order the appointment of a receiver or a sequestration of assets.[42] There is a similar provision for private litigants, but it is considerably more onerous.[43]

III. "TIE-IN" STATUTES

Additionally, there are numerous area-specific laws that provide for attorney general enforcement which tie into the DTPA. In other words, a violation of the area-specific law constitutes a violation of, and is actionable under, the DTPA. Among Texas statutes of this kind are the Business Opportunity Act,[44] the Credit Services Organizations Act,[45] the Debt Collection Act,[46] the Cancellation of Certain Consumer Transactions (Home Solicitation Act),[47] the Home Improvement Contract Act,[48] and the Unfair Claim Settlement Practices Act.[49]

The OAG may also file suit to enforce the Texas Debt Management Services Act,[50] the Business Opportunity Act,[51] the Contest and Gift Giveaway Act,[52] the Texas Mortgage Broker Act,[53] the Notary Public Act[54] and many others.[55]

IV. BANKRUPTCY ACTIONS

The filing of a bankruptcy petition creates a stay, known as the "automatic stay," of certain proceedings or acts against the bankrupt debtor or against the property in the bankruptcy estate.[56] In the absence of an exception, the automatic stay would apply to this state court action and thus prohibit the State from continuing to prosecute the action. The Bankruptcy Code, however, contains an explicit exception to the automatic stay which permits the State to proceed with law enforcement proceedings such as DTPA suits. The filing of a bankruptcy petition does not operate as a stay of "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."[57] This exception to the automatic stay is known as "the police power exception."

Furthermore, a state court has the power to determine whether the stay applies to the suit. It is understandable that a state court may be tempted to stay DTPA litigation in response to a defendant=s suggestion of bankruptcy or other indication that the automatic stay prevents the court from proceeding. However, as Bankruptcy Judge Isgur aptly stated, "The [Bankruptcy] Court appreciates the comity shown by state courts when they decline to proceed in the face of a pending bankruptcy case. Nevertheless, the Court finds that its duty of reciprocal comity requires the issuance of this opinion. Accordingly, this Court issues this Joint Memorandum Opinion clarifying that the state courts in the present cases had the authority to determine that the automatic stay did not apply to the governmental unit's actions to enforce their police and regulatory power."[58]

Civil penalties recovered under the DTPA constitute civil fines or penalties, not compensation for actual pecuniary loss.[59] They are, therefore, debts that will not be dischargeable in a subsequently filed bankruptcy proceeding under either Chapter 7 or Chapter 11.[60]

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18 Tex. Bus. & Com. Code Ann. § 17.47(d) (West 2011).
19 Tex. Bus. & Com. Code Ann. § 17.50(a) (West 2011).
20 *City of Harker Heights, Texas v. Sun Meadows Land, LTD.*, 830 S.W.2d 313 (Tex. App. Austin 1992, no writ).
21 *State ex rel. Kidwell v. Master Distributors, Inc.*, 615 P.2d 116 (Idaho 1980).
22 *People v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 128 Cal. Rptr. 2d 463, 479 (2002); *State v. May Dept Stores Co.*, 849 P.2d 802 (Colo. Ct. App. 1992), rev'd in part on other grounds, 863 P.2d 967 (Colo. 1992).
23 Tex. Bus. & Com. Code Ann. § 17.47(d) (West 2011).
24 *Thomas v. State,* 226 S.W.3d 697, 703-04 (Tex. App.--Corpus Christi 2007, pet. dism'd); *Avila v. State*, 252 S.W.3d 632 (Tex. App.--Tyler 2008, no pet.).
25 Tex. Bus. & Com. Code Ann. § 17.50(a) (West 2011).
26 Tex. Bus. & Com. Code Ann. § 17.50(a)(1)(B) (West 2011).
27 *State ex rel. Webster v. Areaco Investment Company*, 756 S.W.2d 633 (Mo. App. E.D. 1986); *Consumer Protection Div. v. Consumer Publishing,* 304 Md. 731, 501 A.2d 48, 73-74 (1985); *People v. Toomey*, 157 Cal. App. 3d 1, 203 Cal. Rptr. 642 (1984).
28 *Avila v. State*, 252 S.W.3d 632 (Tex. App.--Tyler 2008, no pet.).
29 Tex. Bus. & Com. Code Ann. § 17.47(c) (West 2011).
30 *State v. Durham*, 860 S.W.2d 63 (Tex. 1993).
31 *Thomas v. State,* 226 S.W.3d 697, 703-04 (Tex. App.--Corpus Christi 2007, pet. dism'd); *Molano v. State*, 2011 Tex. App. LEXIS 6612 (Tex. App.--Corpus Christi Aug. 18, 2011, pet den.) (not designated for publication).
32 Tex. Civ. Prac. & Rem. Code Ann. § 16.061; *Monsanto Co. v. Cornerstones Mun. Utility Dist.*, 865 S.W.2d 937 (Tex. 1993).
33 Tex. Gov't Code Ann. § 402.006(c) (West 2005).
34 *Molano v. State*, 262 S.W.3d 554, 557 n.6 (Tex. App. Corpus Christi 2008, no pet.); Error! Main Document Only. *California Common Cause v. Duffy,* 200 Cal.App.3d 730, 246 Cal. Rptr 285 (1987);

State v. Patten Corp., 617 A.2d 210, (Me. 1992). *State v. Sangamo Construction Co.* 657 F2d 855 (7th Cir. 1981).
35 Tex. Bus. & Com. Code Ann. § 17.47(a) (West 2011).
36 Tex. Bus. & Com. Code Ann. § 17.501(c) (West 2011).
37 Tex. Bus. & Com. Code Ann. § 17.58 (West 2011).
38 Tex. Bus. & Com. Code Ann. § 17.61 (West 2011).
39 Tex. Bus. & Com. Code Ann. § 17.60 (West 2011).
40 Tex. Bus. & Com. Code Ann. § 17.62(a) (West 2011).
41 Tex. Bus. & Com. Code Ann. § 17.5051(h) (West 2011); Tex. Civ. Prac. & Rem. Code Ann. §42.002(b) (West 2008).
42 Tex. Bus. & Com. Code Ann. § 17.47(d) (West 2011).
43 Tex. Bus. & Com. Code Ann. § 17.59 (West 2011).
44 Tex. Bus. & Com. Code § 51.02, 51.302 (West 2011).
45 Tex. Fin. Code Ann. §393.001 *et seq.* (West 2006).
46 Tex. Fin. Code §§ 392.001 *et seq.* (West 2006).
47 Tex. Bus. & Com. Code Ann. § 601.001, *et seq.* (West 2009).
48 Tex. Prop. Code Ann. §41.007 (West 2000).
49 Tex. Ins. Code Ann. § 542.004 (West 2009).
50 Tex. Fin. Code §394.001 *et seq.* (West 2006).
51 Tex. Bus. & Com. Code §§ 51.301 *et seq.* (West 2009).
52 Tex. Bus. & Com. Code § 621.001 *et seq.* (West 2009).
53 Tex. Fin. Code §§ 156.001 *et seq.* , 156.402(West 2006).
54 Tex. Gov. Code § 406.017 (West 2005).
55 *See* Richard F. Dole, et al, *O'Connor's Business and Commerce Code Plus,* 972 (2011-12).
56 11 U.S.C. § 362(a) (West 2010).
57 11 U.S.C. § 362(b)(4) (West 2010).
58 *In re Gandy*, 327 B.R. 796, 800 (Bankr. S.D. Tex. 2005); *See also In re Cummings*, 201 B.R. 586 (Bankr. S.D. Fla. 1996) (State courts have concurrent jurisdiction with bankruptcy courts to determine the applicability of the automatic stay).
59 Tex. Bus. & Com. Code Ann. §§ 17.47 (West 2011).
59 60 11 U.S.C. § 523(a)(7) (West 2010).
60 60 11 U.S.C. § 523(a)(7) (West 2010).

