



EL PASO BAR JOURNAL

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An Update of Events and Information

September 2010

MY STORY: How a Few Attorneys Changed My Career

By Mario Martinez. Page 6

al Qaida, the Taliban, & An Innocent Man

By Ballard Shapleigh. Page 14

The El Paso Chapter of the Federal Bar Association

By Deborah L. Fischer. Page 8



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THE PRESIDENT’S PAGE



The Year of the Storytellers

“God made man because he loves stories.”

YIDDISH PROVERB.

From the beginning, men and women have used stories in various ways to relate history, pass on traditions, entertain, and teach lessons. Think of the stories passed down generation to generation to tell the history, adventures, trials and tribulations of world leaders, hometown heroes and scoundrels, and even our own families. Think of the stories told through art, music, plays, and dance. Think of the many parables and fables we heard as children to learn universal moral principles and philosophies.

An old parable about Truth and Story goes something like this:

When Truth was born, he went out among the people. But the men, women and children all turned their backs on him and would have nothing to do with him. No one would let Truth into their homes, and whenever the people would see him, they would turn and run away. Dejected, Truth ran to the mountains, found a cave, and became a hermit. One day when Truth was sadly sitting alone in his cave, Story came to him and asked, “Why are you so sad?” Truth replied to her bitterly, “Things are very bad. No one will acknowledge me or even look at me! They all run away from me when I approach.” Story told Truth, “No wonder! Look at you – you are naked! But I am Story – I have many clothes, many garments, which come in all shapes, sizes and colors. Put on one of my garments, and go out among the people. Let me clothe you, and the people will accept you.” And Truth did just that. Clothed with Story, Truth was accepted, believed and understood by the people.

Stories resonate with each one of us as human beings. We want and need stories to escape, to learn something new, to laugh and cry with the characters, to be changed, and to accept the truth.

One of our monthly luncheon speakers from this past year told the audience that he envied the legal profession because we are the true storytellers – we get to tell our clients’ stories and our own stories every single day we come to work. What a wonderful way of thinking about our profession!

This Bar Association year, we look forward to honoring and celebrating our lawyers and judges as The Storytellers. Every good story has a good beginning and a good ending, but the great stories are those which involve you in the journey of the characters. As we journey through this year together, we will build on the great successes of the past and continue forward towards a bright future. Events for this year include the Access to Justice Fair (October 30), El Paso Lawyers for Patriots Event (November 6), the Annual Civil Trial Seminar in Ruidoso, New Mexico (February 18-19, 2011), various new membership events, great speakers and presentations at our monthly meetings, outreach to the El Paso community, and a special Law Day Event to benefit the El Paso Bar Foundation featuring some famous Storytellers you definitely will not want to miss (May 7, 2011).

So, make it a point to become involved in the journey of the El Paso Bar Association this year. The story promises to be a great one!

Chantel Crews

Chantel Crews

PRESIDENT 2010-2011, EL PASO BAR ASSOCIATION

EL PASO BAR ASSOCIATION

September Bar Luncheon

Tuesday, September 14, 2010

El Paso Club • 201 E. Main, 6th Floor, Chase Bank • \$20 per person • 12:00 Noon

*Guest Speaker will be Tim Roth, Professor at UTEP
who will speak on the U.S. Constitution.*

Approved for ½ hour of Participatory Ethics by the SBOT.

**Please note that for this luncheon only we will be meeting
on the 6th floor as the El Paso Club is currently being renovated.**

**Please make your reservations by Monday, September 13, 2010
at noon by calling Nancy at 532-7052 or via email at nancy@elpasobar.com**



Timothy P. Roth, Ph.D. To speak at September Monthly Luncheon

Mark your calendars for Tuesday, September 14 at 12 noon at the El Paso Club for the first EPBA monthly luncheon of the 2010-2011 year. In honor of the 223rd Anniversary of the Constitution, Timothy P. Roth, Ph.D. will be our featured speaker with “*Morality, Political Economy, and the Constitution: The Founders’ Viewpoint.*” Dr. Roth will provide an examination of the relationships among the Founders’ moral and political philosophy, their constitutional project, and their political economy. This promises to be an interesting presentation and one which you will not want to miss (.5 hours of MCLE Ethics credit pending).

Dr. Roth is the A.B. Templeton Professor and Chairman of the Department of Economics

and Finance at the University of Texas at El Paso and UTEP’s 2005 recipient of the Distinguished Achievement Award for Research Excellence. His academic work includes the publication of eleven books, numerous journal articles, and technological monographs for the U.S. Congress Joint Economic Committee. Of his 2007 book, *Morality, Political Economy, and Constitutionalism*, Nobel Laureate James Buchanan said, “This should be required reading for any aspirant to public office, whether executive, legislative, or judicial.” His most recent book released in June 2010 is entitled *Politicians, Economists, and the Supreme Court at Work: the Founders Betrayed.*

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CALENDAR OF EVENTS

PLEASE NOTE: Please check the Journal for all the details regarding all above listed events. If your club, organization, section or committee would like to put a notice or an announcement in the Bar Journal for your upcoming event or function for the month of Oct/Nov, 2010, please have the information to the Bar Association office by Friday, September 10, 2010. In order to publish your information we must have it in writing. WE WILL MAKE NO EXCEPTIONS. We also reserve the right to make any editorial changes as we deem necessary. Please note that there is no charge for this service: (915) 532-7052; (915) 532-7067-fax; nancy@elpasobar.com - email. If we do not receive your information by the specified date please note that we may try to remind you, but putting this journal together every month is a very big task and we may not have the time to remind you. So please don't miss out on the opportunity to have your event announced.

SEPTEMBER 2010

Monday, September 6

EPBA & El Paso County Offices
Closed for Labor Day

Tuesday, September 7

EPBA Board Meeting

Wednesday, September 8

EPWBA Monthly meeting

Thursday, September 9

EPYLA Board and General Meeting

Friday, September 10

EPYLA Happy Hour

Friday, September 10,

MABA General Elections:

At Noon till 1:00 p.m.:

El Paso County

Courthouse, Room 306

Tuesday, September 14

EPBA Monthly Luncheon

Friday, September 17

4th Annual 243rd Drug Court
Golf Classic

Upcoming Events

OCTOBER 2010

Wednesday, October 6 - Friday, October 8
11th Annual Texas Association of Drug Court
Training Conference

Saturday, October 30

Access to Justice Legal Fair,
EPCC Valle Verde Campus

NOVEMBER 2010

Friday, November 5, 2010

MABA Annual Banquet: at 6:00 p.m. till 11:00 p.m.,
Camino Real Hotel; For tickets, contact Judge Max Mu-
noz at 915-838-7777 or maxmunoz1@sbcglobal.net

Saturday, November 6

El Paso Lawyers for Patriots Veterans Clinic

Friday, November 12

EPPA 1st Annual Golf Tournament

FEBRUARY 2011

15th Annual Civil Trial Seminar

February 18 & 19, 2011, Inn of the Mountain Gods

Statewide Conference of Drug Court Professionals to be held in El Paso

BY JUDGE ROBERT ANCHONDO AND ASSISTANT COUNTY PUBLIC DEFENDER JAY L. NYE



This year, El Paso has the unique opportunity to host the 11th Annual Texas Association of Drug Court Professionals Training Conference, to be held October 6th, 7th, and 8th. This conference brings together over 400 professionals across the State of Texas.

To help make this a successful venture, though, we need supporters who are visionary and vested in promoting a better quality of life here in El Paso, Texas. Drug Courts in El Paso County are established partnerships between private, nonprofit, and public entities united to address the exasperating problem

of drug-abusing offenders.

To better understand the impact that substance abuse has on crime and our community, here are some key points to consider:

1 in 100 US citizens are now confined in jail or prison;

80% of offenders abuse drugs or alcohol;

Nearly 50% of jail and prison inmates are clinically addicted;

60—80% of drug abusers commit a new crime after prison release;

Approximately 95% return to drug abuse upon release from prison.

