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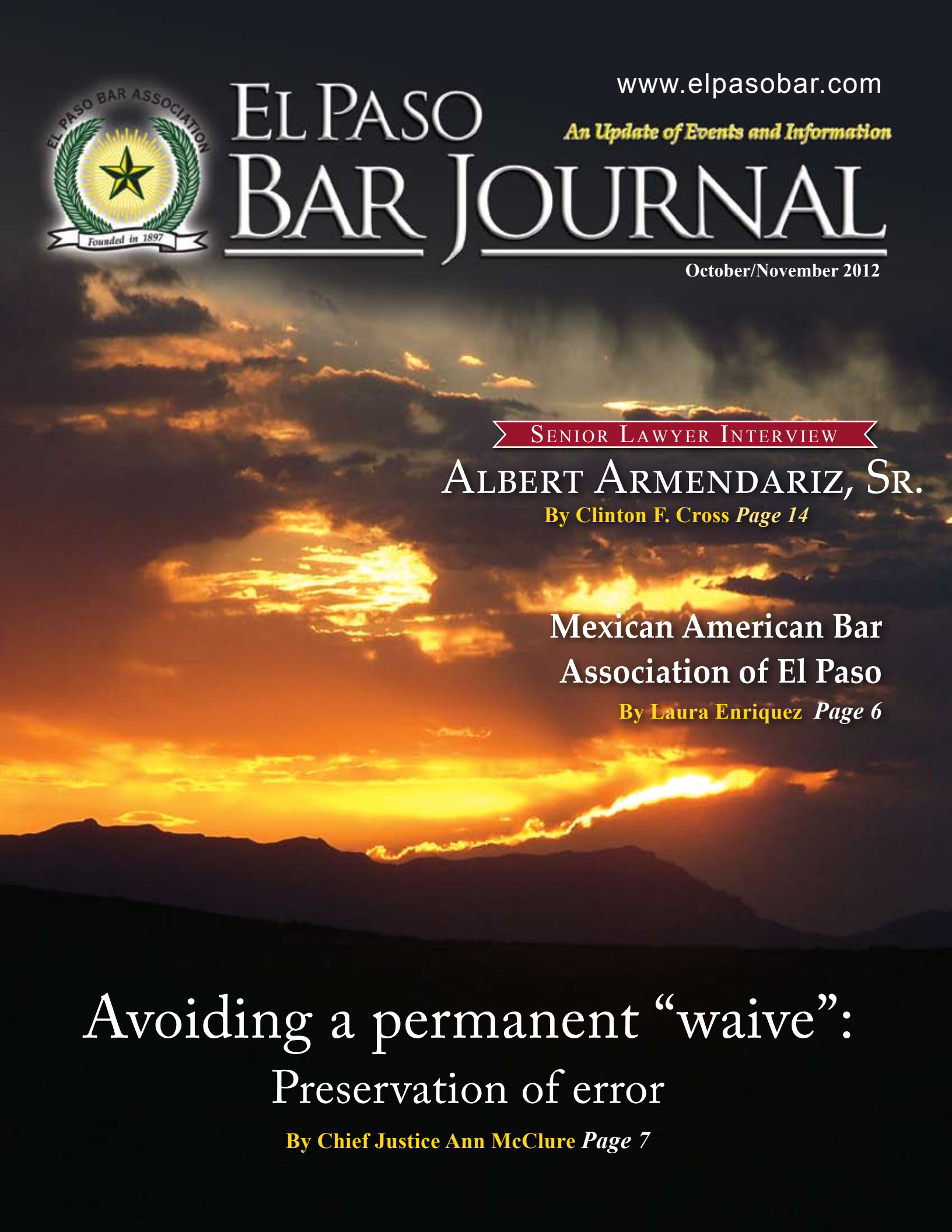
El Paso Bar Journal

An Update of Events and Information

October/November 2012



Senior Lawyer Interview

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PRESIDENT'S PAGE

This Bar's For You!

"Law is a noble calling." That's the first line of William Chriss' *The Noble Lawyer*. Described as a must-read for every lawyer and everyone who knows a lawyer, I have recalled several important thoughts from Chriss' very important discussion about our profession over the last month as I have had several conversations with members and non-members about the Bar's recruitment efforts and my idea that *"This Bar's for You."* In particular, I have recalled these ideas when lawyers ask, "What's in it for me?"

I remain committed and believe in the motto that there is a place in this Bar for everyone, even if one merely considers the Bar's programs, events and benefits. Beyond the decision of individual lawyers not to take advantage of these offerings, I always come back to the same place—either we're in this together or we're not. Every lawyer is part of a community that has a reputation with a larger community and every lawyer has a stake in the reputation of the legal community within their community. Local bar associations also help shape the nature of the local legal community, not just influence its perception by outsiders, by training, mentoring, and promoting ethical behavior. This happens formally (in continuing education efforts), but importantly it happens informally when lawyers come together (during lunch meetings, for example) and share experiences with another about their own cases, that of their colleagues, what the judge did or said, how the lawyers conducted themselves, etc. These conversations shape the practice and profession. In the final analysis, communities are local (Dallas, Austin, San Antonio are all different) and so participation in a local Bar association that represents the collective community of lawyers in that local community matters.

Luckily, Bill Chriss is much more intellectual in his discussion. Here's how he might phrase it:

> The primary correlative factor with respect to whether the profession is advancing or declining in the public's esteem is quite simply the public's perception of the rule of law and the entire system for administering it. When the administration of justice, government in general and the judiciary in particular have a good reputation for solving problems and when people see them as friends and protectors, they likewise tend to see lawyers as good people or better people. When they see the system of law as unintelligible, as oppressive, when they see judges as unresponsive and legislators as corrupt, they tend to see lawyers as equally bad people.

Join me at the next Bar lunch where Bill Chriss is our speaker; as well we will have the judicial candidates that will be on the ballot in November—Judge Bill Hicks and Luis Aguilar in the 243rd race and Justice Chris Antcliff and Yvonne Rodriguez in the 8th Court of Appeals race.

In November, we honor our veterans especially those among us who are also members of this noble profession. See you at lunch~

Judge Maria Salas Mendoza

Cover: Photo by Justice Chris Antcliff taken when returning to El Paso from Ruidoso, New Mexico

El Paso Bar Association

October Bar Luncheon

Tuesday, October 9, 2012

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

Guest Speaker will be

William Chriss, author of *The Noble Lawyer*

We will also have a Candidates Forum
243rd District Court
Judge Bill Hicks and Luis Aguilar
8th Court of Appeals
Justice Chris Antcliff and Yvonne Rodriguez

Door prize donated by Jean Pritchett of Rimkus Consulting Group

Please make your reservations by Friday, October 5, 2012 at 1:00 p.m.
at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

El Paso Bar Association

November Bar Luncheon

Honoring Our Veterans

Tuesday, November 13, 2012

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

Guest Speaker will be

F. R. Buck Files, Jr. President of the State Bar of Texas

Door prize donated by George Andritsos

Please make your reservations by Friday, November 9, 2012 at 1:00 p.m.
at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

CALENDAR OF EVENTS

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 months of December2012/ January, 2013, please have the information to the Bar Association office by Friday, November 7, 2012.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 .

October, 2012

Tuesday, October 2
EPBA BOD Meeting
Wednesday, October 3
FBA Annual Meeting
Thursday, October 4
EPYLA Monthly Meeting
Monday, October 8
EPBA Office Closed
Columbus Day
Tuesday, October 9
EPBA Monthly Luncheon
William Chriss &
Candidates Forum
Wednesday, October 10
EPWBA Monthly Meeting
Wednesday, October 10
Border Bankruptcy CLE
Wednesday, October 10 - 12
TADRO 28th Annual Conference
Thursday, October 11
FBA Brown Bag CLE
Saturday, October 13
MABA Banquet
Thursday, October 18
EPPA Monthly Luncheon
Friday, October 19
Open Government 2012 CLE

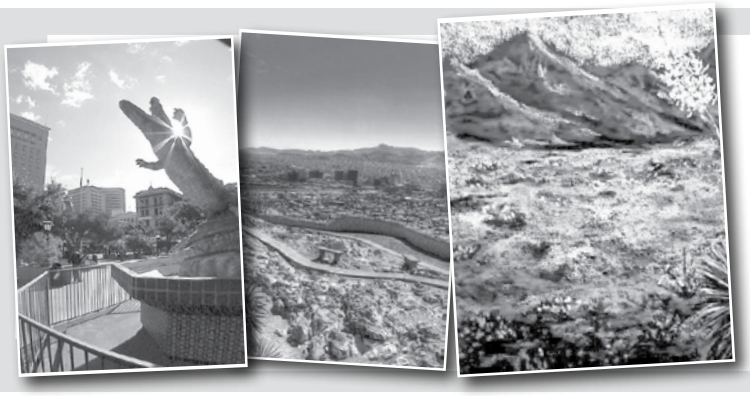
November, 2012

Tuesday, November 6
EPBA BOD Meeting
Tuesday, November 6
Election Day
Saturday, November 10
EPYLA AnnualGolf Tournament
Sunday, November 11
Veterans Day
Monday, November 12
EPBA Office Closed
Veterans Day (observed)
Tuesday, November 13
EPBA Monthly Luncheon
F.R. Buck Files, Jr., SBOT President
Thursday, November 15
EPPA Monthly Luncheon
Saturday, November 17
EPLP Veterans Clinic
Thursday, November 22
EPBA Office Closed Thanksgiving Day
Friday, November 23
EPBA Office Closed
Day after Thanksgiving

Upcoming Events:

Thursday, December 6
Joint Holiday Party

February 15/16, 2013
17th Annual Civil Practice Seminar
Monte Carlo Hotel & Resort Casino,
Las Vegas, Nevada



BE OUR COVER:

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

Mexican American Bar Association of El Paso

Laura Enriquez,
MABA Board Member

The Mexican American Bar Association of El Paso continues to work to promote and educate our members on issues that impact our community. Luis Roberto Vera, Jr., LULAC'S National General Counsel, was the guest speaker at the annual meeting and banquet held last October. Attorney Vera spoke and informed our members about Texas Redistricting litigation and the battle for fairness. Just last month, federal judges in Washington rejected the boundaries drawn by Texas lawmakers as discriminatory. Vera participated in the lawsuit which led to the declaration of the political boundaries as discriminatory. Latino rights groups continue to try to block the use of the districts or political maps that were drawn up for the November elections. It appears the Supreme Court will allow the use of the maps/districts for the elections in November. However, the fight for districts which do not dilute minority voters continues. This year, MABA will host their annual meeting and banquet on Saturday, October 13, 2012. It will be held at El Paso Import which is located at 2201 E. Mills. Please contact Charlie Madrid or Cynthia Canales for tickets.

LAURA ENRIQUEZ Is an associate in the firm of Mounce, Green, Myers, Safi & Galatzan specializing in personal injury defense litigation.

And by the way... (continued)

Last month we published a list of biologically related lawyers (spouses not necessarily included) who have practiced, who are now practicing, or who will soon practice in El Paso. Some names were inadvertently omitted. We provide here an amended and supplemental list:

Bean: four, Woodrow III; his father, a former State District Judge; his grandfather, a former El Paso County Judge; and John Cowan, whose mother was a "Bean."
Caballero: three, Theresa, her sister Jennifer; and their father Ray.
Langford/Howell: two, Ben Howell and his uncle Mark Howell, deceased.