Avoiding a Permanent "Waive": Preservation of Error

Part III

By Chief Justice Ann McClure

IV. Evidentiary Error On Appeal

A. Challenges to Erroneous Admission or Exclusion of Evidence

Challenges to the erroneous admission or exclusion of evidence require a two-prong approach. First, the trial court's evidentiary ruling must be erroneous. Second, assuming error occurred, was it harmful?

When considering whether the erroneous admission or exclusion of evidence constitutes error, the appropriate standard of review is whether the trial court abused its discretion. "The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles*." Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238 (Tex. 1986), *cert. denied* 476 U.S. 1159 (1986), *citing Craddock v. Sunshine Buslines,* 133 S.W.2d 124, 126 (Tex.Com.App.--1939, opinion adopted). Another way of stating the test is whether the act was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Company,* 665 S.W.2d 439, 443 (Tex. 1982); *Landry v. Travelers Insurance Co.,* 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Southwestern Bell Telephone Co.*

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v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn,* 321 S.W.2d 290, 295 (Tex. 1959).

As appellate courts are quick to point out, not all error constitutes reversible error. One of the most difficult steps in handling evidentiary issues on appeal is convincing the appellate court that the trial court's error in admitting or excluding error was harmful. The civil harmless error rule is contained in Texas Rules of Appellate Procedure, Rule 44.1.

Formulations of the harmless error rule vary from time to time. Since 1989, however, the Supreme Court has consistently followed the formulation contained in former Texas rules of Appellate Procedure, Rule 81(b)(1). *E.g., Hill v. Winn Dixie Texas, Inc.,* 849 S.W.2d 802, 803-804 (Tex. 1993); *Elbaor v. Smith,* 845 S.W.2d 240, 251 (Tex. 1992); *Alvarado v. Farah Mfg. Co.,* 830 S.W.2d 911, 917 n.8 (Tex. 1992); *McCraw v. Maris,* 828 S.W.2d 756, 757-58 (Tex. 1992); *Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989). Harmful error is shown under this test when the evidence is controlling on a material issue and is not cumulative. *Mentis v. Barnard,* 870 S.W.2d 14, 16 (Tex. 1994). Furthermore, *McCraw* specifically rejected the requirement of a "but for" relationship between the error and an improper judgment. *City of Brownsville v. Alvarado,* 897 S.W.2d 750 (Tex. 1995); *McCraw,* 828 S.W.2d at 758; *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex. App.--El Paso 1994, writ denied).

There is some authority in the courts of appeals that a case is reversible on wrongful admission or exclusion of evidence only if the entire case turns on the particular evidence. *Litton v. Hanley*, 823 S.W.2d 428, 429-30 (Tex.App.--Houston [1st Dist.] 1992, no writ); *LaCoure v. LaCoure,* 820 S.W.2d 228, 235 (Tex.App.--El Paso 1991, writ denied); *Dudley v. Humana Hosp.,* 817 S.W.2d 124, 126 (Tex.App.--Houston [14th Dist.] 1991, no writ); *Rawhide Oil Co. v. Maxus Exploration Co.,* 766 S.W.2d 264, 279 (Tex.App.--Amarillo 1988, writ denied). Other courts of appeals

combine the "entire case turns" language with former Rule 81(b)(1) language. *E.g., Service Lloyds Ins. Co. v. Martin,* 855 S.W.2d 816 (Tex. App.--Dallas 1993, no writ); *Riggs v. Sentry Ins. Co.,* 821 S.W.2d 701, 708-709 (Tex.App.--Houston [14th Dist.] 1991, writ denied). The "entire case turns" language has been questioned in recent opinions. *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex.App.--El Paso 1994, writ denied); *Castro v. Sebesta,* 808 S. W. 2d 189, 192 n. 1 (Tex.App.--Houston [1st Dist.] 1991, no writ). The state of the law with regard to this language is unclear; if it is viewed as a separate standard, the Supreme Court has not developed it in a harmful error analysis in more recent cases, *see, e.g., City of Brownsville v. Alvarado, 897* S.W.2d 750 (Tex. 1995); if it is viewed as a permutation of the "but for" standard, then it should be viewed as disapproved by *McCraw*; if it is a higher standard than "but for," it is most certainly disapproved by *McCraw.* Perhaps the language is only a variation of the other language often present in this area of the law -- that the evidence must be controlling on a material issue in the case. *See Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989).

Other factors also play into the harmless error arena. If the evidence complained of is only cumulative of other evidence admitted, then error with regard to admission or exclusion is harmless. *Id.; Hyundai Motor Co. v. Chandler,* 882 S.W.2d 606, 620 (Tex.App.--Corpus Christi 1994, writ denied); *see State v. McKinney,* 886 S.W.2d 302, 305 (Tex.App.--Houston [1st Dist.] 1994, writ denied). Furthermore, the evidence must concern an issue material to the case. *Durbin v. DalBriar Corp.,* 871 S.W.2d 263, 271 (Tex.App.--El Paso 1994, writ denied).

The Supreme Court rejected a variation in this area in *Williams Distributing Co. v. Franklin,* 898 S.W.2d 816 (Tex. 1995). *Williams* involved expert testimony excluded due to a party's failure to supplement its discovery designation of expert witnesses. Another expert had been properly designated by the party to testify on the same issue. Without determining if exclusion was erroneous, the Dallas Court of Appeals held that harmful error was not shown because there was no showing the party "was unavailable to testify or **would not give controlling evidence** himself." [Emphasis added.] *Williams Dist. Co. v. Franklin,* 884 S.W.2d 503, 510 (Tex. App.--Dallas 1994), *rev'd,* 898 S.W.2d 816, (Tex. 1995). The Supreme Court attacked the emphasized language, holding that it put a party to an unpleasant election between offering "weaker" testimony and abandoning the exclusion complaint, or disparaging the "weaker" testimony as not controlling. The court also held that it amounted to an impermissible intrusion into a party's trial strategy regarding whether or not to call a witness and determining what evidence is best to put before the jury.