These sobering statistics tell us that something must be done. Much

is being done here in our El Paso community with the nine Drug Courts that include Re-entry, Family, Adult, DWI, Veteran's, Mental Health, Juvenile and Tribal Courts. Drug courts reduce crime, save money, restore lives, save children, and reunite families.

Please join us in this endeavor by supporting us with your tax deductible contribution, or by participating in this conference. For more information, please contact Jay Nye at jnye@epcounty.com, or Kate Sullivan at ktsullivan@epcounty.com, or Ignacio (Nacho) Estrada at 532-8250.

MY STORY: *How a Few Attorneys Changed My Career*

■ BY MARIO MARTINEZ

Many years ago, in February of 1965, I received a call from George McAlmon, attorney and local political leader. He asked me to come to his office. At that time when a senior attorney asked a newly licensed attorney to go to his office, the young attorney as a matter of courtesy complied with the older attorney's request. I went to Mr. McAlmon's office not knowing what he wanted, and not knowing that my professional career was about to change.

Mr. McAlmon came right to the point:

"Ernest Guinn, Joe Yarborough and I have decided it is time for the Anglo-Saxon monopoly at the United States Courthouse to be changed, and we have jointly decided

you will have the next appointment as an Assistant United States Attorney."

In 1965, Ralph Yarborough was the senior United States Senator, and appointments to the federal judiciary, United States Attorney's Office, United States Probation Office and the United States Marshall's Office required his approval of persons appointed. Mr. McAlmon explained that Ernest Guinn, Joe C. Yarborough (a local builder for whom Yarborough Drive on the eastside is named) and he were the Senator's El Paso strongest financial and political backers;

that they had already discussed their idea with the Senator (that a minority attorney should be appointed to the El Paso United States Attorney's Office); and that the Senator had given them instructions to find the right person for the appointment. They were confident that Senator Yarborough would accept their recommendation that I be appointed to the position.



Mario Martinez

The United States Attorney at the time was Ernest Morgan, whose office was in San Antonio. Mr. McAlmon asked me to call Mr. Morgan and introduce myself. I told Mr. McAlmon that I was uneasy calling Mr. Morgan. I never met or talked to him.

Mr. McAlmon picked up his telephone and called the Senator's office. He was unable to reach the Senator. He left a message. He then told me that the Senator would call him back that day or night at his residence. He said he would ask Senator Yarborough to call Mr. Morgan and advise Mr. Morgan that I would be calling him. Someone, he said, would get back with me soon.

The next day my telephone rang. I answered it. A voice with a distinct Texas drawl said, "This is Ralph Yarborough, and I want to introduce myself to you." He recalled that he had begun his law career in El Paso as a young attorney

with the law firm of Burges, Rasberry and Hulse. He then asked me if my father Mike was still a bailiff for the Court of Milton "Buddy" Ward, a County Court at Law Judge. When I replied, "Yes", the Senator talked warmly of his recollections of my father. He then said that Ernest Guinn, Joe Yarborough and George McAlmon had all called him to say I was the only lawyer that they were recommending for a position with the United States Attorney's office in El Paso. Acting on their recommendation, he said that he had already called the United States Attorney, Ernest Morgan, who was waiting for my call. The Senator gave me Mr. Morgan's private phone number and I called him. Mr. Morgan took my call, said the appointment was mine--subject to an FBI investigation, which he had already ordered.

In early April 1965, I was notified by Mr. Morgan that the FBI investigation was complete. On April 5, 1965, I was sworn in as an Assistant United States Attorney by Judge R. E. Thomason. On that same day Judge Thomason also swore in Harry Lee Hudspeth, later to become a United States District Judge, and Jaime Boyd, later to become a United States Magistrate, as Assistant United States attorneys.

Today most positions in the United States Attorney's Office, the Probation Office and the United States Marshall's Service, Chief Probation Officer, and United States Marshall, are under the Merit Systems Protection Board (equivalent to civil service).

The United States Attorney is appointed by the President of the United States.

El Paso Lawyers Recognized for Achievements

■ BY NANCY GALLEGO

During the summer, a number of El Paso lawyers were certified as specially qualified for or specialized legal work. The National Association of Counsel for Children recognized Judge Oscar Gabaldon, Jr., Richard Deck, Mary Alison Gutierrez, Lyda Ness-Garcia, and Mark Briggs as child welfare law specialists.

Judge Oscar G. Gabaldon is the only judge in Texas certified as a child welfare law specialist

by the National Association of Counsel for Children.

A number of local lawyers were also appointed to serve on boards dedicated to serving the public interest. Steve James joined Cori Harbour and Cezy Collins on the State Bar of Texas Board of Directors. Richard Deck was recently elected chairman of the board of directors of the National Alliance on Mental Illness of El Paso ("NAMI"). NAMI provides

emotional and educational support to all people affected by brain disorders.

Finally, Yvonne Acosta received the Gold Nugget Award from UTEP's School of Nursing.

In the future, please notify Nancy Gallego if a lawyer is recognized for achievement in any way, as the editors would like to recognize this lawyer for his achievement in this publication.

|| EPYLA STAR OF THE MONTH ||

Alberto "Beto" Mesta Jr.

■ BY PATSY LÓPEZ

Alberto "Beto" Mesta, Jr. has practiced farmworker employment law with Texas RioGrande Legal Aid, Inc. (TRLA) since 2003. He grew up in El Paso's Lower Valley and graduated from Del Valle High School before majoring in Political Science at the University of Texas at El Paso.

While at UTEP, Beto became part of the first class of the acclaimed Law School Preparation Institute. And in a glimpse of what was to come, Beto was awarded UTEP's Men of Mines Award for his outstanding service to fellow students and the university. He went on to graduate from the University of Texas at Austin School of Law in 2002. (Hook 'Em Horns!)

Beto is currently the Branch Manager of the TRLA-EL Paso office where he oversees a staff of 30, including 15 attorneys. He began his work as a Farm Worker Division Attorney at the El Paso Migrant Farm Worker Office of

Texas Rural Legal Aid, Inc. in 2003. Some years later, Texas Rural Legal Aid was merged with the civil firm El Paso Legal Assistance Society to become what is now TRLA.

Beto has represented the employment interests of farm workers and other low-wage workers in state and federal courts since he joined TRLA. His practice has taken him to Arkansas, Maine, Iowa, and Connecticut, where he has seen first hand the atrocious working conditions low-wage employees are often forced to endure.

When he is not fighting for worker's rights, Beto represents the interests of consumers whose rights are trampled on by third-party debt collectors that make a practice of harassing consumers in violation of the Fair Debt Collection Practices Act. In short, Beto has spent his years in practice championing



for the "little guy" whose only access to justice is often through legal assistance services.

When he is not practicing law, Beto continues to serve the community as a Board Director with the 'NonProfit Enterprise Center' and with the 'El Paso Collaborative for Community and Economic Development.' He was also recently appointed to the El

Paso Bar Association Board of Directors.

In his off time Beto enjoys discovering new music, rediscovering old films, and spending time with his fiancé, Ms. Elizabeth Molina, a fellow TRLA attorney who Beto endearingly refers to as "his better half." Beto constantly strives to improve our community through his practice and public service. EPYLA is proud to spotlight a member who works everyday to make a better El Paso for us all.

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THE EL PASO CHAPTER OF THE FEDERAL BAR ASSOCIATION *August 12, 2010*

■ BY DEBORAH L. FISCHER
Chapter President, 2009-2010



There are a number of specialized bar associations in our legal community. The El Paso Bar Association supports the work of these organizations. This year we will review the work of these local bar associations. We begin with a look at the work of the El Paso Chapter of the Federal Bar Association. Ed.