EPBA/County Holidays

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

Monday, October 8, 2012 – Columbus Day

Monday, November 12, 2012 – Veteran's Day

Thursday, November 22, 2012 – Thanksgiving Day

Friday, November 23, 2012 – Day after Thanksgiving

Avoiding a permanent "waive": Preservation of error

By Chief Justice Ann McClure
8th Court of Appeals

I. INTRODUCTION

Just when you thought you knew all of the answers, somebody changed all of the questions. The rules as to preservation of error are constantly in flux, as the various appellate courts judicially expand on the application of those rules. In some cases, the courts have required an attorney to take steps to preserve error that are not required by the rules. In other instances, the courts are returning to a more liberal interpretation and overruling prior restrictive decisions. Thus, a mere reading of the Rules of Civil Procedure, the Rules of Appellate Procedure and the Rules of Evidence will not in and of itself prepare you to adequately preserve error in the trial court and lay an appropriate predicate for appeal.

II. PROCEEDINGS IN JURY TRIALS

A. Right to Trial by Jury

A timely request for a jury plus a timely payment of the jury fee are essential to preserving the right to trial by jury. *Huddle v. Huddle,* 696 S.W.2d 895, 895 (Tex. 1985); *Whiteford v. Baugher*, 818 S.W.2d 423 (Tex.App.--Houston [1st Dist.] 1991, writ denied). The request and payment of the fee must be made at a reasonable time before trial, but not less than 30 days prior to the date of trial. Tex.R.Civ.P. 216. A demand made 30 days prior to trial is not necessarily timely, but a trial court would abuse its discretion if the jury trial were refused unless it is demonstrated that granting the request will result in injury to the opposing party or will disrupt the court's docket and handling of court business. *Dawson v. Jarvis,* 627 S.W.2d 444 (Tex.Civ.App.--Houston 1981, writ ref'd n.r.e.). In *Halsell v. Dehoyos,* 810 S.W.2d 371 (Tex. 1991), the Supreme Court clarified the law relating to the deadline for requesting a jury trial. Before *Halsell,* many appellate courts held that if a party filed a jury demand more than 30 days before trial, but after the case was certified for trial on the nonjury docket, the request was not timely, and the party was not entitled to a jury trial. Since *Halsell,* a request for a jury trial that

Chief Justice Ann McClure
8th Court of Appeals

is made 30 days before the trial is timely, even if it is made after the case is certified for trial. If the case is re-set, the final trial date is the one that controls the 30 day deadline. *Halsell,* 810 S.W.2d at 371; *Whiteford,* 818 S.W.2d at 425. In calculating the 30 day period, the first day of the prescribed period is not included, while the last day of the period is included. *Wittie v. Skees,* 786 S.W.2d 464 (Tex.App.--Houston [14th Dist.] 1990, writ denied).

Payment of the jury fee in advance of the deadline creates a presumption that the jury demand has been made within a "reasonable time," the opponent may rebut the presumption if the record shows that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the trial court's business. *Halsell,* 810 S.W.2d at 371; *Grossnickle v. Grossnickle*, 865 S.W.2d 211, (Tex.App.--Texarkana 1993, no writ); *Wittie*, 786 S.W.2d at 466. Rebuttal apparently requires affirmative action by the litigant to present competent evidence of injury, disruption or impediment. In *Wittie,* the appellate court determined that since the appellee had presented no reporter's record indicating such testimony, he had failed to rebut the presumption. Accordingly, the trial court's refusal to conduct a jury trial was reversible error.

Further, the refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified. *Halsell*, 810 S.W.2d at 372. In *Grossnickle,* the court concluded that because jury findings as to characterization and valuation of community property are binding upon the trial court, fact issues existed concerning the extent and value of the community estate. Because an instructed verdict would have been inappropriate, the error required remand.

B. Motion *in Limine*

The granting or overruling of a motion *in limine* is not in and of itself error. *Rodarte v. Cox,* 828 S.W.2d 65 (Tex.App.--Tyler 1991, writ denied); *Bifano v. Young,* 665 S.W.2d 536 (Tex.Civ.App.--Corpus Christi 1983, no writ). The Supreme Court discussed motions *in limine* in *Acord v. General Motors Corp.,* 669 S.W.2d 111 (Tex. 1984) and *Hartford Accident and Indemnity, Co. v. McCardell,* 369 S.W.2d 331 (Tex. 1963), stressing that if a motion *in limine* is overruled, a judgment will not be reversed unless the questions or evidence were **in fact** asked or offered. If they were **in fact** asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal. *Acord,* 689 S.W.2d at 116. *See also Amarillo Oil Company v. Energy - Agri Products,* 731 S.W.2d 113 (Tex.App.--Amarillo 1987), *rev'd on other grounds,* 794 S.W.2d 20 (Tex. 1989).

C. *Voir Dire*

The scope of voir dire examination is a matter within the sound discretion of the trial court. *Dickson v. Burlington Northern Railroad,* 730

S.W.2d 82 (Tex.App.--Fort Worth 1987, writ ref'd n. r. e.); *Texas Employers Ins. Ass'n v. Loesch,* 538 S.W.2d 435 (Tex.Civ.App.--Waco 1976, writ ref'd n.r.e.). The court abuses its discretion when it denies a litigant the right to ask a proper question since it prevents an intelligent use of peremptory challenges. *Smith v. State,* 703 S.W.2d 641 (Tex.Crim.App. 1985).

The court reporter is not required to make a record of the *voir dire* proceedings unless specifically requested to do so. Tex.R.Civ.P. 376b. A party wishing to complain of questions asked by opposing counsel must object, obtain a ruling, and request that the court instruct the jury to disregard the question or comment. Error is preserved by the reporter's record if the *voir dire* is being reported. Otherwise, a formal bill of exceptions must be secured.

1. SPECIFIC QUESTIONS DISALLOWED

A party wishing to *voir dire* the jury on certain questions which are not permitted by the trial court must make a bill of exceptions, offer the questions to the court, inform the court as to the necessity of the questions, and obtain a ruling. If the matters complained of are not in the reporter's record or in a bill of exception, they are not preserved for appellate review. *Lauderdale v. Insurance Company of North America,* 527 S.W.2d 841 (Tex.Civ.App.--Fort Worth 1975, writ ref'd n.r.e.).

Keep in mind that where an appellate court has before it only the portion of the voir dire in which the question is asked, objection lodged, and the right denied, nothing is preserved for review. Without the entire voir dire examination, the appellate court cannot determine whether the questions asked were duplicative or whether the answers sought were not otherwise obtained. *Burkett v. State,* 516 S.W.2d 147 (Tex. Crim. App. 1974); *Dickson v. Burlington Northern Railroad,* 730 S.W.2d 82 (Tex.App.--Fort Worth 1987, writ ref d n.r.e.).

2. TIME CONSTRAINTS

In *Kendall v. Whataburger, Inc*., 759 S.W.2d 751 (Tex.App.--Houston [1st Dist.] 1988, no writ), the appellate court determined that a complaint as to the insufficiency of the time allotted for voir dire requires a showing of a desire to continue, a request for additional time, and the making of a bill of exceptions showing any questions that were not asked because of a lack of time. One other court has held that an additional step is required. In *Hall v. Birchfield,* 718 S.W.2d 313 (Tex.App.--Texarkana 1986, no writ), the court held there was no reversible error when the complaining party failed to show that they were required to take an objectionable person on the jury because of the trial court's refusal to permit questions to be asked during voir dire.

D. Challenging Jurors for Cause

A challenge for cause is an objection to a panelist, alleging some fact that by law disqualifies the person to serve as a juror or renders the person unfit to sit on the jury. Tex.R.Civ.P. 228. The rules provide that the court should decide the challenge, and if sustained, discharge the juror, but they do not provide the procedure to be used for preserving error when the challenge is not sustained and an objectionable juror is permitted to serve. In *Hallett v. Houston Northwest Medical Ctr.,* 689 S.W.2d 888, 890 (Tex. 1985), the Supreme Court concluded that the refusal of the trial court to excuse an unqualified juror does not necessarily constitute harm. The harm occurs only if the party uses all of its peremptory challenges. It concluded that to preserve error where a challenge for cause is denied, a party must, before exercising peremptory challenges, advise the trial court that (1) all peremptory challenges will be used, and (2) after exercising the peremptory challenges, specific objectionable jurors would remain on the jury list. *Id.; Wooten v. Southern Pacific Trans. Co.,* 928 S.W.2d 76 (Tex.App.--Houston [14th Dist.] 1995, no writ). By failing to give such notice to the trial court, a party waives any error committed by the court's refusal to discharge jurors challenged for cause.

E. Peremptory Challenges

1. EQUALIZATION

Pursuant to Tex.R.Civ.P. 233, each party to a civil action is entitled to six peremptory challenges in district court and three in county court. Where there are multiple parties, however, it shall be the duty of the trial court to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. Upon proper motion, the court shall equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of alignment of parties. In determining allocation of the challenges, the court shall consider the "ends of justice". The existence of antagonism is a question of law. *Garcia v. Central Power and Light Co.*, 704 S.W.2d 734 (Tex. 1986); *Hyundai Motor Co. v. Alvarado,* 989 S.W.2d 32, 42 (Tex.App.--San Antonio 1998, pet. granted), *remanded by agrmt.*; *Cecil v. TME Investments, Inc.,* 893 S.W.2d 38 (Tex.App.--Corpus Christi 1994, no writ); *Frank B. Hall & Co. v. Beach, Inc.,* 733 S.W.2d 251 (Tex.App.--Corpus Christi 1987, writ ref'd n.r.e.). In making this determination, the court shall consider the pleadings and discovery which has been conducted in the case, information presented and representations made during voir dire, and any other information brought to the attention of the trial court before the exercise of the strikes. *Id.; Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986); *Hyundai*, at 42. The trial court has wide discretion in determining the number of strikes, and in most cases a 2-to-1 ratio between sides would approach the maximum disparity allowed. *Patterson Dental Co. v. Dunn,* 592 S.W.2d 914 (Tex. 1979). To preserve error, the motion to equalize and/or objections to the allocation of peremptory challenges must be lodged **prior** to the exercise of the challenges.

2. JUROR DISCRIMINATION

a. Application of the Rule

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court announced its mandate that in a criminal cause, a prospective juror may not be peremptorily challenged solely on the basis of race. *See also, Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Under *Batson*, the defendant is required to make a three-pronged showing. The first step requires that the defendant establish a *prima facie* case raising an inference of purposeful discrimination on the part of the prosecuting attorney. *Brewer v. State*, 932 S.W.2d 161, 164 (Tex. App.--El Paso 1996, no pet.); *Belton v. State,* 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). As for the second prong, once the accused establishes a *prima facie* case of racially motivated strikes, the burden of production shifts to the State to provide a race-neutral explanation. *Emerson v. State,* 851 S.W.2d 269, 271-72 (Tex. Crim.App. 1993); *Calderon v. State,* 847 S.W.2d 377, 382 (Tex.App.--El Paso 1993, pet. ref'd). In this context, a race-neutral explanation means one based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 358-60, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991); *Francis v. State,* 909 S.W.2d 158, 162

(Tex.App.--Houston [14th Dist.] 1995, no pet.). It must relate to the particular case to be tried, but need not rise to the level justifying exercise of a challenge for cause. *Batson,* 476 U.S. at 97, 98, 106 S.Ct. at 1723, 1724; *Francis,* 909 S.W.2d at 162. Moreover, the explanation need not be persuasive, or even plausible. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995); *Francis,* 909 S.W.2d at 162.