B. Challenges to Sufficiency of the Evidence

Many appeals encompass a sufficiency review. In short, sufficiency of the evidence relates to fundamental questions: "Is there any evidence? Is it enough?" What follows are the standards used by Texas appellate courts, what those standards mean, how they are used by those courts, and how you should use them in appellate proceedings. Detailed discussion of the review of the sufficiency of the evidence is available in excellent articles. *See* William Powers, Jr. and Jack W. Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 Tex.L.Rev. 515 (1991) and Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 Tex.L.Rev. 361 (1960).

Note that as a general rule, in the event a "no evidence" point of error is sustained, it is the court's duty to reverse and render rather than remand. *Vista Chevrolet, Inc. v. Lewis,* 709 S.W. 2d 176 (Tex. 1986); *National Life Accident Insurance Co. v. Blagg,* 438 S.W.2d 905, 909 (Tex. 1969). However, to obtain the benefit of a rendered judgment, the appellant must have raised the no evidence issue in a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion for judgment n.o.v., or a motion to disregard the jury's answer. While the no evidence issue may be preserved by motion for new trial, where it is preserved **only** by motion for new trial, the appellate court may only reverse and **remand**. It may not reverse and **render.** *Gillespie v. Silvia,* 496 S.W.2d 234 (Tex.Civ.App.--El Paso 1973, no writ). This distinction is made because the motion for new trial asks for just that -- a new trial. Thus, remand is proper. However, where the motion before the court is styled, "Motion to Modify, Correct or Reform Judgment, Or in the Alternative, Motion for New Trial," rendition is proper. *City of Garland v. Vasquez,* 734 S.W.2d 92 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). In this situation, the city had prayed for rendition of a take nothing judgment on the basis of a no evidence claim while the motion for new trial was merely an alternative plea for relief.

1. <u>Legal Sufficiency Challenges</u>

A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. In reviewing a verdict for legal sufficiency, the reviewing court must credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005). "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact. *Id.*

There are basically two separate "no evidence" claims. When the party having the burden of proof suffers an unfavorable finding, the point of error challenging the legal sufficiency of the evidence should be that the fact or issue was established as "a matter of law." When the party without the burden of proof suffers an unfavorable finding, the challenge on appeal is one of "no evidence to support the finding." *See Creative Manufacturing, Inc. v. Unik,* 726 S.W.2d 207 (Tex.App.–Fort Worth 1987, no writ). The concept of legal sufficiency of the evidence encompasses the common terminology that there is no evidence to support a jury finding, or that a proposition is proved "as a matter of law." The concept really relates to the following questions, depending upon one's status as proponent or opponent of a fact in issue: (1) is there any legally recognized evidence in support of a finding? or (2) is there any legally recognized evidence opposed to a non-finding? The term "legally recognized" encompasses the idea that in certain factual situations, though there is some evidence present, the evidence constitutes "no evidence" as a matter of law of the fact in issue. In conducting a legal sufficiency review, the reviewing court must consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *City of Keller*, 168 S.W.3d at 822. The reviewing court must be mindful that jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. *Id*. at 819. If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. *Id*. at 822. However, the reviewing court must always remember that the ultimate test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Id*. at 827. Proper legal sufficiency review must

credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

In discussing what evidence could be credited, and what evidence could not be disregarded, by a reasonable juror, the Texas Supreme Court identified several rules a reviewing court must keep in mind when deciding whether evidence offered to prove a vital fact was legally sufficient. First, evidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did. *Wilson,* 168 S.W.3d at 811-12. Thus, if evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict. *Id*. Second, incompetent evidence is legally insufficient to support a judgment, even if admitted without objection. *Wilson,* 168 S.W.3d at 812. If there is evidence in the record which shows that other evidence is incompetent, the evidence proving the incompetency of other evidence cannot be disregarded. *Id*. For example, if an eyewitness' location renders a clear view of an accident physically impossible, it is no evidence of what occurred, even if the eyewitness thinks otherwise. *Id*. Thus, evidence that might be some evidence when considered in isolation is nevertheless rendered no evidence when contrary evidence shows it to be incompetent. *Id*. Third, courts cannot disregard evidence that conclusively establishes the opposite of a vital fact. *Wilson,* 168 S.W.3d at 814.

There are several types of conclusive evidence. First, there is undisputed evidence that allows of only one logical inference. *Id*. Second, there is evidence which an opposing party admits is true. *Id*. at 815. Third, there is undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted. *Id*. at 820. Fourth, the jury is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Wilson*, 168 S.W.3d at 819. The jury may choose to believe one witness and disbelieve another. And a reviewing court cannot impose its own opinions to the contrary. *Id*. Of course, the jury's decisions regarding credibility must be reasonable. *Id*. at 820. Jurors cannot take evidence out of context, cannot disregard evidence which shows that other evidence is incompetent, and cannot disregard evidence that conclusively establishes the opposite of a vital fact. *Id*. at 811-17, 820. Proper sufficiency review prevents reviewing courts from substituting their opinions on credibility for those of the jurors. *Wilson*, 168 S.W.3d at 816-17. However, proper review also prevents jurors from substituting their opinions for undisputed truth. *Id*. When evidence contrary to a verdict is conclusive, it cannot be disregarded. *Id*. Further, when evidence in support of a verdict is taken out of context or is incompetent, it must be disregarded. *Id*. at 811-17, 820. The threshold question in a legal sufficiency review is whether the evidence constitutes *more than a scintilla* of evidence probative of a fact in issue. Zero evidence always fails, of course. Direct evidence of a fact in issue is always more than a scintilla; therefore, if there is some direct evidence of a fact in issue, a jury finding of that fact will be sustained against a legal sufficiency attack. Whether evidence is direct or circumstantial is a critical inquiry. Some circumstantial evidence is deemed so weak that it is considered no evidence of a fact in issue as a matter of law, i.e. it is a mere scintilla. This is the case when the circumstantial evidence requires multiple inferences to reach a finding of a fact in issue, *Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 927 & n.3 (Tex. 1993), or when the inference of a fact in issue from circumstantial evidence is no more likely than an inference of the opposite of a fact in issue. *Walmart v. Gonzalez,* 968 S.W.2d 934, 936 (Tex. 1998); *$57,600 v. State,* 730 S.W.2d 659, 662 (Tex. 1987). Finally, circumstantial evidence falls into the "mere scintilla" category unless the evidence furnishes some reasonable basis for the conclusion by reasonable minds as to the existence of a vital fact. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Orozco v. Sander,* 824 S.W.2d 555, 556 (Tex. 1992). These theories are still alive and well in Supreme Court and can rescue or hamstring practitioners on appeal. *City of Keller*, 168 S.W.3d at 813-14. Therefore, analysis of the number of inferential steps required to reach a finding of a fact in issue, and just plain deep thought about other inferences from circumstantial evidence, is worth the time.

2. <u>Factual Sufficiency Challenges</u>

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. The test for factual insufficiency points is set forth in *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951). In reviewing a point of error or issue for review asserting that a finding is against the great weight and preponderance of the evidence, the appellate court must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. If the verdict is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the point should be sustained. This is true even if the finding is supported by more than a scintilla of evidence and even though reasonable minds might differ as to the conclusions to be drawn from the evidence.