The El Paso Chapter of the Federal Bar Association (FBA) was organized in April 2004, and has been increasingly active each year since then. After being dormant for approximately ten years, the current chapter was inspired and created by attorneys practicing in federal court, who wanted a local association to focus on and promote federal practice. With that in mind, we have steadily increased our membership to its current level of 115.

The national FBA was founded in 1920, and is “dedicated to the advancement of the science of jurisprudence and to promoting the welfare, interests, education, and professional development of all attorneys involved in federal law.” It serves as the “catalyst for communication between the bar and the bench, as well as the private and public sectors.” The mission of the FBA is to “strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.”

The El Paso Chapter FBA provides monthly “brown bag” seminars, held during the lunch hour, on topics relevant to federal practice, and typically approved for one hour of CLE credit. These seminars are held on the third Thursday of the month. Recent speakers have included the Honorable Edward Prado, Justice of the U.S. Fifth Circuit Court of Appeals, who gave a Fifth Circuit Update, and local practitioners and judges discussing various areas of practice such as immigration law, mediation, federal rules updates, military law, magistrate court practice, and ethics.

Every spring, our chapter holds a Federal Court Practice Seminar, that has been approved to satisfy the requirements under the local rules for attorneys seeking admission to practice in the Western District of Texas. It has



Albert Armendariz Federal Courthouse, El Paso, Texas

been approved for four hours of CLE credit, including one hour of ethics. The course topics are presented by local practitioners, both civil and criminal, government and private sector, and judges. The course is videotaped, so that we can show it again in the summer and fall of that same year.

This past year, we held a U.S. Supreme Court Admissions Ceremony and Luncheon, with Supreme Court Clerk William Suter conducting the ceremony and discussing “Today’s Supreme Court.” Approximately thirty attorneys were sworn in. Held at the El Paso Club downtown, the event was well attended with over 100 guests.

As our chapter’s goals have been to promote education and diversity for our legal community, we implemented a program this year for summer interns and new associates

as well as a scholarship program for first year law students. The summer program is an “Introduction to Federal Practice,” with court-watching time, a courthouse tour, and practical and substantive presentations by local attorneys, and federal district and magistrate judges. The scholarship program was implemented to award an outstanding law student from El Paso, who will begin law school at an ABA-accredited law school in the fall of 2010, with a scholarship in the amount of \$1000. The purpose of the scholarship is to support legal education, build the FBA’s ties with the El Paso Community, and increase the recipient’s connection to the El Paso legal community. As these were “pilot” programs, we are looking at ways to improve both the summer associate program and the scholarship program for upcoming years.

We have also co-sponsored some events with the El Paso Bar Association, including a luncheon at Fort Bliss, with guest speaker Col. Michael Benjamin, and a presentation and reception at the El Paso Museum of Art for "El Paso Lawyers for the Arts." The guest speaker for that event, attorney Sergio Munoz Sarmiento, made a presentation on intellectual property and copyright law.

This past year, our chapter welcomed U.S. Magistrate Judge Margaret Leachman into the federal judicial system, and said farewell to U.S. Magistrate Judge Michael McDonald, with his retirement from the judiciary.

We are planning many more upcoming events, educational and social, that we are very excited about. With that said, I invite you to become a member of the FBA, if you are not already. Membership applications may be completed on-line at www.fedbar.org, or you may contact me at (915) 203-6419 for more information. The website has information about the organization, about the chapters, and about member resources and benefits. The National Convention and Annual Meeting this year will be held Sept. 22-25, 2010, in New Orleans. If you are interested in attending, you may register through the FBA website. Also,

if you would like to become involved with our summer program or scholarship committee, please contact me.

In closing, I would like to thank all those who have helped our chapter to better serve our legal community. I am extremely appreciative of the officers and board members, past and present, who have served, as well as our judiciary, who have been extremely supportive of our events and endeavors. It has been a deeply rewarding experience to serve as this chapter's president, which experience will come to a conclusion at the end of September. Then it will be time to welcome the next president.

LAW WEST OF THE PECOS

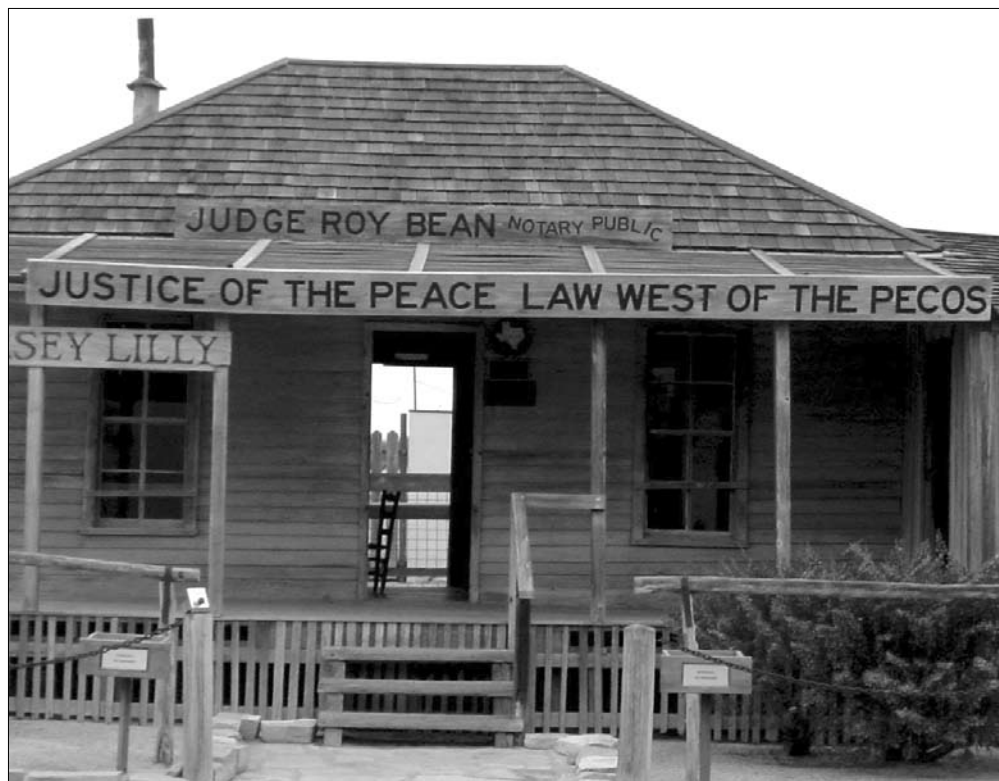
BY JUSTICE ANN CRAWFORD McCLURE

The Eighth Court of Civil Appeals was created on June 14, 1911 and for seventy years, it heard only appeals in civil cases. Effective September 1, 1981, the fourteen intermediate courts became Courts of Appeals and acquired criminal jurisdiction. Despite a bifurcated system between Texas courts of last resort, the Supreme Court and the Court of Criminal Appeals have rarely had occasion to challenge the other's jurisdiction. Docket equalization by the Supreme Court and the transfer of criminal cases between intermediate courts are now being questioned in the jurisdictional context.

The Supreme Court may transfer appeals pursuant to the Texas Government Code which provides:

The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer. TEX.GOV'T CODE ANN. § 73.001 (Vernon 2005).

Although the authority granted to the Supreme Court by Section 73.001 is typically exercised to equalize the dockets of the intermediate appellate courts, the statute does not limit the Supreme Court's authority to that purpose. *Miles v. Ford Motor Company*, 914 S.W.2d 135, 137 (Tex.1995). Nor does it limit transfers to civil cases only. Enter Jesse Arocha. See *Arocha v. State*, No. 08-07-00108-CR, 2009 WL 1883733 (Tex.App.—El Paso Jun



30, 2009). Arocha was convicted of burglary of a habitation in San Antonio. The trial court assessed punishment at imprisonment for six years, probated for six years, and a fine of \$1,500. The Supreme Court transferred the appeal from the Fourth Court to the Eighth Court by docket equalization order.