With regard to the third prong, if the prosecutor's explanation is facially valid, the burden of production shifts back to the accused to establish by a preponderance of the evidence that the reasons given were merely a pretext for the State's racially motivated use of its peremptory strikes. *Salazar v. State,* 818 S.W.2d 405, 409 (Tex.Crim.App. 1991); *Calderon,* 847 S.W.2d at 382. The defendant must do more than simply state his disagreement with some of the State's explanations; he must prove affirmatively that the State's race-neutral explanations were a sham or pretext. *Davis v. State*, 822 S.W.2d 207, 210 (Tex.App.--Dallas 1991, pet. ref'd); *Straughter v. State*, 801 S.W.2d 607, 613 (Tex. App.--Houston [1st Dist.] 1990, no pet.). In other words, the challenging party must prove purposeful discrimination. *Baker v. Sensitive Care-Lexington Place Health Care, Inc.,* 981 S.W.2d 753, 755 (Tex.App.--Houston [1st Dist.] 1998, no pet.).

The Court of Criminal Appeals has established a non-exclusive list of factors that may be used by a defendant to carry this burden:

• The reasons given are not related to the facts of the case;

• there was a lack of questioning to the challenged juror, or a lack of meaningful questions;

• disparate treatment such that persons with the same or similar characteristics as the challenged juror were not stricken;

• disparate examination of members of the venire, such that a question designed to provoke a certain response likely to disqualify the juror was asked to minority jurors, but not to non-minority jurors;

• use of peremptory challenges to remove all minority members from the jury; and

• an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.

Keeton v. State, 749 S.W.2d 861, 868 (Tex. Crim.App. 1988).

Batson was specifically expanded to civil causes in *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), in which the Court mandated that racial exclusion violates the equal protection rights of the challenged juror, and that those rights may be asserted by the party not exercising the peremptory challenge. The *Edmonson* rule was specifically adopted by the Texas Supreme Court in *Powers v. Palacios,* 813 S.W.2d 489 (Tex. 1991).

Batson has also been expanded to gender. In J.*E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the State of Alabama sued in civil court to establish paternity and obtain child support for a minor. The State's attorney used nine of its ten peremptory challenges on male veniremembers. The United States Supreme Court ultimately prohibited gender-based strikes. *Id.* at 1421.

b. Focus on the Record

Where the trial court finds no *prima facie* case, it is imperative that the challenging party include in the record evidence establishing that the challenged veniremembers were members of a protected class, together with a demonstration of the make-up of the jury panel as a whole. Where the trial court proceeds to a hearing on the *Batson* issue, the *prima facie* case has already been sustained and a presumption of discrimination arises. At that point, further evidence on the jury panel's background becomes unnecessary. *Dominguez v. State Farm Ins. Co.,* 905 S.W.2d 713 (Tex.App.--El Paso 1995, writ dism'd by agrmt.). Thus, where the State offers an explanation for the challenged strike and the trial court makes its ruling, the issue of whether the defendant presented a *prima facie* case is moot. *Hernandez*, 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 406. Instead, the facial validity of the prosecutor's explanation becomes the central issue. *Purkett v. Elem,* 115 S.Ct. at 1771; *Francis,* 909 S.W.2d at 162. As a result, an appellate court bypasses the first prong and moves directly to the second prong. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. *Id.*

c. Timing is Everything

Remember that an objection to the racial and ethnic composition of a jury is untimely if it is raised after the jury is empaneled and sworn. This is true since a party may object to the jury composition by either challenging the array or demanding a shuffle. Where neither remedy is requested, a complaint as to racial composition is waived.

d. Tips for Preserving Error

If we can glean any consistency from *Batson* and its progeny, it appears the following steps are necessary to preserve error:

• object before the panel is sworn and the remainder of the venire discharged;

• request, on the record, a copy of your adversary's strike sheet to determine any suspect patterns;

• establish a *prima facie* case by delineating the suspect patterns; for example, all Hispanics were stricken; all woman were stricken; disparate treatment of similar jurors; no questions were asked of the stricken jurors; disparate examination of the stricken jurors; and

• obtain a ruling on whether *a prima facie* case has been made.

Also note that both high courts have determined that your adversary's voir dire notes are subject to disclosure if they are relied upon by the attorney while giving sworn testimony. *Pondexter v. State,* 942 S.W.2d 577, 579 (Tex. Crim.App. 1996); *Salazar v. State,* 795 S.W.2d 187, 193 (Tex.Crim.App. 1990); *Goode,* 943 S.W.2d at 449. Absent such reliance, the notes constitute privileged work product.

If the court rules that a *prima facie* case has been established, be prepared to counter your adversary's efforts to rebut the presumption with a neutral explanation for its strike. Argue the factors that weigh against the legitimacy of a neutral explanation:

• the reason given for the strike is not related to the facts of the case;

• the challenged juror was not asked meaningful questions;

• people with similar characteristics were treated differently;

• the attorney evoked a certain response from the challenged juror without asking the same question to other prospective jurors; and

• the attorney gives an explanation based on group bias but does not show that the group trait applies to the specific challenged juror.

THE MORAL OF THE STORY IS ALWAYS HAVE THE COURT REPORTER PRESENT FOR VOIR DIRE. IF NO IRREGULARITIES OCCUR, YOU NEED NOT HAVE THAT PORTION TRANSCRIBED OR FILED WITH THE REPORTER'S RECORD.

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

SAVE-THE-DATES:

CIVIL TRIAL SERIES

as part of the
Brown Bag Lunch Seminars

Presented by the
Federal Bar Association, El Paso Chapter

October 11, 2012 - Remand/Removal
January 17, 2013 - Discovery
March 21, 2013 - Dispositive Motions
May 16, 2013 - Jury Trial/Technology
June 20, 2013 - Appellate Practice

12:00 - 1:00 p.m.

Albert Armendariz Sr, U.S. Courthouse
Jury Assembly Room

1.0 hr CLE per session, pending approval

Federal Bar Association – El Paso Chapter

Invites all Federal Bar Association Members to attend our:

ANNUAL MEETING

Wednesday, October 3, 2012
12:00 p.m. – 1:00 p.m.

Albert Armendariz, Sr. U.S. Courthouse,
Jury Assembly Room

Lunch Provided Free to Members
RSVP by September 26, to Cara at
cara_rodriguez@txwd.uscourts.gov

Agenda items:
1. The new officer slate, as approved, will be sworn in.
2. Incoming and outgoing presidents will each give a short address.
3. Our committees will briefly fill you in on all upcoming plans.
4. Todd Hedgepeth, our Circuit Vice President from National FBA, will share some information about National.
5. We will discuss and move for adoption of the new, proposed by-laws.

Pursuant to our old by-laws, we must have a quorum present (60 members) at the meeting in order to adopt new by-laws. We look forward to seeing you on October 3rd!

Joe Brown's murder trial

By Ken Jackson

"Joe Brown's trial created more perjurers than El Paso ever had." Owen White.

The victim

In this case, the dead man, not the defendant, made the trial famous. The victim was a former El Paso police officer and constable named Emanuel (Mannie) Clements, Jr. Historians wrote that he was the town's last real gunfighter and that his death ended El Paso's "Six Shooter" era.

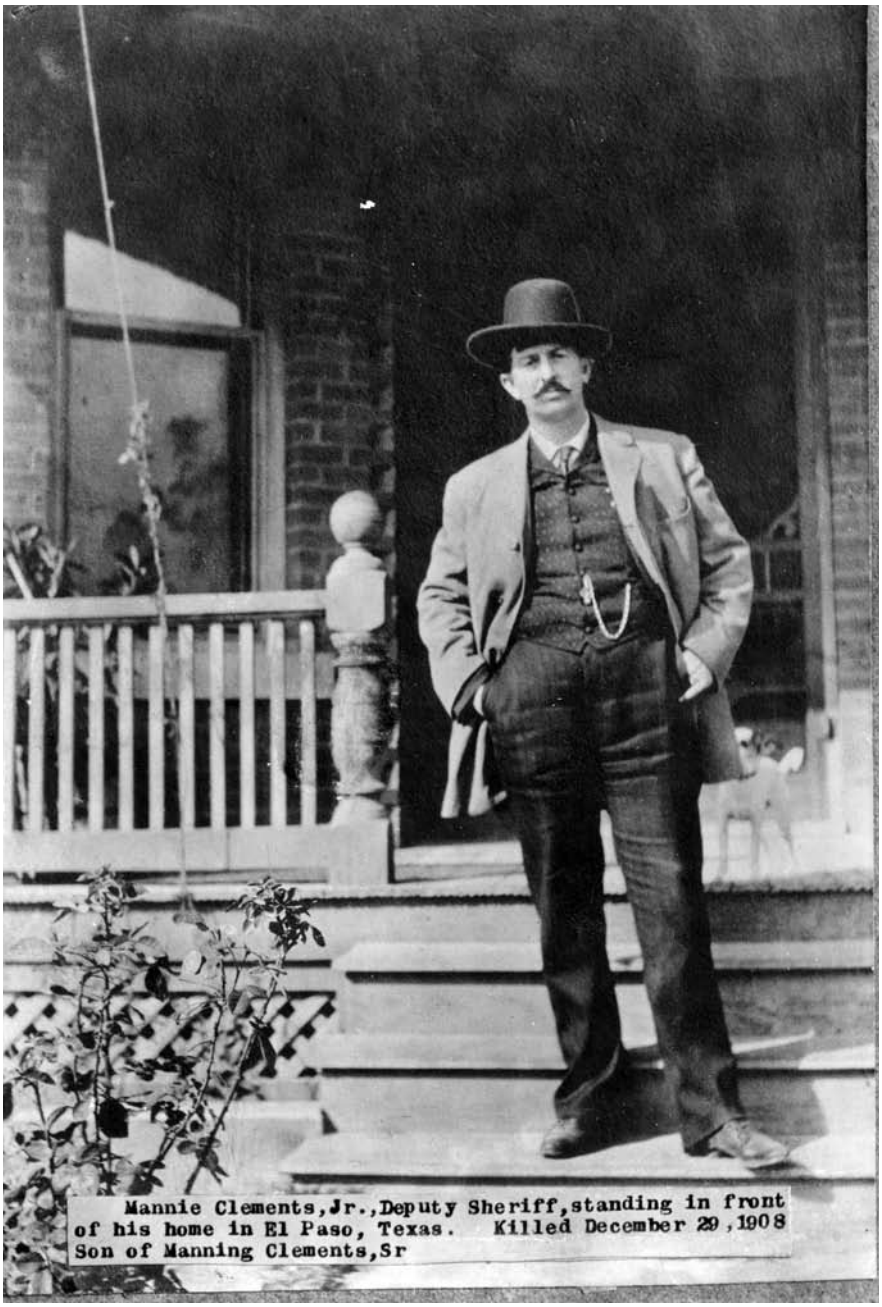
Clements was one of those men, like Pat Garrett, John Selman, and "Killer" Jim Miller who straddled the line between gunfighter and lawman. He was a cousin of John Wesley Hardin and a brother-in-law of "Killer" Jim.