The realm of insufficient evidence exists where there is some evidence of a fact in issue, sufficient such that a jury question is warranted, but that evidence will not support a finding in favor of the proponent of that fact in issue. The parlance used by the courts of appeals is that such a finding shocks the conscience. or that it is "manifestly unjust" limited by such phrases as "the jury's determination is usually regarded as conclusive when the evidence is conflicting," or "we cannot substitute our conclusions for those of the jury," or "it is the province of the jury to pass on the weight or credibility of a witness's testimony." *See, e.g., Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 30 (Tex. 1994); *Beall v. Ditmore,* 867 S.W.2d 791, 795 (Tex.App.–El Paso 1993, writ denied).

The method employed for reviewing factual sufficiency requires the reviewing court to look at all of the evidence, not just the evidence supporting a jury finding. *In re Kings Estate,* 150 Tex. 662, 244 S.W. 2d 660, 661 (1952). For example, in *Ellis County State Bank v. Keever,* 915 S.W.2d 478 (Tex. 1996), the court of appeals affirmed a punitive damage award and the defendant appealed. The Supreme Court noted that the court of appeals had reviewed only the evidence supporting the award. The Court then admonished the lower court that while conducting a factual sufficiency review of the damage award under *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10 (Tex. 1994), it must detail all of the relevant evidence and explain why the evidence supports or does not support the punitive damages award. The court remanded the case to the court of appeals for a *Moriel* analysis. The converse is equally true. Where the court of appeals overturns findings because of factual insufficiency, it must consider all of the evidence and state why the finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust. In *Ortiz v. Jones*, 917 S.W.2d 770 (Tex. 1996), the Supreme Court reversed because the court of appeals did not discuss and apparently did not consider the evidence supporting the finding. Further, the Supreme Court requires the court of appeals to lay out the relevant facts with regard to factual sufficiency challenges sustained to insure that the appellate court applied the correct method of analysis. *Pool v. Ford Motor Co.,* 715 S.W.2d

629, 635-36 (Tex. 1986). This is an opportunity for an advocate to marshal all the facts, showing that the client's position is the righteous one and that the jury was swayed by some adverse force to find as they did.

3. Enhanced Burdens of Proof

Enhanced burdens of proof, i.e. clear and convincing evidence, require a different analysis. The traditional legal sufficiency standard is inadequate when proof by clear and convincing evidence is required. *In the Interest of J.F.C., A.B.C., and M.B.C.*, 96 S.W.3d 256, 264-65 (Tex. 2003). Instead, review must take into consideration whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the matter on which the proponent bears the burden of proof. *Id.* at 266. To give appropriate deference to the fact finder, the reviewing court must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so. Consequently, a court should disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible; but it doesn't require a court to disregard all evidence that does not support the finding. *Id.* at 266. If the court determines that no reasonable fact finder could form a firm belief or conviction that the matter that must be proven is true, then the evidence is legally insufficient. In a factual sufficiency review, the court of appeals must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. *Id., citing In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). The inquiry must be whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the allegations. A court of appeals should consider whether disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of its finding. If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that the fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

To be continued .....

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

What do women have to do with it?

By Clinton F. Cross

(*Based on a March, 2005 article in the El Paso Bar Bulletin*)

When I graduated from law school in 1968, there were few women law students. There were fewer female lawyers. One of my female classmates obtained a job with Fulbright, Freeman, Bates and Jarwoski. At the time, the firm only employed three female attorneys. Two of the three female lawyers in the firm did collection work. My friend was pessimistic about her future.

When I arrived in El Paso, Alice Dwyer and Ruth Kern had established practices, primarily in family law. Doris Sipes, a fellow classmate, came to El Paso at the same time. She got a job with District Attorney Steve Simmons, screening but not trying cases. When Doris persuaded the grand jury to indict the Director of the Juvenile Department for theft, District Attorney Simmons assigned trial of the case to Doris. Although at the time she had no previous trial experience and she was expecting the birth of a child, Doris obtained a conviction.

In 1969, the El Paso Bar Association was a fraternity; not a fraternity and a sorority. The Bar Association's annual banquet usually featured a clever skit. Frequently, some of the scenes were a bit 'off-color.' Female attendance at the banquet was not expected. Ruth Kern was the first woman lawyer to attend the event and she was asked to leave at the conclusion of the social hour. Kitty Schild and Judge Janet Reusch (no longer in El Paso) went the next year but when asked to leave declined to do so. With increased female attendance, the event eventually was replaced by the annual Law Day banquet.

The female lawyer's participation in the adversary process has not always been welcomed. After all, isn't a trial a 'war'? Shouldn't men be society's 'warriors'? The Pentagon only recently decided to send women into combat with men. Debate over that decision will in all likelihood continue for some time.

For some reason, in the 1970's, '80's, and 90's women began to attend law schools in larger and larger numbers. Most of the women students graduated; some settled in El Paso. Susan Urbieta, Kitty Schild, and Susan Larsen, for instance, left their home towns and moved to El Paso to practice law. Of the aforementioned, each one first went to work for the El Paso Legal Assistance Society. A few years later, two held elected judicial positions. Another former EPLAS attorney, Alma Trejo, also was elected to a judicial post. Many years later Susan Urbieta was elected President of the El Paso Family Bar Association.

Today more women attend law school than men. Soon, if not now, women may hold more judicial position than men. What is driving this cultural change? Is it just about being fair to women or are other factors involved? Why are women mounting courthouse benches faster than they are mounting church pulpits? Isn't the courthouse the 'temple of justice' and are not judges members of a 'secular priesthood'?

In addition to simply being 'fair' to women, will their participation in the profession make a difference in any way? Are women lawyers just like male lawyers, only with different bodies? Are they spiritually different? If so, will female attorneys in time perhaps modify the way the profession manages conflict resolution, in ways that might not otherwise occur without their participation?

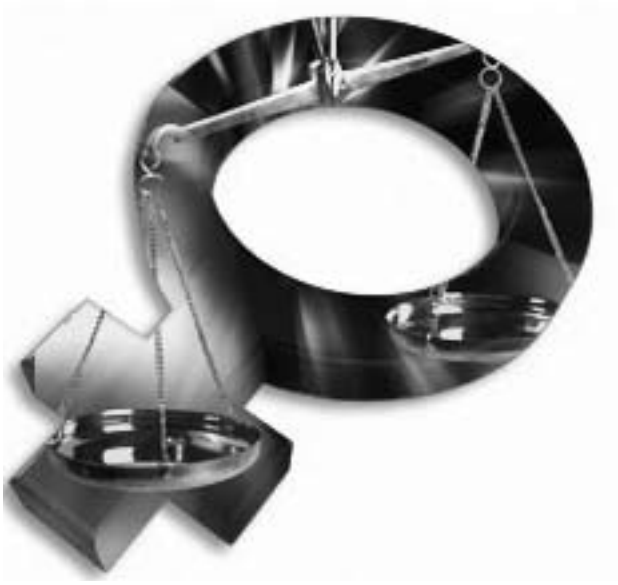
CLINTON CROSS is an Assistant El Paso County Attorney responsible for prosecuting criminal Deceptive Business Practice cases

The El Paso Women's Bar Association:
A fresh Vision for Better Justice and a Better Community

By Janet Monteros

The El Paso Women's Bar Association invites you to participate in their association. As a member, you can access the legal experiences of your peers as well as share experiences about juggling the challenges presented by the competing concerns of law practice, bar participation and personal life.