In challenging the court's jurisdiction, Arocha argued that (1) Section 73.001 of the Government Code is unconstitutional and

violates the Equal Protection Clause because it does not give proper effect to Texas voters who elect the justices of the intermediate courts; (2) the Supreme Court's transfer order was unconstitutional due to a conflict between the Texas Constitution and Chapter 73 of the Government Code; (3) jurisdiction was lacking because the transfer order violates the equal protection and due course of law provisions of the Texas Constitution; and (4) the transfer

order was unconstitutional because it was a void exercise of legislative authority over the judiciary in violation of the Separation of Powers provision found in Article 2, Section 1 of the Texas Constitution. He asked that we transfer the case back to the Fourth Court of Appeals.

We first addressed whether Arocha had preserved error. To preserve a complaint for appellate review, a party must raise the issue by a timely and specific objection or motion. See TEX.R.APP.P. 33.1(a). Even constitutional errors may be waived by failure to object. *Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim.App.2000); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex.Crim.App.1995). Generally an appellant complains about a ruling of the trial court. In this case, however, Arocha complained about an action of the Texas Supreme Court after he filed his notice of appeal to the Fourth Court of Appeals. The issues we decided were, (1) was he obligated to preserve his complaints about the transfer order and the constitutionality of Section 73.001, as applied to him, and if so, what steps must be taken to preserve the error?

Arocha framed his appellate issues in terms of a challenge to the court's jurisdiction. Generally, a party is not required to preserve a challenge to the court of appeals' jurisdiction, which is defined by the Texas Constitution and by statute. See TEX.CONST. art. V, § 1 (courts in which judicial power is vested); TEX.CONST. art. V, § 6¹ (courts of appeals); TEX.GOV'T CODE ANN. § 21.001 (Vernon Supp. 2004) (courts of appeals districts) (inherent power and duty of courts); TEX.GOV'T CODE ANN. § 22.220 (civil jurisdiction); TEX.GOV'T CODE ANN. § 22.201 (Vernon Supp. 2008) (courts of appeals districts); TEX.GOV'T CODE ANN. § 22.221 (writ power); TEX.GOV'T CODE ANN. §§ 73.001-73.002² (transfer of courts of appeals' cases); TEX.CODE CRIM.PROC. ANN. art. 4.01 (Vernon 2005) (providing that courts of appeals have jurisdiction in criminal

actions); TEX.CODE CRIM.PROC.ANN. art. 4.03 (providing that "[t]he Courts of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed.").

We found that even if Section 73.001 is unconstitutional as applied to Arocha, we would not be divested of jurisdiction and concluded that he was not excused from preserving the constitutional arguments he raised with respect to the transfer order.

Turning to the method of preservation, we first recognized that the Texas Supreme Court has established that the proper procedure for obtaining a transfer is by motion:

The party requesting a transfer should file a copy of the motion to transfer in each of the two courts of appeals, asking that, when the motion is forwarded to the Supreme Court, each court of appeals advise the Supreme Court in writing whether it has any objection to the proposed transfer. Any briefs in favor of the proposed transfer should also be filed in each court of appeals and forwarded with the transfer motion. We will then have the motion, the briefs, and the comments of the two courts of appeals in determining whether to grant the motion to transfer.

Miles, 914 S.W.2d at 137 n. 2. Citing *Miles*, the State maintained that Arocha had not followed the proper procedure for seeking transfer back to the Fourth Court of Appeals. Arocha countered that he should not have to "acquiesce" to the authority of the Supreme Court in order to have his "criminal law matter" transferred back to the Fourth Court. But if he had followed the established procedure – and the Supreme Court had granted his motion and transferred the appeal back to the Fourth Court – his constitutional complaints would have been remedied. If, on the other hand, the Supreme

Court had denied his motion, then we would be in a position to address the constitutional issues he raised. Because Appellant refused to avail himself of an established procedure which potentially could remedy the alleged constitutional violations, we held that he failed to preserve error.

Arocha filed a petition for discretionary review which the Court of Criminal Appeals granted on November 18, 2009. After reviewing the briefs of the parties and the relevant portions of the record, the court concluded that its decision to grant review was improvident. The petition was dismissed on June 30, 2010. See *Arocha v. State*, 2010 WL 2618421 (Tex.Crim.App. Jun 30, 2010) (No. PD 1189 09).

On the same day we issued the opinion in *Arocha*, we applied its jurisdictional analysis in *Pena v. State*, No. 08-07-00107-CR, 2009 WL 1889009 (Tex.App.–El Paso Jun 30, 2009, pet. filed). Suffice it to say that when the procedural requirements have been met, these issues will be decided on the merits.

1. Article V, Section 6 of the Texas Constitution provides:
Sec. 6. (a) The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

2. Section 73.002 specifically provides:
(a) The court of appeals to which a case is transferred has jurisdiction of the case without regard to the district in which the case originally was tried and to which it is returnable on appeal.

The advertisement features a collage of legal publications. On the left, a man in a suit is partially visible. The central focus is the *EL PASO BAR JOURNAL*, with several covers shown. One cover has the headline "WE ARE FAMILY" and another has "JUDGING FROM THE PAST Hazards of the Job Circa 1850." Other covers include "THE LAW OF WAR" and "EXTRA! Victory EXTRA! Waterloo Daily Courier." To the right, the logo for **DEL PUEBLO PRESS Inc.** is displayed, featuring a silhouette of a person in a sombrero. Below the logo, the text reads: "The El Paso Bar Association's Bar Bulletin is proudly designed and published by DEL PUEBLO PRESS, INC. We are located on Third and Mesa, Ste E. Contact us at (915) 545-1598 or pueblo@ureach.com."

SENIOR LAWYER INTERVIEW

GERALD J. SMITH.

■ BY CLINTON F. CROSS

This month I interviewed Gerald J. Smith. I was Gerald's associate for a time, and I learned as much or more from him about practicing law than anyone else I ever worked for.

CROSS: Who were your parents?

SMITH: My father, Eugene Smith, came from Thackerville, Oklahoma, located North of Gainsville, Texas near the Red River. My mother was Jewel Hensing from Grubville, Missouri.

CROSS: Any interesting ancestors?

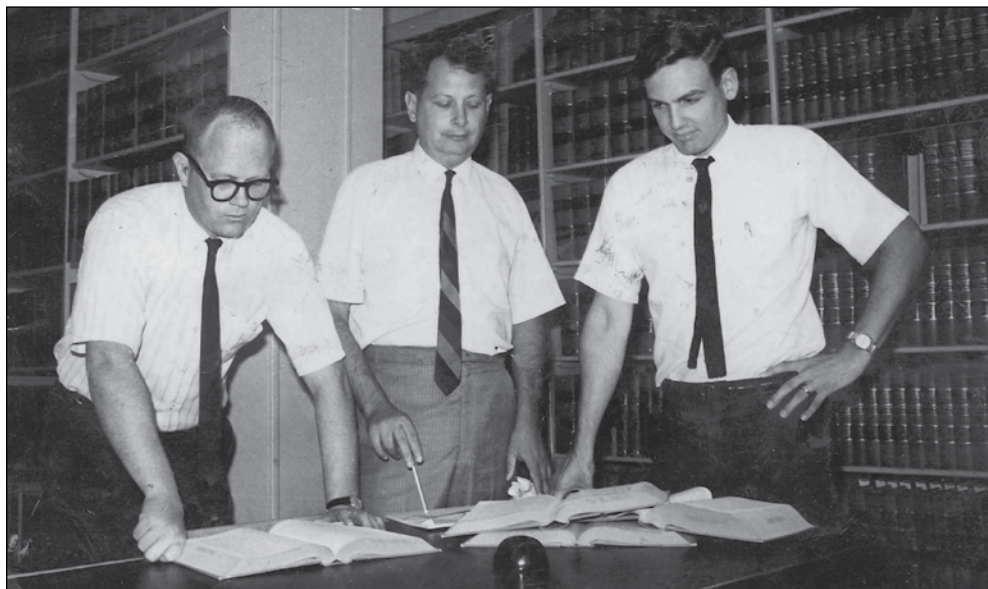
SMITH: Cynthia Smith, my paternal great-grandmother, was the illegitimate daughter of William Smith O'Brien, the legendary member of Parliament who fostered a revolution in Ireland and was convicted of high treason. Under the law the only sentence he could receive was to be hung and drawn and quartered as he died. His sentence was commuted, but he was forcibly emigrated to Tasmania. He was later pardoned.