These men formed a tight-knit, deadly community. John Selman killed John Wesley Hardin at El Paso's Acme Saloon on San Antonio Street. "Killer" Jim Miller was implicated in the murder of Pat Garrett in the New Mexico desert north of Las Cruces.

Mannie Clements ran for re-election as Constable in 1908 and easily won the Democratic Primary. At the time, he had been arrested and was awaiting trial for his alleged part in an armed robbery, which netted a cache of diamonds from a particularly gullible traveler named Van Rooyen. This inconvenience must have swayed a few voters because Mannie was the only Democrat to lose in the general election that year…by four votes. (The fact that a candidate for constable who was awaiting trial for a violent felony only lost by four votes says a lot about early 20th Century El Paso).

Mannie Clements was later acquitted of the robbery charge, but by then Mannie was a broke and broken man. He had to pawn a pistol and his gold constable's badge. He began trying to sell his services as a hired gun. He also hoped to provide the police with testimony regarding a lucrative Chinese immigrant smuggling syndicate--for a price.

Mannie Clements may have been broke, but he had enough money to show up at the Coney Island Saloon at about 6 o'clock on the evening of December 29, 1908.



Western History Collections, University of Oklahoma Libraries, Rose Collection #431.

Mannie Clements, Jr. standing in front of his home in El Paso, Texas.

Case background

The Coney Island Saloon was co-owned by "One-Eyed" Tom Powers. Tom was Pat Garrett's friend. At Pat's funeral, Tom Powers delivered the eulogy. The gun Pat Garrett used to ambush Billy the Kid hung behind Tom's bar.

Pat Garrett was shot and killed in February, 1908. The circumstances of the murder suggested that Mannie Clements and his brother-in-law "Killer" Jim Miller might have been involved in the shooting.

Tom Powers may have wanted to kill Mannie Clements; however, other individuals may have wanted to kill Mannie Clements. The other suspects included:

Joe Brown, who may have participated in a diamond robbery with Clements and disagreed with him about how to split the loot (the diamonds were reportedly in a safe at the

Coney Island Saloon);

Albert B. Fall, the lawyer who represented John Selman and who Clements had often threatened and twice nearly shot. Selman shot and killed Clements's cousin, El Paso attorney John Wesley Hardin;

Smugglers who were transporting illegal Chinese immigrants across the Mexican border, who may have feared Clements would blackmail them or report them to the law; and

Other individuals who Clements was known to have threatened to kill.

The answer to the question, "Who killed Mannie Clements?" probably depended upon the answer to the question, "Why was he killed?" A lot of people wanted Mannie Clements dead in December of 1908, and for many different reasons.

Crime scene

The Coney Island Saloon was in a long narrow building across an alley from the city's most famous hotel, The Sheldon. The main entrance of the bar was at 111 North Oregon Street.

When a customer walked in the front door, he would see a traditional Old West barroom and a standing-room-only bar, backed by a mirror and shelves of liquor. He would probably observe a harried staff of bartenders wearing white starched shirts and black bow ties scrambling to serve noisy customers. Walking toward the rear of the building, he would pass through a folding door into a seating area called the "wine room" where females, if any were brave enough to enter, would stand or sit in booths. As he stood inside the wine room, he would see to his left an enclosed pool room, separated from the wine room by another folding door. To the right he would see the bathroom and a boot-black stand.

When Clements was shot, the Coney Island Saloon was packed. At least twenty men were standing at the front bar. About a dozen more were sitting in the wine room booths (no doubt savoring rare French vintages). Another eight or ten were playing and betting in the poolroom.

There were only three undisputed facts regarding who was inside the saloon and where they were sitting or standing at the time of the shooting:

First, Tom Powers was trying to fix the hinge on the folding door that separated the pool room from the wine room very close to the murder scene.

Second, Tom's partner G.E. Truesdale was giving advice to the players in the pool room.

University of Texas at El Paso Library, Special Collections Department

The Coney Island Saloon, where Mannie Clements, Jr. had his last drink.

Finally, after the shooting, Mannie's body was on the floor just inside the wine room near the door to the main bar.

When the shot was fired that killed Mannie Clements, two things happened. First, almost everyone inside the bar rushed out to avoid becoming involved in the incident and, secondly, almost everyone outside the bar who heard the shot rushed in to see what had happened.

A few of those who stayed inside the bar after the shooting chanted to the outsiders who rushed into the saloon, "Mannie Clements just committed suicide." One of these latecomers was William Fryer. Many years later, Fryer reported to UTEP professor Sonnichsen that Tom Powers himself had told him it was a suicide.

Initial inquiry

A Grand Jury convened one week later. The coroner testified that Clements had been shot in the back of the head from a distance of at least eight feet. This testimony cast some doubt on the claim that Clements had committed suicide. However, no possible witness could or would identify a killer, and so for some time no one was charged with a crime as a result of the shooting.

The police later arrested, for no apparent reason, a man at the Washington Park horse racetrack named C. W. Clipper. The next day they released him. One local jokester claimed that Clipper was arrested because he happened to be at the racetrack where the City Police Chief Campbell spent all his waking hours. If Clipper had been anywhere else, the wag claimed, the Chief wouldn't have noticed him.

Trial buildup

The investigation failed to make any progress for several months. The mayor was under pressure from newspapers around the state and from honorable El Paso citizens to charge someone with a cold-blooded murder that occurred in front of so many people.

The mayor finally replaced Police Chief Campbell. The new Chief charged Joe Brown with Clements' murder. The Defendant Joe Brown was a bartender at the Coney Island. Joe hired defense attorneys Dan Jackson and Victor Moore. The trial began on May 11, 1909.

The trial

District Attorneys Walter Howe and Joseph Nealon prosecuted. Very few of El Paso's citizens wanted to sit on the jury. The court called 75 men before qualifying 12 jurors to hear the case. The El Paso Times observed that when the potential jurors were examined "an abnormally acute bunch of consciences were on hand and one after another the jurors were disqualified under the plea of conscientious scruples."

The prosecution's case

When a jury was finally empanelled, the state produced three witnesses: Bauer, Webb and Gann. All three testified that they were in the Coney Island Saloon at the time of the murder and they saw Joe Brown holding a smoking

gun and standing over the body on Clements. Prior to testifying, none of them had previously mentioned this fact to anyone—other than the prosecutors themselves. Webb had also forgotten to tell the Grand Jury about it when he testified before them.

Defense witnesses later testified that two of the State's witnesses, Bauer and Webb, were together at a different saloon at the time of the shooting. Bauer admitted that he had been at the horse races and he also admitted that before that he had been at two other saloons. In fact, he admitted frequently spending time in saloons--almost every day of his life. Defense witnesses also claimed that the other State's witness, Gann, would lie to his own mother.

All three of the State's witnesses had previously been indicted for various crimes, including horse theft. The day after Webb's testimony, he was arrested and jailed for another theft. The defense also offered evidence that the new police chief may have given Bauer money for his testimony, and further that Gann tried to extort money from Victor Moore to help the defense.

After presenting these three witnesses, the State rested its case.

The defense case

The defense introduced Brown's alibi. The defense attorneys produced four witnesses who testified that Brown was behind the bar serving them near the Oregon Street entrance; and since Clements was shot inside the wine room, Brown could not have done it. On cross examination, however, two of these men admitted having previously tried to hire Clements to kill someone.

One lawyer who was watching the proceedings commented, "If the witnesses are to be believed, the riff-raff of creation was gathered at the Coney Island the night Clements was killed. There were ex-convicts and people under indictment brought prominently to the front on both sides."

The state's "surprise" witness

After the defense attorneys presented their alibi evidence and trashed the reputations of the prosecution's witnesses, they rested.

The prosecuting attorneys then called a "surprise witness," named Walter Randall. As the Times reported, "For a few minutes there were thrills enough to satisfy the most ravenous appetite for sensation, and then some."

Walter Randall said almost exactly what the other prosecution witnesses had said: He saw Clements dead on the floor in the wine room and Joe Brown slipping a pistol into his pocket. Walter Randall was really a surprise witness because, unlike the other witnesses, he wasn't a person with a bad reputation or a felon. In fact, he was a respectable citizen from out of town with a semi-honest job as a real estate agent and a bond broker. Why he was in a den of bandits at the Coney Island Saloon that night was not explored.

Cross-examination could not shake Randall's testimony, and as the prosecution closed its case, no one could predict the jury verdict.

In his 1942 *Autobiography of a Durable Sinner,* Owen White characterized the evidence as confusing. "Joe Brown's trial created more perjurers than El Paso ever had. It was astonishing. One after another some two dozen El Pasoans, all of whom had been standing within 20 feet of Mannen Clements when he was shot, swore they didn't know who did it. It was clearly a miracle: a bullet from Heaven."

Summation arguments

Walter Howe began his summation by stating that "(t)he Coney Island Saloon was the rendezvous for all the un-caged convicts in the West."

Howe then made a crucial argument. He said, "There is no halfway ground in this case. The defendant is either guilty of murder in the first degree [and must be hanged], or he is entitled to an acquittal."

The jury's choice was now crystal clear: If they didn't want to hang Joe Brown they had to set him free.

Jackson opened the defense summation with a strong argument, the papers reported. First he questioned why "surprise" witness Randall had come forward at the eleventh hour and had kept quiet for so many months. Then he threw in a red herring and covered the whole proceedings with smoke by pointing out that, "even though there may be nothing in it," Randall closely resembled Brown in appearance, and perhaps Randall might have seen himself with the gun.

After that, the Times reported Jackson "attacked the credibility of the state's witnesses and vigorously going down the line, he dealt blows left and right and hit his man every time."

Next he talked about the defendant being a good citizen and having won the confidence of his employers and the esteem of their patrons. (In the context of the Coney Island's owners and patrons, this might have been better left unsaid in Brown's defense).

The jury's only choice now was the gallows or freedom for Joe Brown. So Jackson put a human, family-man face on his client by talking about Joe's loving wife who sat by his side in the courtroom and Joe's trusting innocent child. Jackson basically defied the jury to hang a family man like Joe Brown for killing an assassin like Mannie Clements--whether or not he actually did it.

Jury deliberations

The jury got the case at on the fourth day of the trial at about 5:15 in the afternoon. They took three votes and finished in less than an hour, just in time to hit the saloons before supper. The first vote was 8-4 to acquit. The second was 11-1 to acquit. The last was a 12-0 acquittal.

Joe Brown was free, and once again, somebody (not necessarily Joe Brown), got away with murder in El Paso.

The Times interviewed jurors after the trial. The most illuminating response came from a juror who, following one of Victor Moore's summation arguments, said that he couldn't believe Joe Brown would secretly ambush Clements because everyone knew Mannie Clements had threatened Joe so often that Joe could have just shot him in public in front of witnesses and no one would have even criticized him for it, much less convicted him of it.