Women attorneys in El Paso County constitute less than 0.04 of the total population.[1] Throughout the rest of the United States, women comprise 26% of the national and state judiciary.[2] In El Paso County, women attorneys constitute almost 50% of the judiciary and a robust number of the elected official positions. Every day, the impact of women attorneys is felt in countless numbers of households, impact which is dramatically disproportionate to the .04% of the population.



The El Paso Women's Bar Association maintains a presence in the El Paso community through women leaders in this county. Key leaders such as Susan Urbieta, Kitty Schild, Susan Larsen,, Carmen Rodriguez, Cezy Collins, and Alma Trejo, were and are active in the legal community, all of whom first went to work for the El Paso Legal Assistance society.

Historic landmarks continue for women attorneys, such as the recent historic composition of an all woman member Eighth Court of Appeals with Chief Justice Ann McClure, Justice Guadalupe Rivera and Justice Yvonne Rodriguez.

The key mission of the El Paso Women's Bar Association is to maintain a leadership presence in the El Paso community, especially for the children of El Paso County. Marie Wilson, the Founding President of the White House Project recently said, "You can't be what you can't see." The El Paso Women's Bar Association wishes to see more young people taking an interest in their roles as leaders in the community, efforts which will impact the positioning of El Paso County in the rest of Texas and the country.

The El Paso Women's Bar Association sponsors the following projects, hoping to make a difference in the lives of El Pasoans:

- Through the Positive Role Model Programs which includes a pen pal program,. coordinated by Judge Salas-Mendoza with County Attorney Jo Anne Bernal and Judge Kathleen Olivares with Cezy Collins. The programs involve bringing 5th graders from Burleson and Aoy elementary schools to the courthouse on a monthly basis to hear speakers, learn about the law and be exposed to positive influences in the law.
- The EPWBA offers continuing legal education courses usually in the area of ethics, at no cost to members, during some of its meetings, conveniently held at the county courthouse during the lunch hour on the second Wednesday of every month.
- The EPWBA participates with other nonprofits in conducting food drives for the community.
- The EPWBA assists Judge Yahara Gutierrez in facilitating her extraordinary and memorable National Adoption Day in El Paso, at which where foster children are adopted by loving families.

The EPWBA also holds an annual Charity Bash event to raises money for the Legal Charitable Foundation of El Paso, a 501(c)(3) tax-exempt charitable organization created by the El Paso Women's Bar Association, which awards scholarships to local area students and awards grants for law-related public-service projects, such as Project Future. The EPWBA also founded Project Future to provide internships to youths "aging" out of foster care, giving them the job skills and positive work environment needed for a more productive and stable life. Project Future was spearheaded by County Attorney Jo Anne Bernal, Judges Maria Salas Mendoza, Yahara Gutierrez, Annabelle Perez, assistant District Attorney Lily Stroud, Assistant County Attorneys Marilyn Mungerson and Gabriella Edwards Reed.

Women lawyers in El Paso come together as members of the El Paso Women's Bar Association to build important personal and professional relationships; And to support attorneys personal and professional growth by providing access to needed resources and connecting members with other women who share an undivided passion for the law, for women's issues, and for the community. We also understand that our members, whether in private practice or governmental practice, have different needs and that everyone defines personal and professional success a little differently. The EPWBA has room for everyone and invites you to join our efforts to serve our profession and larger community.

Footnotes

1. Figures from the State Bar of Texas, Department of Research and Analysis, "El Paso County: Attorney Statistical Profile (2011-12) report female attorneys number 335, 28% of the total number of attorneys (1,202) in El Paso county. The U.S. Department of Commerce in its United States Census numbers report El Paso County at a population of 820,790 in the year 2011.
2. *Women in Federal and State-Level Judgeships.* A Report of the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York. Spring 2010.

JANET MONTEROS is President of the El Paso Women's Bar Association. She is also presently Regional Counsel for the Texas Health and Human Services Commission.

Spotlight On A Lawyer

Teresa Beltrán

By Clinton F. Cross

This month I wanted to interview a "Senior" female attorney for this featured column. Unfortunately, I could find no one willing to submit to an interview. I decided to forego the "senior" requirement, met with Teresa R. Beltrán and talked about her mid-life decision to follow in her son's footsteps and become a lawyer.

CROSS: Tell me a little bit about your parents.

BELTRAN: My father was from Zacatecas, Mexico; my mother was from Chihuahua, Mexico. My parents emigrated from Mexico to the United States without visas. They met in Smeltertown, fell in love, got married, and then moved to Arizona.

My mother and father had fifteen children but five died at birth. Four of the children were born in Arizona. The rest were born in El Paso. I was the thirteenth child and I was born here in El Paso.

My dad died in 1951, leaving my mother with ten children and no life insurance. In 1951, there were no social or financial safety nets. We learned early on that we had to work hard and work together to get ahead. In spite of the financial challenges, all but three of the surviving ten children--five men and five women--earned college degrees.

CROSS: Any of them become professional people?

BELTRAN: Yes, two brothers became educators. Another is a metallurgical engineer; another is an advertising executive. One of my sisters is a registered nurse and another one was a business executive. The other three that did not get a college degree had successful careers in their line of work.

CROSS: Where did you go to school?

BELTRAN: I graduated from Thomas Jefferson High School. After I got married, I went to the University of Texas at El Paso (UTEP).

CROSS: Who did you marry?

BELTRAN: I married Hector Beltrán. He is the bailiff in County Court Seven. We have been married almost 43 years.

Teresa Beltrán

CROSS: Did you have any children?

BELTRAN: Yes, I had a son, Hector Andre Beltrán, who is a lawyer here in El Paso and a daughter, Celina Renée Beltrán, who is a medical doctor at Centro San Vicente Clinic in El Paso.

CROSS: Did you go to UTEP right after you got married?

BELTRAN: No. Shortly after we got married, Hector started his own business. He owned a security guard company that eventually expanded throughout Texas, New Mexico, Arizona and Oklahoma. The company specialized in providing professional security guards at federal government buildings. This was a natural progression for him as he came from a law enforcement background.

CROSS: You were a "stay at home" mom?

BELTRAN: No, I worked at Ft. Bliss to help support the family when the business was young and then in Hector's business when the business started growing.

CROSS: Let's get back to talking about your education. When did you decide to go back to school?

BELTRAN: I went back to school in 1981, when my son Hector was nine and Celina was six. I graduated from UTEP in 1985 with a Bachelor of Business Administration Degree. I majored in Accounting and Finance.