In about 1848, during the great potato famine, and before going to Tasmania, William placed his daughter Cynthia with the Hamilton family of Virginia as a servant in their home. He posted a security bond to assure that she was not a public charge.

Cynthia fell in love with Vance Hamilton, who also apparently loved her. Unfortunately, Vance's step-father objected to the relationship.

Although Vance's motive is now lost in the mists of time, but perhaps for the love of Cynthia, Vance killed his stepfather.

Thereafter, Vance and Cynthia ran away to Kentucky. They had five children there. The youngest was my grandfather. Shortly after his birth they moved to Overton County Tennessee. Vance and Cynthia had nine more children



Gerald J. Smith (center), Island Attorney, Attorney General's Office, and Associates

The Governor did not want me to send his sister to prison. But an F.B.I agent and the Filipino consulate were in my office almost everyday pressuring me to prosecute. I told the Governor that I had to prosecute or we would both go to Jail. He did not understand. I prosecuted. The jury convicted. The Judge sentenced her to six years in prison. After it was all over I talked to her. She said she did not blame me for what I had done. But the Governor did. He forced me to quit.

there. Altogether, they had fourteen children.

CROSS: I'm confused. Since Cynthia Smith married Vance Hamilton, shouldn't your last name be "Hamilton"?

SMITH: They could not go by Hamilton or even admit that Vance existed. He was a fugitive subject to being hanged. Cynthia listed herself as head of household to census takers of 1860, 1870 and 1880. She listed herself as a widow at each census but kept having kids. She probably passed her husband off as a temporary farm hand.

Cynthia and her children were the first members of my family to move to Indian

Territory. They leased farmland in the Red River Valley bottom from the Chickasaw Nation.

My Grandfather, Joseph Hamilton Smith, was a teenager around 1884 when he, Cynthia and the rest of the family arrived in Oklahoma Indian Territory from Pickett County, Tennessee.

My Grandfather died of flu in the epidemic of 1918. Soon thereafter the family moved to Anthony, Doña Ana County, New Mexico where they bought a farm.

My maternal grandfather, George Hensing, moved to Vinton, Texas at about the same time. He was a prosperous farmer. My mother and

my father met in Valley Union High School, predecessor of Gadsden High School. They married and I was born soon thereafter.

CROSS: What was your childhood like?

SMITH: I grew up on the family farm. I loved it. At eight I had a horse and a twenty two rifle. In the summer time my mother took off our school shoes and shirts and turned us loose. We did not put shirts and shoes on again until we went back to school in the fall, except when we went to the Baptist church on Sunday. My mother took us every Sunday, and she made us wear shirts and shoes.

My dad seldom attended church. He believed that religion was best suited to women and children.

CROSS: Where did you go to school?

SMITH: When I was a very small child a horse kicked me, causing a serious injury. My father feared that I was becoming frail as a result of my injury. He sent me to New Mexico Military School to toughen me up. I did not like the school much, but I loved playing polo.

I attended N.M.S.U. and the University of Texas Law School. I served in the Army. I graduated from Law School in 1956.

CROSS: Tell me about your legal career.

SMITH: After law school, I moved to Dallas, Texas where I opened a law office. I will never forget my first day. I had on a new suit and I went to Court for the first time. I also had new shoes, so I stopped to get them shined on the way. A shoe shine man spotted me as a new lawyer right away. As he shined my shoes he said, "Do you know how to spell lawyer?" I hesitated. He continued, "L" pop-pop, "T" pop-pop, "A" pop-pop, "R" pop-pop, "LIAR, that is how you spell lawyer." That hurt. I believed the law to be a calling, something like the priesthood. I still believe that.

I had a tough time making a living as a lawyer. I had to get a part time job with Retail Credit Company doing investigations of people applying for insurance. In my part time law practice I got lucky. I made a big fee. I immediately quit Retail Credit. I spent the next several months taking care of my kids and haunting used book stores. Marie, my wife was in medical school.

I then went to work for Fannie Mae as a real estate lawyer.

On one of the first few days I did not report in until 10 a.m. in the morning. My boss asked me why. I told him that I was a professional person, a lawyer, and I did not deem it necessary

to keep regular hours; but that I would keep up with my work and work more than forty hours a week. He informed me that I would report at eight thirty take thirty minutes for lunch and leave at five- no exceptions. The work was dull. I reviewed over one hundred mortgage applications per day. Most of the ones that I rejected were rejected for typographical errors. But I more than met my quota. After that I got along very well with Mr. King, my boss.

In 1960, I transferred to the Los Angeles office when my wife graduated from medical school. I found work in that office difficult. One of the other lawyers resented me and shot paper clips at me. I made one good friend. He lived in a small apartment with his wife. I think he had some drug or alcohol abuse problem.

One of the lawyers in the office had been a very successful Chicago lawyer, but had taken a job with F.N.M.A as a sort of a retirement ploy. I was assigned to review a proposed bill being considered by a Congressional committee. I wrote a scathing report. In substance, I said the bill was written to give big mortgage companies an undeserved windfall.

Shortly after that my boss called me in and told me that Daniel E. Farr, a very prominent Los Angeles lawyer, wanted to interview me for a job. We met for lunch at the Brown Derby. He offered me a job making five times my salary at F.N.M.A. I took it, but I did not really enjoy it. I did not have a private secretary. I had to share one. I was not given anything really important to do. I did do some routine work for John Wayne and Fernando Lamas. It occurred to me sometime later that perhaps I had been hired to get me out of F.N.M.A.

CROSS: How did you end up in El Paso?

SMITH: I went home one day and there was a note on the kitchen table that my wife had quit her internship and taken the kids to her brother's place. I quit my job and followed her. We reconciled, but then we had to find jobs and restart our lives.

We moved to El Paso, where she entered another residency and I started law practice. The first year I netted six hundred dollars. Others told me that that was good for the first year. After that Mr. King sent me the El Paso F.N.M.A. foreclosure business and a prominent childhood friend of my father's hired me to handle his real estate work. We founded the town of Chaparral, New Mexico. I drafted the initial sales brochures and legal contracts. The business went great. My client offered me a percentage of the business rather than cash payments. I insisted on cash, a decision that

cost me several million dollars.

I then started representing a rag tag bunch of employees down at the local Levi Straus Company, and my income went up to about six thousand dollars a year.

A worker a Levi Straus came in my office and told me that the President of the United Garment Workers union had fired him. He was called before all of the workers and the representative announced that as line representative he had filed a grievance against Levis Straus. This was the first grievance filed in the sixteen years that the labor contract had been in effect. I verified his story and took the case. I petitioned to have this international A. F. L. – C. I. O. union decertified and asserted that it was a company dominated union. I succeeded. National Labor Relations ordered an election. We won.

We met to negotiate a contract. During the negotiations, Mr. Cohen, the local president, offered us a one cent raise and made the statement that his workers would never strike him. I raised the window shade of the room we were in and Mr. Cohen saw that all of his workers were across the street on strike.

Then things began to get brutal. Goons beat up union members. The union members caught strike breakers in Juarez and put glue in their hair. They had to shave there heads and were too ashamed to cross the picket line after that. We won.

CROSS: What happened next?

SMITH: My wife left me again, and we divorced.

CROSS: I know that broke your heart. What did you do about it?