Mannie's personal history of violent aggression and his long enemies list probably made him one of those men who just needed killing. Whoever performed that public service was not likely to be punished for it.

Wild celebrations

The El Paso Times reported, "When the gladsome news that Brown had been acquitted was telephoned to the Coney Island, joy was unconfined, or as one enthusiast put it, 'uncoffined.' Champagne flowed like water, and everybody was free to get in line . . . The news quickly spread, and the scenes enacted at the Coney Island were re-enacted in many other resorts in the downtown district during the evening. It is among the probabilities that more champagne was drunk last night over the acquittal of Brown than was ever drunk in one evening in the history of El Paso."

New police chief's interview

"I have nothing to say regarding the outcome of the prosecution of Joe Brown…I received the hunting down of a murderer of Mannie Clements as a legacy from my predecessor in office…A jury of Mr. Brown's peers has found

him innocent of the crime…and as an officer of the law, I cannot go behind that finding. I have no word of reproach, no fault to find with the result."

No one else was ever charged. The politicians had done their duty by bringing anyone to trial, and they were excused from further diligence by the verdict of Joe Brown's peers.

If Joe Brown dodged a figurative bullet with his acquittal, he also dodged a literal one when a lynch mob hanged Mannie's brother-in-law and close friend "Killer" Jim Miller, in Ada, Oklahoma, on April 19, 1909. Miller had sworn to avenge Mannie's murder, and based upon his record as an assassin, you wouldn't have bet against him.

Conclusions

Owen White, a contemporary of Clements, Brown, and Powers and an occasional patron of The Coney Island, believed that Albert B. Fall hired one of the bartenders to kill Clements. The barman, he believed, fired a pistol though a dishcloth, muffling the sound, and then dropped the gun into a sink of soapy water.

For many years Judge Howe, the chief prosecutor, believed Brown was guilty. In a 1946 interview, he stated he had changed his mind. "Tom Powers," he said, "killed Mannie Clements."

In 1963 Gunther Lessing, Dan Jackson's brother-in-law and law partner during the trial, wrote without equivocation that "Mannie Clements…was killed by one Joe Brown (a bartender)."

So who killed Mannie Clements?

The truth, my friends, is blowing in El Paso's winds.

KEN JACKSON is a retired Alabama lawyer currently living in San Diego. He is the great grandson of former El Paso attorney and 34th District Court Judge Dan Jackson; and great nephew of Gunther Lessing, whose El Paso clients included Pancho Villa. After the Mexican Revolution, Gunther Lessing moved to California and served as General Counsel for Walt Disney Corporation.

SOURCES

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Senior Lawyer Interview

Albert Armendariz, Sr.

By Clinton F. Cross

I interviewed Albert Armendariz, Sr. for a Senior Lawyer Interview seven years ago. The interview was first published in the June 2005 issue of the El Paso Bar Bulletin.

Albert Armendariz, Sr. was one of the founders of the El Paso Mexican American Bar Association and one of the original incorporators of the Mexican American Legal Defense Fund. He was born in 1919 and died October 4, 2007.

CROSS: Tell me about your parents.

ARMENDARIZ: My mother was from Camargo; my father was from Chihuahua. My mother's name was Refujio Trejo; her father was a lawyer. My father was a Mexican federal employee.

My parents fled to the United States around 1913 with four of my uncles on my mother's side. They were admitted through the Labor Department after paying an $8.00 tax, which allowed them to enter as legal resident aliens. All my relatives later returned to Mexico except, of course, my parents.

CROSS: Your childhood?

ARMENDARIZ: I was a child during the great depression. I began work selling newspapers when I was seven or eight years old. I would sell papers with Pablo Ayub at the corner of the old Cortez building. I told Pablo I was going to be a lawyer; Pablo wanted to be a doctor. We were both poor, but we both made it.

I turned nine on August 11 and my mother died the following week on August 17. My father said he would never give us a madrasta (stepmother), and he never did. My father raised all eight of us children. He worked as a telegraph operator in Juarez and commuted to our home on Missouri Street, on the north side of the railroad tracks.

CROSS: Education?

ARMENDARIZ: I went to Bailey Grammar School on the present site of the YMCA on Montana Street and then to El Paso High School where I graduated in 1938. I remember asking my father for a pair of tennis shoes like all the other kids were wearing, and he explained why

Judge José Baca

I didn't have any tennis shoes, "I have just been paid, but I also just paid the rent and the rent here is higher than in the El Segundo Barrio. I pay the higher rent so my children can receive a better education by going to school north of the tracks. I have no money left to buy tennis shoes."

CROSS: Work history?

ARMENDARIZ: During high school, I went to work for Abe Horowitz, Julian's uncle, selling shoes at Lion Shoe Store. (Julian Horowitz is an El Paso attorney, editor). A young woman by the name of Mary Louis Regalado worked across the street selling shoes at the Chic Shoe Store. This was the girl I married.

Phil Horowitz, Julian's father, was my boss at the shoe store. Almost every day from the day I started work at the shoe store, Mr. Horowitz would accuse me of wasting time messing around with boxes of shoes when I should be in school developing what he perceived as a good mind and ability.

With Mr. Horowitz's words in mind, I left Lion Shoe Store where my pay was $7.00 a week and went to work as a "grease monkey" at A.B. Poe Chrysler dealership on Texas Street for $12.50 a week, where I remained until I was drafted into the US Army. I spent four years in the US Army and was honorably discharged with forty months of GI Bill schooling at my disposal, which Mary Lou and I decided to use. Facing a seven year course in law, Mary Lou and I approached my father for his approval and blessing. He said, "No, sir. You are married and have a child and you have obligations." Mary Lou said to my father, "I want many children, and Albert cannot support them working for A.B. Poe. I will work to support the family…and God will provide." My father finally agreed and gave us his blessing. So I entered Texas Western (now UTEP) as a freshman on a four year course.

During my first week of classes at Texas Western, God sent a message to all GI Bill students to report to their counselor. God had provided: on inquiry to my counselor, I was advised that students under the GI Bill were now allowed to register and attend all professional schools if they had a 2.0 or better average. My entire schedule of classes was changed to meet the requirements for pre-law and with a 2.1 average I used seventeen of my forty months to do this.

I was admitted to USC Law School and went to Los Angeles with twenty-three months left on my GI Bill. Going summer and winter, I obtained my law degree and gave Uncle Sam a month and seventeen days change on my eligibility.

CROSS: Tell me about your most important case.

ARMENDARIZ: I think the Alvarado case may have been the most important one.

For many years, there was a small Hispanic community living next to ASARCO, known as Smeltertown. The El Paso Independent School District would bus the children from Smeltertown past the new Coronado High School to El Paso High, which was like Bowie and Jefferson at that time. In 1971 or '72, El Paso Legal Assistance Society (EPLAS) filed a suit to desegregate the schools. When EPLAS couldn't continue the case, I was able to get the Mexican American Legal Defense Fund (MALDEF) to assume responsibility for the case. I also represented the plaintiffs, pro bono, with help from two brilliant young MALDEF lawyers. The school district was defended by Morris Galatzan and Sam Sparks. The case landed in Judge Guinn's court, and he summarily dismissed the case. The Fifth Circuit reversed, and instructed Judge Guinn to permit discovery. Alvarado v. El Paso Independent School District, 445 F. 2d 1011 (5th Cir. 1971). Upon remand, the case was transferred to Judge Sessions' court. After extensive discovery and a long trial, the court found deliberate discrimination and ordered the schools integrated. Alvarado, 426 F. Supp. 575 (1976).

CROSS: Most interesting case?

ARMENDARIZ: I think my most interesting case was Hurtado v. the United States of America, 410 U.S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973). In this case, we filed a class action lawsuit to obtain compensation for material witnesses being held pending trial of "cayotes." We won the lawsuit, but also lost because the court held the witnesses were only entitled to compensation during the time they were incarcerated during the trial itself. My son Albert, at that time a new lawyer, was with me when I argued this case before the U.S. Supreme Court.

CROSS: Public service activities?

ARMENDARIZ: I served as national President of LULAC in 1953-1954. Additionally, in El Paso I was Chairman of the Civil Service Commission in El Paso, Chairman of the Child Welfare Board for several years, and served on the Public Housing Board and on numerous other boards. I also headed the local Cancer Society.

When we were in positions of authority, Pete Tijerana and I authorized the use of LULAC money to obtain trial court records to perfect an appeal from the Texas Court of Criminal Appeals to the U.S. Supreme Court, which challenged the method for selecting juries in Texas. The case was Hernandez v. Texas, 2347 U.S. 475, 74 S. Ct. 667 (1954). We got in trouble for using the money for that case, but the case became and now is the basis for much Hispanic rights litigation.

After the Hernandez case, we decided Hispanics needed a law office to handle cases like Hernandez. Pete and a group of San Antonio LULACS wrote a grant proposal for such an office, and the Ford Foundation funded it. Thus, MALDEF was born. I served as the first Chairman of the Board.

As President, I recommended creation of a scholarship fund for young Hispanics planning to go to law school. The Ford Foundation also funded that program, and gave us another million dollars for that project. We got law schools to match the funds. We were able to provide funding for two hundred students. The scholarship fund became a part of MALDEF.

As a member of the Civil Service Commission here in El Paso, I played a role in opening up employment opportunities for Hispanics and Blacks with the Police and Fire Departments. When I arrived, Hispanics and Blacks did not get hired. I objected and the practice was changed.

CROSS: What aspect of your career was the most satisfying?

ARMENDARIZ: As an attorney handling criminal cases, I was concerned that my clients would often receive a suspended sentence with no help from anyone. I obtained funding from MALDEF for a pilot program in El Paso. The program was designed to help people rehabilitate themselves after being sentenced in a criminal matter. Subsequently, I believe the El Paso program served as a model for the present Texas State probation system. This may have been my most important contribution to the justice system in this State. Recidivism was high and we moved to correct that situation.

CROSS: What has been your most satisfying life experience?

ARMENDARIZ: I am very proud of my children; five boys and two girls. I have also been blessed by professional association with my son, Albert Armendariz, Jr.

During my life, I have also been blessed by two beautiful Marias—Maria Luisa, my wife for fifty-three years and the mother of my children; and Maria de Jesus, with whom I have been married for more than six years.

CROSS: If you are given the opportunity to give advice to a young lawyer, what would you say?

ARMENDARIZ: I would repeat my father's words to me when he loaned me $40 to pay the first month's rent in my new law office. At that time, he said to me, "The Lord did not make you a lawyer to serve yourself. You have a duty to serve your country and especially the oppressed group of people of which you are a member. If there is a group of people that needs good and honest representation, it is the Mexican-American." Of course, he probably thought most of my clients would be Mexican-American, and they have been. The message, however, is universal, "Take care of your clients and treat them properly, whoever they might be."

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

Affirmative Action Revisited

By Ed Hernández

On October 10th the U.S. Supreme Court will hear oral arguments in the case of *Abigail Fisher, et al vs. The University of Texas at Austin, et al.*[1] *Fisher* is the latest in a line of Supreme Court cases beginning with *Plessy v. Ferguson*[2] dealing with the issue of race in admissions to colleges and universities. *Plessy* held that segregation was constitutional, provided blacks were provided access to facilities that were "equal" to those offered whites.