CROSS: What did you do after graduation?

BELTRAN: When I graduated from UTEP, our business had grown quite a bit. I felt I could be an asset to the business because of my business degree. So I continued working with Hector as the chief financial officer for the business. After being in business for over twenty years, we sold our business in 1998. At that time, we had over 300 employees in five states.

CROSS: How did you end up going to law school?

BELTRAN: Since I was a young girl I wanted to be a lawyer. My hero was Perry Mason. Back in those days it was unheard of to see a Latina lawyer but I didn't care; I had a dream. A year after we sold the business, I decided it was now or never to realize my dream of becoming an attorney.

CROSS: Did you attend law school with your son?

BELTRAN: No, my son had graduated from UT Law School in Austin the year before I started law school and was working for a law firm in El Paso.

CROSS: Where did you go to Iaw school?

BELTRAN: South Texas College of Law in Houston

CROSS: What was it like to be in law school as a mature student?

BELTRAN: I'd been out of college for several years, plus I was more than twice the age of the majority of my classmates, so it was quite an adjustment. It was comical that most of my classmates thought that because I was older, I had a better understanding of the law courses. Boy were they wrong!

CROSS: How did your family feel about you going to law school in your mid-life years?

BELTRAN: It was hard on my husband but

he nevertheless was supportive. My children were especially supportive; they encouraged me and gave me moral support whenever I was filled with self-doubt. They believed in me even in those moments when I did not believe in myself.

CROSS: Did your children attend your graduation?

BELTRAN: Yes, my son "hooded me" at my graduation ceremony, a very proud moment for me. Then when my daughter graduated from medical school, she asked me to "hood" her, also a very proud moment for me.

CROSS: What are you doing now?

BELTRAN: I am practicing law as a sole practitioner, focusing on state and federal criminal defense, probate and collection work. I'm also a volunteer mediator for the Dispute Resolution Center.

CROSS: Did you find it hard to practice law on your own right out of law school?

BELTRAN: Yes and no. Clients tend to feel comfortable with me because I'm older and they assume I've been practicing law for a long time. It has not been hard getting clients. While I am not a "senior" lawyer as far as years in practice, I am a senior lawyer because of my age. I've had to learn a lot of things by trial and error, especially procedural matters.

BELTRAN: Do you office with your son?

BELTRAN: No, my son is married to Angélica Carreón-Beltrán, who is also an attorney, and they office together. I office with Charlie Vinson who has been practicing law for almost forty years.

CROSS: Is the practice of law what you imagined it would be all those years?

BELTRAN: It is much more challenging and rewarding than I imagined it would be.

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

El Paso Bar Foundation Fellow's Journal Recognition:

The El Paso Bar Foundation would like to thank the following Life Fellows who provided generous financial support to the Foundation over the last few years. The Foundation was established in 1999 by the El Paso Bar Association. The Foundation awards annual grants to organizations for projects that promote activities which further the administration of justice, enhance the stature of the legal profession and serve the interest of the El Paso community. The El Paso Bar Foundation Fellow who have fulfilled their commitment to the Foundation are:

Hon. Gary Aboud
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Additionally, the Foundation would like to thank members of the El Paso Bar Association who have given donations through their membership dues.

HELP!

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

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

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

ADVANCE SHEET, *1550 A.D.*

By Charles Gaunce

In my career, I have read numerous summaries of legal principles: Corbin on Contracts, Prosser on Torts, McCormick on Evidence, etc. I am also sure that many of the readers of this have also read the same or similar summaries. These summaries have a long and glorious history in legal education. When I started law school, it was not unusual for acquaintances to comment that I was planning to "read Blackstone." William Blackstone, 1723 – 1780, wrote *Commentaries on the Laws of England.* These volumes were readily accessible to both counsel and judges and formed the backbone of the precedential legal system of both England and the United States for the reason that they were far more readable and understandable than the serial opinions regularly handed down by the courts. Blackstone digested the holdings and gave a roadmap of sorts for the parties to litigation to follow. He was not the first to do so.

Others who had preceded him in writing commentaries on the law included Ranulf de Glanvill, *Treatise on the laws and customs of the Kingdom of England,* circa 1180, first printed 1554, and Henry de Bracton, *On the Laws and Customs of England,* 1235 – 1260. I will focus here on a third work, *The Mirror of Justices,* author unknown, that was first cited in a case argued before the Exchequer Chamber in 1550. Manuscript copies of this work were passed about among jurists and counsel, and Edward Coke, Chief Justice of the King's Bench, 1613 – 1616, referred to it as "a very ancient and learned treatise of the laws and usages of this kingdom whereby the commonwealth of our nation was governed about eleven hundred years past."

The Mirror of Justices treats women in a manner that gives us today pause to consider the rather remarkable journey that women have trod through our legal history. The commentary provides:

> "Judges are those who have jurisdiction. All save those forbidden by law can be judges. The law forbids women to act as judges, and hence it is that women are exempt from doing suit to the inferior courts." Book II, Chapter II.

Thus, if you happened to be female, you had a strict bar placed upon your career choices in that you could not, in any event, choose to be a jurist. Nor could you commence an action of any sort that was subject to review by an appellate court. This kind of legal reasoning limits a person's legal rights, but the English courts weren't too bothered by such niceties; as it only involved women, after all. But, it being English law, you just know that there were exceptions. And sure enough:

> "Who may be plaintiffs. Plaintiffs are those who seek their own right of another's by plaints. All save those forbidden by law can bring accusations and plaints. The following cannot accuse: lepers, idiots without guardians, children underage without guardians, criminals outlaws, exiles, banished men, women who are waived, serfs without their owners, married women without their husbands…." Book II, Chapter III.

A woman who is waived is a woman who by her conduct has deprived herself of the protection of the law. While the term generally means to us a woman who had committed an illegal act, the English were not so obliging. "Depriving herself of the protection of the law" could mean just about anything the justices hearing the case wanted it to mean, including an unchaste unmarried woman.

A woman could bring a case for the slaying of her husband, because that action was commenced by an appeal, not by accusation or plaint:

> "To the appeal of homicide all persons connected by consanguinity, affinity, or alliance are wont to be received; but the appeal of the wife of the slain is receivable before all others. This, however, is not so with all wives, but only of her in whose arms, *i.e.* in whose seisin, he was slain, for if he had several wives and all of them were alive at the time of his death, the appeal of her whom he last held as his wife is receivable before all the others, albeit she was not his wife de *iure*; and this is because the lay court cannot try the question which was his wife *de facto* and which de *iure*; and the appeals of all the others are suspended pending the appeal which is receivable." Book II, Chapter VII.

Rummaging about in the early volumes of English law is a fascinating journey of discovery. There is a myth that the Eskimo have an unusually large number of words for "snow" because the various distinctions have such a large impact upon their survival. Applying the same logic to early English law leads on to truly wonder what was going on in Ye Merrie Olde England. I will leave it to the reader to explore further, but I will leave you with the knowledge that *The Mirror of Justices* provides for five different levels of rape "if we speak correctly and differentiate sins of which some are greater than others." Book I, Chapter XII.