SMITH: I married again. We had a son, Jason. I also left El Paso and went to Guam, working as an Island Attorney General. My salary started at twelve thousand a year. I did not have much to do as Island Attorney General, so I volunteered to help the overworked District Attorney. The District Attorney handled all of the misdemeanors and felonies, and of course all of the appeals to the Ninth Circuit.

When the District Attorney unexpectedly resigned, I was offered the job. With the new job, I could make twenty-five thousand a year—more than twice my salary as Deputy Attorney General. I took the new job.

CROSS: Any interesting cases as District Attorney?

SMITH: The Governor's sister shot her husband with a 357 magnum in the heart and twice in the head when he fell. Being a tough

Filipino, he survived to testify against her. She had gotten fed up with him getting drunk and beating her. She told a gun merchant and a neighbor that she was going to kill her husband if he came home drunk one more time in a mood to beat her up.

The Governor did not want me to send his sister to prison. But an F.B.I agent and the Filipino consulate were in my office almost everyday pressuring me to prosecute. I told the Governor that I had to prosecute or we would both go to jail. He did not understand. I prosecuted. The jury convicted. The Judge sentenced her to six years in prison. After it was all over I talked to her. She said she did not blame me for what I had done.

But the Governor did. He forced me to quit.

CROSS: So then what did you do?

SMITH: I took a job with one of the most prominent firms on the Island as head of their

trial section. Things went well until my wife sort of lost it and moved out with my son.

So I came back to El Paso and opened an office with Vernon Decker. Later, I officed with Julian Horowitz and Holvey Williams, a retired appellant judge. My wife sent my son back to me to care for. He lived with me until he was grown.

I became a board certified personal injury lawyer in 1978 and prospered. I settled a big case and was able to hire lawyers, legal assistants, secretaries and a full time bookkeeper. One of the lawyers that I hired was Clinton Cross. He took one of the cases that I assigned him to the Supreme Court of Texas. I took two cases to the Texas Supreme Court and won. I worked on one for fifteen years.

CROSS: I understand you are now retired.

SMITH: I "semi-retired" in 1991 in order to go back to college at N.M.S.U to study agronomy. I got to my senior year, but quit

school in order to go back to law practice.

In 1999 I retired for good and joined the Peace Corps. I was sent to Russia where with the help of a Moscow law firm I started a comparative law course at Vladimir Law School, in Vladimir, Russia. With the help of a Russian lawyer who spoke English, I taught the course in Russian. I loved Russia and its people. I had more fun in Russia for two years than I have had in all of the rest of my life put together.

I came home. I had serious health problems. I would have gone back to Russia had I not had these problems.

With Enrique Moreno, I tried and settled one of the cases that the Supremes sent back to the trial court. I did that recently, after I came back from the Peace Corps.

CROSS: Your children?

SMITH: I have three son's, Eugene, Ron and Jason. I have one daughter, Teresa.

BAR ASSOCIATION AWARDS

BY NANCY GALLEGO



Nancy Gallego & Carlos Cardenas receiving LexisNexis award from Diane Callaghan, NABE/ABA Annual Meeting, San Francisco, August 5, 2010



Cori Harbour, Nancy Gallego, TYLA Treasurer, Roland Johnson in San Francisco

At the State Bar Convention in June, the El Paso Bar Association, led by President Carlos Cardenas, won seven awards for outstanding leadership and service: the Award of Merit award for the bar association's overall projects throughout the year, the Star of Achievement award for the Access to Justice Legal Fair, and the Outstanding Partnership award for the Access to Justice Legal Fair.

The El Paso Bar Journal received an award for being the "Best Local Bar Association Newsletter" in its class. In addition, it received awards for publishing the "Best Series of Articles" (*Pro Bono Et Malo: From Odometers to Divorces*, by Ballard Shapleigh); the "Best News Article" (*Down By The River: Illegal Entry and the Spirit of Journalism*, by Ballard Shapleigh); and the "Best Feature Story" (*Texas Rio Grande Legal Services: Providing Access to Justice for the Poor*, by Alberto Mesta).



Carlos Cardenas, Addressing General Assembly, State Bar Meeting, Ft. Worth, June 10, 2010.

The El Paso Bar Association also received the LexisNexis 2010 Community and Education Outreach Award for the Access to Justice Legal Fair in San Francisco, CA on August 5, 2010.

HOW CIVILIZATION CAME TO EL PASO

al Qaida, the Taliban, & An Innocent Man A Chance to Do Something

A Postscript to the Keynote Address of the 2010 Bar Banquet

■ BY BALLARD COLDWELL SHAPLEIGH

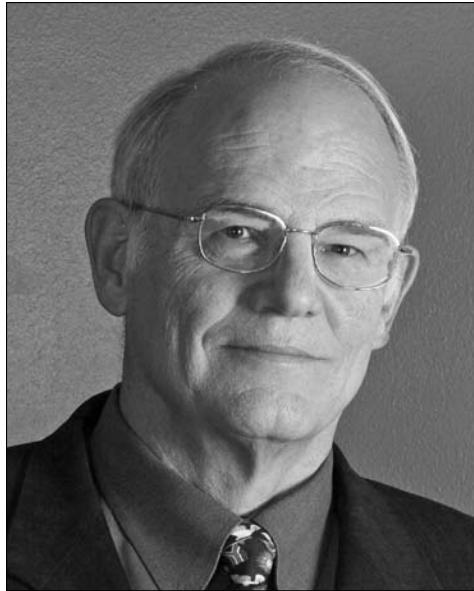
Civilization sometimes comes to El Paso in speeches. At the first bar banquet in 1902, the keynote speaker took a humorous glance back at an uncivilized El Paso, with a 19th century system of justice that barely worked, and “law and lawyers in the sage brush and chaparral days” when, even if a paying client could actually be found, it was hard to get “the judge, sheriffs, juries and attorneys all sober at the same time so as to constitute that majestic and collective whole denominated a court.”

In 1911, attorney W.H. Burges addressed a gathering at the Toltec Club to honor Francisco I. Madero and his victory in the Battle of Juárez, which ignited the Mexican Revolution. Burges chided the victor by lauding the loser. He told Madero, somewhat ironically given present-day conditions in Juárez, that, “A Mexico in which order is preserved, the laws enforced, property held inviolate and life secure, is the gift of General [Porfirio] Díaz to you and to the world.”

In 1935, Gutzon Borglum, sculptor of Mt. Rushmore, addressed a civic-minded audience at the Scottish Rite auditorium downtown. He talked about the desirability, and even the urgent necessity, of sculpting a memorial at Hueco Tanks “to reap the wealth of El Paso’s history and 460 years of pioneering in the Southwest, beginning with the visit by Cabeza de Vaca,” or of carving a memorial “in red granite” on the slopes of Mt. Franklin. “These things can be done if you have the courage,” he said.

At the most recent bar banquet on May 1, 2010, Austin lawyer Dicky Grigg talked about the difficulty of traveling to Guantánamo and the necessity of defending individuals detained on terrorism charges “if for no other reason than for the sake of the system.”

“It’s not about them. It’s about us,” he said. Grigg freely admits that he borrowed the line from John McCain. He uses it every time he talks about his *pro bono* work as a member of the “Guantánamo Bar Association,” the informal name given to the lawyers who work on behalf of the detainees.



Dicky Grigg gave the keynote address at the 2010 Bar Banquet

As Grigg said to one newspaper, “I’m just sort of sitting on the sidelines in a rocking chair and griping about everything, and this was a chance to go try to do something, so I volunteered.” Since 2002, over 770 individuals – described originally as the “worst of the worst” – have been imprisoned at Guantánamo.