The debate over the importance of racial diversity in higher education goes back to the 1950 decision in *Sweatt v. Painter*[3] when the Supreme Court recognized a compelling state interest in racial diversity. The *Sweatt* case involved Heman Sweatt, a black applicant to the University of Texas Law School at a time when no alternate law school for black law school applicants yet existed in Texas.[4] When Sweatt applied for admission to the University of Texas School of Law and qualified for admission, state officials attempted to create a separate law school for Blacks which was called the "Law School of the Texas State University for Negroes." The State offered the black students the same faculty, the same textbooks, and a better library than it offered the white students at the University of Texas. The facility itself was different, "in a basement," so came to be known as "the basement law school."

After World War II there was a shift in public opinion regarding race relations, with civil rights advocates speaking out forcefully against racism and discrimination. Shortly after the war, a black dentist in Houston successfully challenged the "White Primary" legislation. The *Smith v. Allwright*[5] case encouraged the NAACP to begin its fight to desegregate public schools.

Sweatt declined to attend the new law school for blacks. He demanded admission to the University of Texas School of Law, and he filed suit to gain admission. He was represented by NAACP attorney Thurgood Marshall.[6] Attorney General Price Daniel, Sr. represented the State of Texas.

The trial court judge found the new school was "equal" and in compliance with the standards set forth in *Plessy v. Ferguson*. The Austin Court of Appeals agreed. The Texas Supreme Court affirmed without issuing an opinion.[7]

Headed by Chief Justice Vinson, the United States Supreme Court held that the new law school was not equal to the University of Texas School of Law partly because the two schools were not equal in intangible ways; for instance, the University of Texas had a better reputation than "the basement law school."[8] In addition, the court argued that diversity mattered: Sweatt would be "removed from the interplay of ideas and the exchange of views" with "members of the racial groups which number 85% of the population of the State."[9]

The *Sweatt* case was quickly followed by the Warren Court's decision in *Brown v. Board of Education.*[10] *Brown* stated clearly what the Vinson Court had already decided—that there could be no such thing as separate and also equal facilities Blacks and Whites.

Recognizing the compelling need for minority participation in the professions, the nation in the 1960s moved away from John Marshall Harlan's criteria for a "color blind" standard (which he articulated in his dissenting opinion in *Plessy*) and began to approve "affirmative action" programs designed to accelerate educational opportunities for minorities. Some whites objected, claimed "reverse discrimination," and challenged these "affirmative action" efforts.[11]

The *Fisher* case itself is an attempt to undo the Supreme Court's decision in the 2005 *Grutter v. Bollinger*[12] case reaffirming the use of race as a factor in the admissions process to ensure racial diversity. Because of Texas's top 10% rule automatically allowing the top 10% of all Texas public high school graduates admission to Texas public universities, the actual effect of a reversal of *Grutter* on undergraduate admissions in Texas would be relatively limited. This is because the top 10% rule is not being challenged. Instead, Abigail Fisher challenged UT-Austin's use of race as a consideration in the admission of those students, like herself, who were not in the top 10% of their class.[13]

The real impact of the *Fisher* decision in Texas will be in the admission to graduate and professional schools, where there is no top 10% rule to guarantee a racially diverse student body.[14] However, the bigger problem facing the State of Texas is the rapid rise of the minority (and specifically Hispanic) population, as compared to the white population and the re-segregation of public education. As of 2011, the Hispanic population of Texas has grown to 38.1% and the white, non-Hispanic population has dropped to 44.8%.[15] The shifting demographics in public schools are even more

dramatic. By the 2010-2011 school year only 36.4% of public school twelfth graders were white, and 15.6% of pre-kindergartners were white.[16] While the Hispanic population will soon become the majority population in Texas, the percentage of Hispanic and other minority professionals is miniscule by comparison. By 2008 Hispanics accounted for only 4.9% of all physicians in the United States, and blacks accounted for 3.5%.[17]

In Texas, where the majority of all patients are minorities, Hispanics accounted for only 8.9% of direct patient care physicians in urban areas and 5.8% in rural areas. Blacks accounted for 4% in urban areas and 3.1% in rural areas, and whites accounted for 72.5% in urban areas and 82.1 % in rural areas.[18]

The percentages are just as bad in the legal profession. As of December 31, 2011 minorities represented only 23% of licensed Texas attorneys with 9% being Hispanic, 8% being black, 4 % being Asian/Pacific Islander and less than 1% being Native American or Alaska Native.[19] Fisher, in her petition, does not argue that diversity is not a compelling interest, but rather that race should not be a factor in its achievement. Regardless of how the U.S. Supreme Court finally rules in this case, it is clear that our political and educational leaders have their work cut out for them. Texas has already become more brown and black than white and re-segregation is already occurring in earnest. If we want to avoid Texas becoming the new South Africa, with all the racial resentments, conflicts and tensions that that entails, we have to find a way to diversify our elite institutions and our graduate and professional schools regardless of what the Supreme Court does in *Fisher*.

ED HERNANDEZ is an El Paso attorney who with his wife Maria is engaged in the general practice of law.

1 *Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted by Fisher v. University of Texas at Austin*, --- U.S. ---, 132 S.Ct. 1536, 182 L.Ed. 2d 160 (U.S. Feb 21, 2012) (NO. 11-345).
2 *Plessy v. Ferguson*, 163 U.S. 537 (1896).
3 *Sweatt v. Painter*, 339 U.S. 629 (1950).
4 *Amicus* Brief of the Family Heman Sweatt in *Fisher v. University of Texas at Austin*, pp. 10-13 (hereinafter Amicus) citing Gary M. Lavergne, *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice*, pp. 131-149 (2010).
5 *Smith v. Allwright*, 321 U.S. 649 (1944).
6 *Amicus* at 11.
7 *Amicus* at 15.
8 *Sweatt*, pp. 633-634, at 634.
9 *Sweatt* at 634.
10 *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).
11 *Amicus*, pp. 25-27.
12 *Grutter v. Bollinger*, 539 U.S. 306 (2005).
13 Fisher's Second Amended Petition (hereinafter Fisher's Petition).
14 Fisher's Petition at 16.
15 Texas QuickFacts from the US Census Bureau http://quickfacts.census.gov/qfd/states/48000.html
16 *Amicus*, pp. 29-30.
17 *Physician Characteristics and Distribution in the US, 2010 Edition*, American Medical Association
18 Source: Texas Medical Board. Prepared by: Health Professions Resource Center, Center for Health Statistics, Texas Department of State Health Services, October 25, 2011.
19 Office of Minority Affairs Overview, State Bar of Texas, as of December 31, 2011.

The Way to Serenity and Happiness in Our Professional and Personal Lives

Judge Oscar G. Gabaldón, Jr., CWLS

"A fool dreams of wealth; a wise man, of happiness." This Turkish proverb suggests that, if we are indeed wise, we will seek to pursue unadulterated and unblemished happiness in our personal and professional lives rather than pursue a false happiness through affluence, opulence, possessions, riches, and such kinds of secular fortunes. The attainment of happiness in its purest form brings to us a state of serenity. Serenity, however, does not necessarily mean enjoying a life free from conflict and adversity. Instead, serenity entails something more elevated. "Serenity is not freedom from the storm, but peace amid the storm" (unknown author). Let us examine how this "peace amid the storm" is to be found and embraced.

Disciples and lovers of wisdom have long recognized that in our human condition we are frequently exposed to all sorts of temptations that test the fiber of our moral and ethical compass. Some of the most recurrent of these temptations are the moral and ethical offenses known as pride, anger, envy, and avarice. These are mentioned and discussed in Dante Alighieri's famous 14th century epic poem, Divine Comedy, as being part of the list of offenses known in some circles as the cardinal or deadly sins. Of these offenses, perhaps most would agree that pride is the most fundamental, and is at the core of the other offenses. Pride is, in essence, the sovereign of most, if not all, ethical and moral transgressions.

Most people think of pride in one of two ways. There is positive pride, which is the kind of pride we may feel when we do the honest and right thing in a given situation, or when a loved one accomplishes a certain goal in life, such as graduating from college or being promoted at work. We may feel pride when our sports team wins a game. This type of pride creates a sense of solidarity and togetherness. Pride, however, can be negative, and that sort of pride is destructive to one's well-being and all too often towards the well-being of others.

Pride, in its negative context, involves a sense of bloated or exaggerated self-perception of status and achievement. It is a focus on "me, myself, and I." When we feel insulted or we somehow feel threatened by someone, sometimes our pride unleashes our anger. The anger, in turn, quickly, and sometimes indiscriminately, seeks out someone to devour.

Moreover, if we feel someone has achieved something better than us, our pride allows the Pandora's Box of envy to emerge. Envy consistently resents what another has achieved or obtained; if another person has had good fortune in life, we also want it. Thus envy together with its cousin, avarice, will sneak out like a slithering serpent and will greedily try to also

have it, hoping to possess what the other has, while lamenting every moment that it is unable to also possess what the other enjoys. Avarice thrives on excess, it wants it all. The more, the better, for its hunger cannot be satisfied.

These ethical and moral maladies often enslave us and bind us with heavy chains, obstructing our ability to bring peace and therefore serenity to our hearts and minds. A "tranquility of being" ensues from the ability to curtail and control these afflictions. Without doing this, true happiness remains a "yet to be realized" ethereal dream. The question remains: How do we control these afflictions we call pride, envy, anger, and avarice? We do it by working on developing and strengthening their opposites; that is, by bringing life to the virtues that serve as antidotes to those venomous monsters.

The antidote for pride is humility. Just as pride is at the center of virtually all moral and ethical infirmities, so humility is at the core of all virtues. Sir Thomas Moore (1478-1535), the Tudor Renaissance English author of Utopia, clearly recognized the superior nobility of humility when he exclaimed, "Humility, that low, sweet root from which all heavenly virtues shoot." But let us be vigilant and careful not to be fooled by false humility. William Temple (1881-1944), Archbishop of Canterbury, describes genuine humility in this way: "Humility does not mean thinking less of yourself than of other people, nor does it mean having a low opinion of your own gifts. It means freedom from thinking about yourself at all." The force of humility, therefore, shatters pride; it humbles pride to its knees.

Anger, on the other hand, is tempered with patience. "Patience is waiting. Not passively waiting. That is laziness. But to keep going when the going is hard and slow – that is patience" (unknown author). Hence, patience involves the ability to control oneself; it is a virtue of forbearance. Brian Adams brings a noteworthy perspective on this virtue. He says "Learn the art

of patience. Apply discipline to your thoughts when they become anxious over the outcome of a goal. Impatience breeds anxiety, fear, discouragement and failure. Patience creates confidence, decisiveness, and a rational outlook, all which eventually lead to success."

As for envy, it is subdued by kindness. Oftentimes we demonstrate kindness through words. In these respects, Mother Teresa of Calcutta (1910-1997) observed that "Kind words can be short and easy to speak, but their echoes are truly endless." Kindness transcends barriers. American author Mark Twain (1835-1910), like Mother Teresa, also observed the transcendence of kindness when he stated that "Kindness is a language the deaf can hear and the blind can see." Kindness knows no limits, it has no borders, and it is always focused on doing well towards others.