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

Waiting Period for Probate Letters of Testamentary, Administration and Guardianship

To All Members of the El Paso Bar Association:
Please be advised that effective January 1, 2013, there will no longer be a 24 hour waiting period to receive "Letters of Testamentary", "Letters of Guardianship" or "Letters of Administration" from the El Paso County Clerk's Probate Division, provided that all documents required to receive "Letters" have been filed and approved by the respective Probate Court.

Using Binding Arbitration Clauses in Attorney – Client Representation Agreements

by Charles Skinner

With the movement toward Alternative Dispute Resolution in all manner of contractual agreements to reduce the time, expense and public nature of lawsuits, it was only a matter of time before mandatory binding arbitration clauses would be examined by attorneys for use in engagement agreements to settle fee disputes and malpractice claims.

An arbitration agreement can have many benefits. From a cost standpoint, arbitration is almost always less expensive than any form of civil trial, in large part because it has more relaxed rules which allow for presentation of evidence that is relevant, leading to less objections over evidence and testimony which might be excluded in the normal civil setting. Further, an experienced arbitrator, by being an active investigator in the dispute rather than a passive observer, can often use the questions asked during the arbitration hearing to formulate an outcome which is a better fit to the dispute between the parties than a traditional judicial award.

The Texas Disciplinary Rules of Professional Conduct do not specifically address the use of arbitration clauses (binding or non-binding) in client representation agreements. However, the rules do prohibit a lawyer from prospectively agreeing to limit the lawyer's malpractice liability unless the agreement is permitted by law and the client is independently represented for the purposes of that agreement. See Rule 1.08(g).

The Supreme Court Professionalism Committee, via the Texas Center for Legal Ethics in Opinion 586 dated October of 2008, has agreed with the view that a binding arbitration provision does not prospectively limit a lawyer's liability. Instead, the Committee suggests it is a choice of mechanism between the attorney and client to resolve any claims which might be brought, thereby shifting the resolution of a dispute from a court of law to a different forum. What is not allowed is for the arbitration clause to shield the lawyer from liability to which the lawyer would otherwise be exposed (such as prohibiting recovery of otherwise allowable malpractice damages).

Other states that have addressed the issue of binding arbitration in attorney-client representation agreements have found them impermissible as a business transaction between an attorney and their client. But in Opinion 586, the Committee stated that it "is of the opinion that Rule 1.08(a) [prohibiting business transactions with clients unless the transaction is fair and the client has the opportunity to be otherwise represented] does not apply to a transaction establishing a lawyer-client relationship." The Committee also stated that as a general principle, all transactions between client. and a lawyer should be fair and reasonable to client. Thus, a lawyer should not attempt to include clearly unfair terms, such as lawyer's sole selection of arbitrator, remote location or imposition of excessive costs of arbitration upon the client. Insistence on any such onerous term, the Committee states, would be both fundamentally unfair to the client and would violate Rule 1.08(g) as an impermissible prospective limitation on malpractice liability.

With these limitations in mind, if you are considering using a binding arbitration provision in your client representation agreements, take into account that the client must receive sufficient information about the differences between litigation and arbitration to make an informed decision to agree to the clause. This is one of the few duties which would attach before a lawyer-client relationship is established. See Rule 1.03(b). This information should include advantages and disadvantages such as:

a) The waiver of significant rights, such as the client's right to a jury trial.

b) The possibly reduced level of discovery by either party.

c) The loss of the right to a judicial appeal because arbitration decisions may only be challenged on very limited grounds (almost exclusively lack of disclosure of personal, professional or business relations of the arbitrator with one of the parties). See *Karlseng v. Cooke,* 346 S.W.3d (Tex. App. --Dallas. 2011).

d) Even if the arbitrator makes an error of law or fact, the opinion is not generally subject to judicial review under the Texas Arbitration Act. [You and the client may add an expanded judicial review provision of arbitration awards, but this is not required by law. See *Nafta Traders, Inc. v. Quinn,*339 S.W.3d 84 (Tex. 2011)].

e) The relaxed application of the rules of evidence.

f) The privacy and confidentiality of the arbitration process as compared to a public trial.

g) The method of selecting arbitrators, which should also be spelled out in your agreement.

h) Any obligation of the client to pay some or all of the fees and costs of any arbitration, if those costs could be substantial.

Remember, the key is providing *sufficient* information, and the disclosure may vary from client to client. But in Opinion 586 the Committee reminds the lawyer that the overriding concern should be that the lawyer provide information necessary for the client to make an informed decision.

There are two final ideas to keep in mind when considering using a binding arbitration clause in representation agreements:

1) The Texas Courts of Appeals are split on "whether a legal malpractice claim is one for 'personal injury,' which under the Texas Arbitration Act can be the subject of an arbitration agreement only if the client has separate representation in entering into the agreement." Ethics Opinion 586 lists several cases with conflicting opinions regarding this fact. To my knowledge, the 8th Court of Appeals has not ruled on whether a legal malpractice claim is one for 'personal injury.' If you also practice outside the 8th Circuit's territory, as one of my favorite law professors used to say: "Check your local jurisdiction when you get home."

2) Some requirements and "best practices" tips for construction and use of the arbitration clauses in your representation agreements:

a) Under the Texas Arbitration Act, the arbitration agreement must be in writing.

b) As a matter of contract construction, it

is recommended that arbitration clauses be in all capital letters, bold and underlined. It is an important clause, on the same level as the fee agreement. Treat it similarly.

c) Set the location of the arbitration in the clause, such as El Paso County.

d) Set which rules will govern any arbitration in the clause (American Arbitration Association, Better Business Bureau Arbitration Program, or other arbitration association).

e) State that the decision must be provided in writing, and must include assessment of costs, expenses and reasonable attorney's fees.

f) Set the method of selecting the arbitrator(s). My preference is to include language which limits the selection of arbitrators to those with experience in arbitrating legal representation agreements or arbitrators with not less than 10 years experience unless otherwise agreed to in writing by the parties (you and the client).

g) Briefly restate that the arbitration clause waives significant rights.

h) State specifically that if the client has any questions regarding the arbitration clause, they should consult with another attorney before signing the document.

Arbitration clauses can be powerful tools to use in your client representation agreements in order to reduce the potential cost of any future dispute between you and your client. In order to fulfill your ethical obligations as an attorney, the terms of such a clause must be fair to the client, must not limit the lawyer's liability for malpractice, and the terms, benefits and disadvantages must be explained to the client sufficient for the client to make an informed decision to accept the agreement.

CHARLES SKINNER is an El Paso attorney, a solo practitioner, arbitrator and mediator .

Ads you'll never see again

Law Day Awards

The El Paso Young Lawyers Association *and the* El Paso Bar Association

are soliciting nominations for the following awards: Outstanding Young Lawyer, Outstanding Jurist, Outstanding Senior Lawyer, Outstanding Lawyer, Outstanding Pre-Law Student, Liberty Bell, Professionalism, Pro Bono, Mediator of the Year, Outstanding Federal Attorney and Outstanding State Attorney for 2012-2013.