For the better part of a fast-moving hour at the El Paso Country Club, complete with a PowerPoint presentation, Grigg (a/k/a Richard Alan Grigg) talked about the trials and tribulations that he experienced while representing terror suspect and Guantánamo detainee Mohammed Akhtiar (a/k/a Akhtiar Mohammed, Akteyar Mohammad), a then 53-year-old Afghan accused of launching a rocket attack on troops in his homeland of Gardez, Afghanistan in May, 2003. The U.S. also accused him of planning an attack on a local governor, and of being a militant leader. The U.S. government had determined that Akhtiar was an enemy combatant “based on information possessed by the United States that indicated he was associated with forces that were engaged in hostilities against the United States and its

coalition partners.”

None of it was true. He had been set up. Akhtiar should never have been arrested or sent to Guantánamo.

Because of physical abuse suffered by his family, Akhtiar was so anti-Taliban and anti-al Qaida that he had to flee to a refugee camp in Pakistan for his own safety. After the initial success of the U.S. invasion in 2001, he returned to his homeland. He was a loyalist to U.S.-backed President Hamid Karzai.

A month before he was to start a job with the Karzai government, he was arrested by U.S. soldiers. The revenge-minded Taliban, worried that he might again become too powerful and influential, fabricated a multitude of false allegations against Akhtiar which were fed to the U.S. military through informants.

At one point, Akhtiar told U.S. officers, “I wish that the United States would realize who the bad guys are and who the good guys are.” When he got to Guantánamo, he knew he had more to fear from other prisoners loyal to the Taliban and al Qaida than from his U.S. captors.

For Dicky Grigg, just trying to get a face-to-face interview with his client was no small matter or an easy task.

For starters, in August 2005, Grigg was required to pay his own way to a two-day seminar in New York sponsored by the Center for Constitutional Rights, a non-profit organization that is coordinating representation for the Guantánamo detainees. That organization assisted him in preparing and filing a writ of *habeas corpus*, naming George Bush and Donald Rumsfeld as respondents, challenging their authority to hold his client.

Next, Grigg had to obtain a U.S. government security clearance by filling out a ten-page questionnaire and subjecting his friends, neighbors and coworkers to the rigor of an FBI background check. He was required to examine classified documents in a secure court facility in suburban Washington, D.C. He could only discuss the classified information with other

lawyers who also had a security clearance - in person, not over the phone, and not by email. Moreover, he could not share that information with his client.

He had to contend with government lawyers who did not want him to be there, and actively tried to keep him out. Finally, Grigg had to travel to the Caribbean simply to speak to his client at Guantánamo. When he left, guards took possession of his notes and he did not see them again until copies arrived at his Austin office with sensitive information redacted. If he needed access to the originals, he would have to travel to Virginia to review them.

In Austin, Grigg's trial practice centers on personal injury, wrongful death and breach of contract suits, not criminal defense. His clients have included the families of federal agents killed in the 1993 Branch Davidian raid near Waco. In that case, he reportedly won a settlement from, among other concerns, the *Waco Tribune-Herald*. He also won a \$22.5 million award for a Texas Tech quarterback accused of shoplifting in the mid-1990s. He is now defending Texas Tech University against a lawsuit by ex-football coach Mike Leach, who was fired at the end of last season.

Grigg, a native of Sweetwater, Texas, graduated from U.T. Law School in 1973 which, coincidentally, is exactly what George W. Bush, a native of New Haven, Connecticut, might have done but for the rejection of Bush's law school application in 1970. As a former captain of the Texas Tech football team, Grigg likes to say that he did his part to help Texas win the 1969 national championship.

When Grigg was finally cleared to travel to Guantánamo, Mohammed Akhtiar had already been held for three years without trial. Grigg said that he began his first (and apparently only) interview with his client by producing a photo depicting Akhtiar's children in a Pakistani refugee camp.

Grigg was surprised when his client responded, "I've never seen these people



Presented:
31st ANNUAL
PAGE KEETON
CIVIL LITIGATION CONFERENCE
OCTOBER 25 - 26, 2007

GUANTANAMO: IT IS NOT ABOUT THEM - IT IS ABOUT US

DICKY GRIGG

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Grigg's presentation at the 31st Annual Page Keeton Civil Litigation Conference in 2007.

Mohammed Akhtiar, Grigg's first client as a member of the Guantánamo Bar Association.

before in my life." A little while later, feeling more comfortable and less suspicious that the photo was some kind of interrogation method designed to intimidate him - "tell us now or we'll kill them one by one" - Akhtiar began to talk about his family.

Every statement was translated by a \$1,100-a-day Pashto interpreter, hired by Grigg, part of the estimated \$10,000 out of his own pocket spent on this defense. His client denied launching a rocket attack. He insisted that he was in Pakistan at the time. He also said he fought against the Soviets in the 1980s and had opposed the Taliban in 2001 as part of the

Northern Alliance.

When Akhtiar asked how Grigg was being paid, and Grigg said he wasn't, Aktiar got emotional, teared up, and thanked him profusely.

In November, 2006, Akhtiar came up for a second hearing before the Combatant Status Review Board. He told the board about the two men who had denounced him to the Americans. He told the board that one of his denouncers was a member of the Afghan KGB during the Soviet era.

Akhtiar was released from U.S. custody in December 2006. He was flown by military transport to Kabul where members from his tribe came to pick him up.

If this story sounds troublesome, consider what happened to Nazar Chaman Gul, a house guest of Grigg's client who, as a friend of Akhtiar's cousin, had come to spend the night in Gardez because of a toothache. He too was taken away that night in May 2003.

Ruben Iniguez, an assistant Federal Public Defender from Portland, Oregon represented Gul. Iniguez traveled to Afghanistan and Pakistan. He discovered that his client's story of professed innocence - "every single, minor detail" - checked out completely.

Iniguez' client had been confused with another guy named Gul, and the other guy happened to be a real terrorist.

Criminal defense lawyers like to say that it is better to let hundreds of guilty men go free than to imprison just one innocent man. Or is it "to convict" one innocent man? Either way, Texas has prior experience with this aspect of justice.

This is the 150th anniversary of the events leading up to secession and the Civil War, and the "Texas Troubles" of 1860 when, in response to the slave-insurrection panic sweeping the state, one Fort Worth vigilante wrote to a New York publication that, "We will hang every man who does not live above suspicion. It is better for us to hang ninety-nine innocent men than to let one guilty one pass, for the guilty one endangers the peace of society."

The "Civilization" series is written in appreciation of the 113th anniversary of the El Paso Bar Association, the agenda on access to justice of Immediate Past President Carlos Cárdenas who invited Dicky Grigg to deliver the keynote address, and the transition of President Chantel Crews. In addition to the address and PowerPoint presentation by Mr. Grigg, the following resources have been consulted: Marlana Hartz, "Dicky Grigg has gone from Tech football to controversial job of defending detainees," *Lubbock Avalanche-Journal*, October 7, 2007; Dicky Grigg, "Guantánamo: It's Not About Them, It's About Us," 31st Annual Page Keeton Civil Litigation Conference, Oct. 25-26, 2007; Chuck Lindell, "Defending detainees for sake of the system," *Austin American-Statesman*, June 25, 2006; Tom Lasseter, Guantánamo Inmate Database: Mohammed Akhtiar, *McClatchy Newspapers* at <http://detainees.mcclatchydc.com/detainees/52>; Tom Lasseter, Guantánamo Inmate Database: Nazar Chaman Gul, *McClatchy Newspapers* at <http://detainees.mcclatchydc.com/detainees/53>; Guantánamo Docket, *New York Times*. at <http://projects.nytimes.com/guantanamo/detainees/1036-akhtiar-mohamma>; Donald Reynolds, *Texas Terror: The Slave Insurrection Panic of 1860 and the Secession of the Lower South* (Baton Rouge: LSU Press, 2007); Julia Barton, "Troubled Times," *Texas Observer*, August, 6, 2010. This presentation includes the creative work of others. This property is being used by permission or under a claim of "fair use" pursuant to 17 U.S.C. §107, and was created pursuant to fair use guidelines and further use is prohibited.