Avarice breaks down against the amazing power of charity. The Swedish scientist, philosopher, and theologian, Emanuel Swedenborg (1688-1772), described charity in this way: "True charity is the desire to be useful to others without the thought of recompense." Charity, like kindness; therefore, is other-oriented and is usually associated with love. It is love for others, even at the cost of losing ourselves. St. Basil the Great reminds us of our obligation to be charitable. He says "The bread in your cupboard belongs to the hungry man; the coat hanging unused in your closet belongs to the man who needs it; the shoes rotting in your closet belong to the man who has none; the money which you hoard in the bank belongs to the poor. You do wrong to everyone you could help, but fail to help."

Only when we make a thoughtful and persistent effort to master the virtues of humility, patience, kindness, and charity do we come closer to finding serenity in our professional and personal lives. Once our pride, anger, envy and avarice are kept in check, under lock and key, we will be better able to let our sense of serenity become one with our sense of happiness. While achieving a state of happiness is not an attainment of perfection, it is undoubtedly a desirable state of human existence we all aspire to. "Being happy does not mean that everything is perfect. It means that you've decided to look beyond the imperfections" (unknown author). Happiness is the prime objective of every man and women. That is our heaven on earth.

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

Joint Holiday Party

Thursday, December 6, 2012
5:30 p.m. to 7:30 p.m.
El Paso Community Foundation
333 N. Oregon, 1st Floor
Join us for Food, Drinks, Laughter, Silent Auction and Holiday Cheer!!!

ADVANCE SHEET, *1537 A. D.*

By Charles Gaunce

John Lambert

"IMMEDIATELY upon the ruin and destruction of the monasteries, the same year, and in the month of November, followed the trouble and condemnation of John Lambert, the faithful servant of Jesus Christ, and martyr of blessed memory. This Lambert, being born and brought up in Norfolk, was first converted by Bilney, and studied in the university of Cambridge; where after that he had sufficiently profited both in Latin and Greek, and had translated out of both tongues sundry things into the English tongue, being forced at last by violence of the time, he departed from thence to the parts beyond the seas, to Tyndale and Frith, and there remained the space of a year and more, being preacher and chaplain to the English House at Antwerp, till he was disturbed by Sir Thomas More, and, by the accusation of one Barlow, was carried from Antwerp to London; where he was brought to examination first at Lambeth, then at the bishop's house at Otford, before Warham, the archbishop of Canterbury, and other adversaries; having five and forty articles ministered against him, whereunto he rendered answer again by writing."

- Excerpt from Foxe's Book of Martyrs

John Lambert was tried in the ecclesiastical courts. He was a priest and was suspected by Thomas More of the crime of having converted to Protestantism. He was presented with 45 articles (what we would call charges), and was required to answer each of them in writing. The articles were framed as questions designed to elicit Lambert's doctrinal errors, thereby justifying his conviction thereon. From this, we can see that the practice of well-crafted interrogatories has a long and storied history. Our concern here is the first article, and Lambert's response to it:

Imprimis, Whether thou wast suspected or infamed of heresy?

"Unto your first demand, wherein you do ask whether I was suspected of or infamed of heresy, I answer, that I am not certain what all persons at all seasons have deemed or suspected of me; peradventure some better, some worse; like as the opinion of the people was never one, but thought diversely of all the famous prophets, and of the apostles, yea, and of Christ himself: as appeareth in St. John, how, when he came into Jerusalem in the feast called Scenopegia, anon there arose upon him a great noise, some saying that he was a very good man; others said nay, and called him a seducer, because he led the people from the right ways of Moses's law into error. Seeing therefore that all men could not say well by Christ, which is the author of verity and truth, yea, the very truth itself, and likewise of his best servants; what should I need to regard if at some time some person, for a like cause, should suspect of me amiss, and evil report of me? seeing moreover, it is said in the Gospel, Woe be to you, when all men speak well of you; for so did their fathers to the false prophets. If therefore at any season such infamy was put upon me, I am glad that I have so little regarded the same, that now I have forgotten it. And though I did remember any such, yet were I more than twice a fool to show you thereof; for it is written in your own law, No man is bound to bewray himself. But this I insure you: I was never so charged with suspicion or infamy of crime, that I was therefore at any time convented and reproved before any judge before that I was troubled for these causes, for which I was at the first put into your hands: and of them, seeing you could not prove me faulty, I wonder why you would never yet pronounce me quit and innocent, according as I have even lowly desired of you, and required full instantly the same. But letting those things pass, you have imagined new matters to charge me with, wherein I think certainly, that you could no more have proved me culpable, than you did in the first; that is to wit, no whit culpable in either, had it not been that by long imprisonment you forced me to tell what I thought in them, which I have and will freely do; and that, indifferently considered, I suppose shall not deserve any sore punishment, unless you will beard the truth, whereunto I hope it shall not disagree.

Today, we can discern that his answer to the first article was a statement that he would not answer as he had no obligation to provide the evidence necessary to convict him. Oddly enough, one of the bases for Thomas More's belief that Lambert was a heretic was founded on Lambert's belief that ecclesiastical judges could not compel suspects to swear an oath on the bible that they would tell the truth. Nevertheless, Lambert was convicted and burned at the stake as a heretic in 1538.

The accusatorial system of criminal justice that predated Magna Carta was essentially a system where the judgment was determined first, and the form of the trial was considered thereafter: it could be either trial by battle, compurgation, or ordeal. This form of justice was eventually replaced by new forms such as presentment and trial by jury, but these still preserved the accusatorial character of the old system. The criminal justice system became highly ritualized and was dependent on oaths. Lambert is among the first of the cases to challenge the right of the tribunal to compel testimony against the accused, from the accused. Our modern system of having witnesses swear to tell the truth derives from the accusatorial system of justice where refusing to take the oath was direct evidence of guilt. The path from Lambert's claim, that he could not be compelled to give testimony against himself, to the embodiment that no person "shall be compelled in any criminal case to be a witness against himself," is a long and winding one.

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

Association News

El Paso Young Lawyers Association

EPYLA October Meeting
October 4, 2012, 12:00 p.m.
Leo's; 315 E. Mills

El Paso Young Lawyers Association Annual Golf Tournament
November 10, 2012; 8:00 a.m. Shotgun Start
Butterfield Trail Golf Club
Register at: www.butterfieldtrailgolf.com

El Paso Women's Bar Association

The El Paso Women's Bar Association will hold its next monthly meeting on Wednesday, October 10, 2012 at 12:00 noon in Room L-106 of the El Paso County Courthouse. November meeting will be held on Wednesday, November 14, 2012 in Room L-106 of the El Paso County Courthouse. Monthly meeting are the 2nd Wednesday of each month.

El Paso Paralegal Association

The El Paso Paralegal Association will be celebrating "Texas Paralegal Day" (officially recognized by Senate Proclamation No. 1144 on October 23 each year) at its general meeting on Thursday, October 18, 2012, noon to 1:00 p.m. at the El Paso Club, Chase Tower, 201 E. Main St., 18th floor. Speaker: David Ferrell. Topic: Legal Internet Research: Tools to Assist Paralegals. The cost for lunch, which is optional, is: $16.00 buffet or $10.50 salad bar. Please RSVP for the luncheon with Peggy Dieter at Kemp Smith: 546-5267.

The El Paso Paralegal Association will hold its November general meeting on Thursday, November 15, 2012 from 12:00 noon to 1:00 p.m. at the El Paso Club, Chase Tower, 201 E. Main St., 18th floor. Speaker: Jeffrey Tasher, Attorney Advisor (General), Fort Bliss OSJA. Topic: The Federal Tort Claims Act. The cost for lunch, which is optional, is: $16.00 buffet or $10.50 salad bar. Please RSVP for the luncheon with Peggy Dieter at Kemp Smith: 546-5267.

Border Bankruptcy Bar

The Border Bankruptcy Bar will hold a seminar on "Chapter 11 Plans and Disclosure Statements" on Wednesday, October 10, 2012 at the U.S. Bankruptcy Court, Room 1, 8515 Lockheed Dr. Guest Speakers will be Judge H. Christopher Mott and U.S. Trustee Kevin Epstein. Approved for 1.0 hours of MCLE by the SBOT, FREE.

"Bringing our Heroes Home"

El Paso Veterans Court Program- Felony Component

By Silvia Serna

El Paso County has expanded the El Paso Veterans Court Program (EPVCP) and now has two subcomponents in the program. County Court #1, headed by Judge Ricardo Herrera, continues to handle the misdemeanor cases in the Veteran's Treatment and Intervention Program. The 346th District Court, headed by Judge Angie Juarez Barill, is now responsible for supervising felony cases.

El Paso County was the second county in the State of Texas to create a Veterans Court to handle criminal cases. The courts handle cases involving armed service men and women and/or veterans who, having served in a combat zone or other hazardous duty, have been affected by mental health issues.

In order to be considered for the EPVCP, participants must meet the statutory criteria of 1) a veteran or current member of the United States armed forces, including a member of the reserves, national guard, or state guard; and 2) suffers from a brain injury, mental illness, or mental disorder, including post-traumatic stress disorder, that, a) resulted from military service in a combat zone or other similar hazardous duty area; and b) materially affected their criminal conduct at issue in the case.

Under the EPVCP felony component, armed service members and/or veterans who are accepted and screened into the program will have the opportunity to participate in an eighteen month program and receive medical assistance from either William Beaumont Army Medical Hospital or the El Paso VA. The program has a ten member team which consists of a Judge, Prosecutor, Public Defender, Veterans Program Director, Probation Officer, Evaluator, Law Enforcement Representative, Outreach Justice Specialist, Treatment Coordinator, and the Mentor Coordinator, all of whom work with the participants and other veteran organizations to help the participants succeed. The team meets weekly to review the proposed policies and procedures and provide input in the program. The EPVCP has also finalized the Participant Handbook which will be distributed when an individual enters the program. Court hearings are held once a week.

The EPVCP felony team, headed by Judge Barill, has visited the Veteran Courts in Tulsa, Oklahoma, and the Veterans Court in Houston, headed by Judge Marc Carter. The team has also attended the National Drug Court Institute training at Orange County, California.

The EPVCP is presently focusing on the participation and work of the Mentor volunteers and our community partners, which is an essential aspect of the program. As we know, veterans; respond to veterans and thus mentors are an integral part of the program in court, during the last phase of the program. "We believe that we have a moral and ethical obligation to restore our servicemen and women to who they were before they went to war. We hope that we can now serve them," says Judge Angie Juarez Barill.

SILVIA SERNA is the Veterans Program Director for the 346th District Court

Persuasion, Perception - Then and Now

by David J. Ferrell
djf@elpasolaw.com

I began writing an article for this edition of the El Paso Bar Journal in late August. On September 4th I threw that article away - the content was obsolete (in about six days).

On September 4th a major event in computer/Internet technology occurred that will significantly change the Internet landscape. The next day I began writing an article for this Journal regarding the significance of that event. Unfortunately, only two days later everything changed once again.