The awards will be given at the Law Day Dinner on Saturday, May 4, 2013 at Ardovino's Desert Crossing.

Submit the following nominations to Aldo Lopez at alopez22@gmail.com by Monday, April 1, 2013:

OUTSTANDING YOUNG LAWYER:
The nominee must be licensed to practice in Texas and must be 36 years of age or younger, or is in his/her first five years of licensure, regardless of age, on June 1, 2012. In addition, while all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community.

OUTSTANDING JURIST:
The nominee must be currently serving as an active Administrative, Federal or State Judge. The nominee cannot be standing for election or re-election during the year in which the award is given. In addition, while all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community.

OUTSTANDING SENIOR LAWYER:
The nominee must be licensed to practice in Texas. The nominee must have practiced law for 30 years or be over the age of 60 and have practiced law for 15 years. In addition, while all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community.

OUTSTANDING LAWYER:
The nominee must be licensed to practice in Texas. The nominee must be aged out of the Young Lawyer category (i.e. over the age of 36 years of age on June 1, 2012), but not yet eligible for the Senior Lawyer category. In addition, while all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community.

OUTSTANDING PRE-LAW STUDENT (THE CORI A. HARBOUR AWARD):
The nominee must be student enrolled in an institute of higher learning who plans to study law after graduation. In addition, while all outstanding qualities are considered, particular attention is given to service to the community, service to the profession, academic ability, maturity and integrity.

LIBERTY BELL AWARD:
This award is given to a non-attorney who has made a selfless contribution to his/her community to strengthen the effectiveness of the American system of justice by instilling better understanding and appreciation of the law.

Submit the following nominations to Nancy Gallego at ngallego.epba@sbcglobal.netby Monday, April 1, 2013:

PROFESSIONALISM AWARD:
The nominee must be licensed to practice in Texas. He/she is a person who best exemplifies by conduct and character, truly professional traits that others in the bar seek to emulate. The nominee should be an inspiring role model for the bar, respected by his/her peers, and someone who makes us proud of the legal profession. Nominations can be based on a lifetime or a specific occurrence of professionalism. In addition, attention is given to service to the profession and service to the community.

PRO BONO AWARD:
This award honors individuals or law firms (large or small) for the volunteer work they do. Please consider the following criteria: number of hours of pro bono work done, as well as the volunteers attitude and effect of the nominee's pro bono work. In addition, attention is given to service to the profession and service to the community. This award will be selected by the Legal Aid/Lawyer Referral Service Committee of the El Paso Bar Association.

HONORABLE ENRIQUE H. PEÑA MEDIATOR OF THE YEAR AWARD:
This award honors an attorney or non-attorney mediator. Please consider the following criteria: Effectiveness in mediation, allowing all sides to be heard in the mediation process and contribution to promoting use of alternative dispute resolution as an alternative to litigation. In addition, while all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community. This award will be selected by the ADR Committee of the El Paso Bar Association.

OUTSTANDING FEDERAL ATTORNEY:
The nominee must be licensed to practice in Texas. The nominee must work in one of the Federal offices. While all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community.

OUTSTANDING STATE ATTORNEY:
The nominee must be licensed to practice in Texas. The nominee must work in one of the State offices. While all outstanding qualities are considered, particular attention is given to exemplified professional proficiency, service to the profession and service to the community.

Your nominations are sincerely appreciated and will help us recognize and give credit to deserving judges, lawyers and others who have made a positive impact on our profession and community.

El Paso Bar Association

Presents

17th Annual Civil Practice Seminar

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

Approved for 11.75 hours of MCLE, including 2.5 hours of Ethics by the State Bar of Texas & Approved for 9.5 hours of CLE, including 2.5 hours of Ethics by the Nevada Board of Examiners

Randy Grambling, Moderator & Judge Linda Chew, Course Director

Join us for a Weekend of Fun & Education but mostly FUN!!

Schedule (Subject to change)

Thursday, February 14, 2013

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

Friday, February 15, 2013

8:00 a.m. Registration begins

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

9:05 – 10:05 a.m. Intersection/Civil & Criminal
Carl Green, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C. and Mary Stillinger, Attorney at Law, El Paso

10:05-10:15 a.m. Break

10:15-11:15 a.m. Fiduciary Litigation
Milton Colia, Kemp Smith, L.L.P., El Paso

11:15-12:00 p.m. Civil Law Update
Steven Blanco, Blanco, Ordonez, Mata & Wallace, P.C. and Sam Legate, Scherr & Legate, P.L.L.C., El Paso

12:00-1:00 p.m. Lunch to be provided (Sponsors to speak)

1:00-2:30 p.m. Evidence Jeopardy
Judge Tom Spieczny, County Court at Law #7, El Paso and Speaker TBA

2:30-2:45 p.m. Afternoon Break

2:45-3:30 p.m. Immigration ~ The Dream Lives On
Kristin Connor, President, Federal Bar Association, El Paso

3:30-4:15 p.m. Probate ~ Really We Won't Put You to Sleep
Associate Judge Joseph Strelitz,
Probate Court #1, El Paso

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

5:30-6:30 p.m. Happy Hour

Saturday, February 16, 2013

8:00-9:00 a.m. Breakfast to be provided

9:00-9:45 a.m. Family Law – Protective Orders
Gabriella Edwards, El Paso County Attorney's Office, El Paso

9:45-10:30 a.m. Federal Procedure ~ Know It, Learn It, Live It ~ Pointers and Pitfalls
Darryl Vereen, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso

10:30-10:45 a.m. Morning Break

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

Door Prizes will be given throughout the seminar
Course Materials will be in the form of a flash drive

While our Hotel Group Rate is no longer available, please go to the Monte Carlo website to book your room or book your room at one of the many great hotels in Las Vegas.

REGISTRATION FORM

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You can also pay by credit card by going to our website:
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El Paso Bar Association
500 E. San Antonio, L-112
El Paso, Texas 79901

$300 – EPBA Members
$350 - Nonmembers
$225 – Legal Assistants Paralegals

If you have any questions, comments or would like to be a sponsor, please contact the Bar Association Office at (915) 532-7052, (915) 532-7067 - FAX or go to our website, www.elpasobar.com or send an email to nancy@elpasobar.com

EL PASO BAR ASSOCIATION
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El Paso, Texas 79901
(915) 532-7052
(Address Service Requested)

Judge Maria Salas-Mendoza, President
The Board of Directors of the El Paso Bar Association
cordially invite you to attend the annual

Law Day Dinner and Awards Banquet

Saturday, May 4, 2013
Ardovino's Desert Crossing
Sunland Park, NM

Cocktail Hour - 6:00 p.m.
Dinner and Awards Presentation to Follow
Guest Speaker:
Honorable Royal Furgeson

Cost $60 per person
Invitations will be mailed in late March

Contact Nancy at *nancy@elpasobar.com*
for additional information.