Today is September 7th and I have just thrown away that second article, because it became obsolete in 2 days. Technology bloggers are filling the technology stream to the brim with the significance of this September 4th event.

The Perfect Storm Europe 2012 website warns of our digital impending doom and points out four disruptive technologies: 1. Mobile, 2. Smart Systems, 3. Cloud and 4. Social Media. So, I must apologize, I am going to wait for the dust to settle before I disclose what happened on September 4th and how it will affect our law practices.

This gives me an opportunity to explain why I think technology is critical for lawyers - all lawyers.

Technology is POWER. It enhances our ability to communicate in trial. Juries expect to be "shown" not just listen to the spoken word. Judges want written briefs with "up to the minute" changes and if you are arguing obsolete law you are in trouble.

Our offices are storage vaults of paper filled distress or we are digitizing and organizing (see last month's article "Paperless").

Technology allows us to be "mobile". That means we can access public data (statutes, case law, law review articles, etc.) and private data (our case files, our office bank accounts, an employee's files, etc.) on our smart phones/ IPads, home computers, etc. We have to make sure that "unauthorized others" do not gain access to our private data.

The heart of all technology is "the computer". The heart of all computers is the "OS" (operating system). The OS tells the computer, smart phone, IPad, etc. what to do and how.

So, we have had a major event on September 4th where a very powerful but seemingly lethargic OS provider accepted the changes in

the OS game, and now it wants to exploit the inevitable.

I will now tell you a story about POWER. Power can be real, unreal, perceived, not-perceived, over inflated, under inflated, etc.

I hope you will forgive me for this "war story" but I think it will clarify the point I am trying to make. In May 1978, I passed the Texas Bar exam, received my law license, and I was appointed as an Assistant Attorney General of Texas - in the Consumer Protection Division and I was assigned to the El Paso Regional office.

There were few lawyers in El Paso greener than me; that's 1978 green not 2012 green. In July of that year I sent a form letter to a large automobile dealership with an attached consumer complaint requesting a prompt response.

About three days later, I received a telephone call from an attorney with a well established El Paso law firm. This was a tenured high-powered attorney who explained the complaint was ridiculous and did not warrant any further investigation. I was a bit intimidated but I disagreed with the attorney's assessment and he then suggested we meet at the dealership so his client could show me how ridiculous the complaint was.

A couple of days later, I attended the meeting with the high powered attorney and his client at the dealership.

The meeting was not pleasant for me and I was now being attacked by two high-powered individuals. I was quiet, not really sure what I needed to do, but I did speak up about the condescending manner in which they were treating this case and me.

The owner of the dealership offered to give me a tour of his facility and I agreed just to get out of that office. The dealer's desk was the size of a naval aircraft carrier.

The lawyer and the dealer speedily walked ahead of me, transmitting obvious disdain for this affront.

I was wearing my only suit. My mother bought it for me when I graduated from college in 1974, and it was my only suit all throughout law school. It was still my only suit.

While trying to catch up with those two powerful men I dropped my keys in the auto repair area of the dealership. I bent down to pick up my keys and the crotch seam in my antiquated suit pants split "all the way".

I was extremely embarrassed and stopped in my tracks; the powerful duo did not notice and maintained their fast steady trip to the back lot talking to each other as though I did not exist. I was happy they were not near me and I turned around and speeded to my 63 Volkswagen and departed without any explanation.

I went home, put on jeans and went to Sears, and bought a new suit, I had a Sears credit card. I got back to my office about two and a half hours later.

There were four phone call messages waiting for me from the high powered lawyer. Each message was more urgent that the last, and the fourth message said specifically, "Please don't file a lawsuit against my client!"

The lawyer and his client did not know the real reason I left the dealership so abruptly and thought that I had taken offense at their condescension and apparent lack of concern for this consumer case. We settled that case promptly to the satisfaction of that consumer and I learned that day, by accident, that perception is very powerful. I should have accepted the inevitability of the worn out stitching in my suit, but alas a fabric oriented paradigm shift ripped my lethargy.

In trial we need to focus the positive, persuasive facts of our clients' cases in a manner that enhances perception in our winner take all jury system. Technology can do that.

Don't forget to read next month's El Paso Bar Journal for the September 4, 2012 computer/ internet technology paradigm changing event.

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

Job Announcement

Diocesan Migrant & Refugee Services, Inc. (DMRS). the immigration legal aid clinic and refugee resettlement agency for the Catholic Diocese of El Paso, Texas, seeks new leadership. Situated on the border of the U.S. and Mexico, DMRS serves as the only full-service immigration legal aid clinic in the desert southwest, offering legal services in the area of family-sponsored immigration, religious immigration, legal services to domestic violence and other serious crime victims, citizenship and naturalization, and deportation defense. DMRS also serves as the USCCB/Migration & Refugee Services refugee resettlement program for the area and provides Refugee Cash assistance to refugees, asylees and human trafficking victims. DMRS is staffed by a team of 30, including 4 attorneys and 8 accredited representatives. Each year, DMRS provides services to more than 30,000 individuals, including direct representation of approximately 4,000 individuals seeking benefits under the immigration laws. The goal of the agency is to re-unify families impacted and/or separated by the immigration and refugee laws and to educate the community in the area of immigration rights, benefits and reform within the context of Catholic social teaching.

The applicant should have a strong background in Catholic social teaching, especially in the area of migration, at least two years of management experience and significant litigation skills, especially in immigration law. A doctorate in jurisprudence is required with licensure or ability to attain licensure in the State of Texas as well as eligibility for admission in the federal district court and for the Western District of Texas and the 5th Circuit Court of Appeals.
This individual will be responsible for the oversight of all legal and social services provided by the agency, including but not limited to staff development and supervision, policy and program development, fundraising and grant reporting and development of the agency budget with the collaboration of the Board of Directors.
The closing date for applications is 31 October with a tentative hiring date of 15 December. Submit all applications with resumé to Patricia Fierro, Human Resources Director, Catholic Diocese of El Paso, 499 St. Matthews Street, El Paso, Texas 79907. No emails, faxes or phone calls will be accepted for consideration.

El Paso Lawyers for Patriots Legal Clinic

Saturday, November 17, 2012
Ambrosio Guillen Texas State Veterans Home
9650 Kenworthy

9:00 a.m. – 10:30 a.m. –
Subject Matter Presentations
10:30 a.m. to 2:00 p.m. –
Legal Consultations

If you would like to volunteer for this clinic, please contact Nancy at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

Open Government 2012

A Symposium on Access to Public Information & Open Meetings in Texas

Friday, October 19, 2012
El Paso Times Community Room,
300 N. Campbell St.

Morning session from
8:30 a.m to 11:30 a.m. is FREE
Afternoon session from
1:00 p.m. to 4:00 p.m. is $50

The Freedom of Information Foundation of Texas and the Office of the Attorney General are sponsoring the seminar. Approved for 4.0 hours of MCLE by the SBOT. Register at www.foift.org

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 inter-net 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.

20th Annual El Paso Criminal Law Seminar

11.0 hours of MCLE, including 1.5 hours of Ethics (pending approval)

LOCATION:
The Inn of the Mountain Gods
Ruidoso, New Mexico
(www. innofthemountaingods.com)

DATE: November 2 and 3, 2012

MCLE: 12.0 Hours Texas and NM MCLE Credits(applied for), includes 2 Hours Ethics

COST:
$300.00 for attorneys licensed 3 years or more;
$250.00 all others,
No charge for full-time judges hearing criminal cases

COURSE DIRECTORS:
Matthew R. DeKoatz,
Judge David C. Guaderrama,
Judge Julie Gonzalez,
M. Clara Hernandez,
and Mike Gibson.

ACCOMMODATIONS: A block of rooms has been reserved for November 1, 2, & 3, 2012, at the Inn of the Mountain Gods, 1-800-545-9011, Ext. 7660. Room prices are $129.00 plus tax if you inform the reservation desk that you are with the El Paso Criminal Law Seminar. To assure a stay at the Inn, make your reservations on or before 3:00 P.M . October 2,2012. Your room will not be guaranteed until payment is received. For more information call M. Clara Hernandez at (915)546-8185, Judge David C. Guaderrama at (915)534-6005, Matthew DeKoatz at (915)626-8833, Judge Julie Gonzalez at (915)546-2145, or Mike Gibson at (915)532-2977.

REFUND POLICY: A full refund of your seminar registration fee will be provided until October 26, 2012, after that you will receive a flash drive containing all seminar materials but no refund.

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

Seminar registration form

Name _____

Phone number( ) _____ Fax: _____

e-mail address: _____ Mailing address: _____

$250.00 New attorneys licensed less than 3 years	**$300.00** Attorneys licensed for 3 or more years	**No charge** full time judges hearing criminal cases

Make check payable to:
El Paso Criminal Law Group, Inc.
To ensure credit on opening day of the seminar, please return payment and registration form no later than october 28, 2012 to:

El Paso Criminal Law Group, inc.
Attn.: Elena Aguilar
525 Magoffin Avenue, Room 451
El Paso, Texas 79901

EL PASO BAR ASSOCIATION
500 E.San Antonio L-112
El Paso, Texas 79901
(915) 532-7052
(Address Service Requested)

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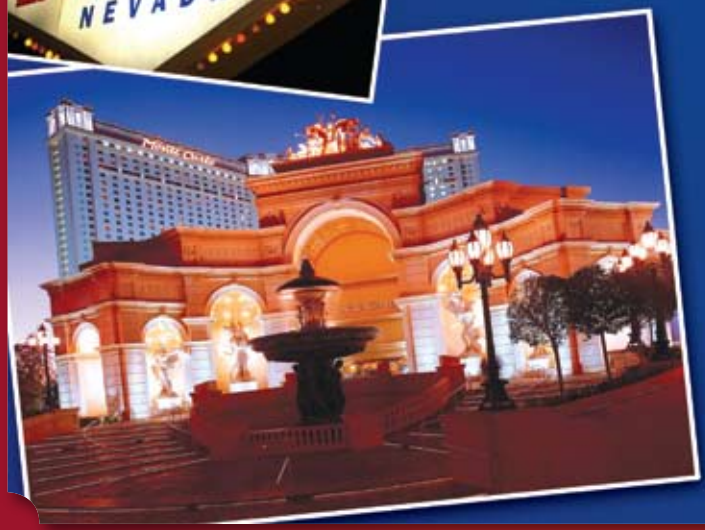
17th Annual Civil Practice Seminar

Monte Carlo Hotel and Resort Casino. Las Vegas, Nevada

February 15 & 16, 2013

Make your plans to join us for a weekend of FUN and EDUCATION!!!



To make your hotel room reservations, please call the Monte Carlo at 1/800/311-8999 and give them our Group Name "El Paso Bar Association" or group code, "XPASO13".

You can also go to the online reservation link: https://resweb.passkey.com/go/XPASO13

Seminar Topics

- Intersection between Civil and Criminal Law
- Social Media and Evidentiary Pitfalls
- Family Law: Protective Orders
- Evidence Jeopardy
- Immigration: Dreamers
- Probate
- Fiduciary Litigation
- Civil Law
- Federal Procedures
- Ethics

Room rate is $60 for Thursday, February 14, 2013, $105 for Friday, February 15, 2013 and $160 for Saturday, February 16, 2013