JUDGE EDUARDO A. GAMBOA: An Illustrious Man Of Good Will

BY JUDGE OSCAR G. GABALDÓN, JR. CWLS

Though born in the United States of America, El Paso Bar Association board member Judge Eduardo A. Gamboa enjoyed some of his formative years in Ciudad Juárez in Mexico. When he was five years old, his family moved to La Chihuahuita section in South El Paso; however, soon after that, his father passed away. As a child, Judge Gamboa seized learning opportunities at Aoy School, Houston School, and Zavala School in El Paso. After graduating from Jefferson High School in 1968, he went on to UTEP where he earned an undergraduate degree in education. Judge Gamboa was then drafted into the U.S. Army, and now has the distinction of being a Vietnam era veteran. Resuming his education after his service in the armed forces, Judge Gamboa earned a Master of Education degree in Psychological Testing and Guidance. Then, in 1979, Judge Gamboa received his Juris

Doctor degree from the University of Houston.

During his 27 years in the private practice of law, Judge Gamboa primarily handled probate, social security, criminal, civil, and CPS cases. In 1996, he was appointed by Probate Judge Max Higgs to serve as an Associate Judge for the Mental Health docket. He also served as a Mediator from 2001 until July 31, 2006. He successfully ran in 2006 for the newly created El Paso Statutory Probate Court No. 2, and was sworn into office on January 1, 2007.

A proactive and compassionate civic-minded individual, Judge Gamboa has served in numerous professional and community organizations, including serving as a member



or a director of the Child Welfare Board, Zoning Board, Children's Model Court, Harvest Christian Center, different bar associations, and other organizations. He has also been the recipient of numerous recognitions, such as the National Association of Social Workers (NASW) Public Elected Official of the Year Award and the El Paso Mexican-American Bar Association Scholarship Drive Award to name a few.

Married since 1988 to the love of his life, Ana, Judge Gamboa's other loves are his children, Ivy, Ari and Jacob. A man who has dedicated his life to the ideal of service to others, especially the most vulnerable in our society, Judge Gamboa will continue to inspire future generations of lawyers and judges.

THE TEXAS AMERICAN CIVIL LIBERTIES UNION: Still Fighting for Civil Rights

BY DOTTY GRIFFITH

The American Civil Liberties Union of Texas reviews more than 500 requests for legal assistance from persons claiming civil rights violations...every month.

Justifiably, the ACLU of Texas is known for its litigation work, but the number of wrongs that need righting in Texas is beyond the capacity of even our dedicated and energetic fulltime staff of three attorneys.

That's where co-operating counsel come in.

"We couldn't accomplish all that we do without the help of volunteer attorneys and law firms that devote considerable resources to our work," said Lisa Graybill, legal director of the ACLU of Texas. "It is a win-win situation, because the lawyers get experience working on the kinds of constitutional civil rights cases we all went to law school to litigate and the ACLU and our clients get *pro bono* help from some of

the state's best and brightest lawyers."

ACLU of Texas cases

If it hadn't been for the help of attorneys Sinead O'Carroll and Paul Schlaud, partners at Austin's Reeves & Brightwell LLP, we might not have been able to keep a Needville Independent School District (NISD) kindergarten student in regular classes. They wrote our 5th Circuit brief defending federal district judge Keith Ellison's ruling prohibiting school officials from disciplining the child for wearing his hair in long braids in keeping with his family's Native American religious beliefs.

Without Adam K. Levin, Tom Widor, and David Weiner of Hogan & Hartson, a Washington, D.C.-based international law firm, and solo practitioner Lisa Brodyaga, of Refugio del Rio Grande, Inc. in the Lower Rio Grande Valley, we could not have won a successful settlement with the U.S. Department of State



to play fair with passport applicants who were born not in hospitals, but to midwives as is common in border communities.

Michael Wyatt, assistant county attorney with the El Paso County attorney's office, and a member of the ACLU of Texas board of directors, recalled how our staff attorneys lended their support following an incident at an El Paso restaurant when several patrons were asked to leave after two men in the group kissed one another. Private security guards called police and told the customers that "faggot stuff" was against the law. On arrival, an El Paso police officer threatened to ticket the men, citing a state law that was declared unconstitutional by the United States

Supreme Court. No citations were issued, nor arrests made.

Graybill and ACLU of Texas staff attorney Fleming Terrell worked with El Paso community members to investigate why a city ordinance that specifically prohibits discrimination based on sexual orientation as well as race, gender and other protected classes was not enforced.

Why work with the ACLU of Texas

The opportunity to practice pure civil rights law is important to prospective cooperating attorneys. Wyatt explained, "I think cooperating attorneys generally are committed to protecting and defending civil liberties under the Constitution, but have pursued career paths where that type of work is not typically on their plate. Therefore, being a co-operating attorney allows them the opportunity to engage in the fundamental principles of our legal system, which is a mentally challenging and morally invigorating exercise every time."

"Working with the ACLU of Texas on a *pro*

bono basis provides lawyers with a chance to do something that is simultaneously noble and selfish--because it is just plain fun to champion causes designed to protect fundamental liberties that all lawyers, at some level, cherish and that all citizens, whether they know it or not, depend upon," said cooperating attorney Gretchen Sween, of Dechert LLP in Austin. Working with the ACLU of Texas on a lawsuit that challenged the use of solitary confinement and strip searches for girls held in the Texas Youth Commission (TYC) facility in Brownwood "gave me a chance to help shine a spotlight on suspect practices and to improve the conditions of young women in state custody."

"Aside from the righteousness of the work, I have enjoyed my involvement with the ACLU of Texas because it permits me to stretch beyond the confines of my ordinary practice, which is complex commercial litigation," said Sween.

What You Can Do

There are various roles for a cooperating

attorney, depending on the attorney's level of experience and commitment. Some cooperating attorneys may be in a position to contribute the time and resources necessary to spearhead a major case.

Cooperating attorneys also can help by financially supporting our work, generally or in a particular case; or they can help us sponsor a CLE event or other fundraising activity. Several cooperating attorneys serve as members of our advisory legal panel.

Executive Director Terri Burke put it this way. "The addition of even one or two cooperating attorneys from El Paso and West Texas would greatly increase our capacity to address conditions of concern in that region."

To find out more about becoming a cooperating attorney with the ACLU of Texas, please contact Lisa Graybill at (512) 478 7300 x 116; lgraybill@aclutx.org

Dotty Griffith is public education director of the ACLU of Texas.

Should Judges/Lawyers "Friend" on Facebook, Linkedin, Texas Bar Circle, etc.?

BY DAVID J. FERRELL

djf@elpasolaw.com

This is a good question and it is in the minds of all lawyers and judges RIGHT NOW. What happens if you file a lawsuit and it is placed by the random selection process into a court that has a judge that you feel is really a good choice for impartiality and competence regarding your client's case, however, later you learn opposing counsel has not had good luck in that court, not because of the judge but because the lawyer is a jerk? Then it is disclosed that you are "FRIENDED" one way or the other to that judge and the opposing attorney is not. Here comes the motion for recusal and win or lose, it is not a happy time.

The Texas Bar is reviewing this issue and so is the Texas Supreme Court. I have noticed that the Texas Bar is worried about lawyers misusing internet social networking sites to the detriment of consumers perhaps more than lawyers and judges using/misusing these sites *vis a vis* conflict of interest, *ex parte* communications, frivolous recusal, etc.

In December 2009 the Florida Judicial Ethics Advisory Committee articulated its position on ethical issues relating to judges' use of on line

social networking sites by saying,

"Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct. ANSWER: Yes. Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend." ANSWER: No."

On April 30, 2010 *SLATE* published a good article on judicial social networking pointing out that "Judges are people too..." This article cites an August 25, 2009, *Texas Lawyer* article where this issue is examined fairly thoroughly and you can draw your own conclusions. Space limitations prevent a more detailed review of this important topic so I have posted links on my website to these articles. Go to <http://elpasolaw.com/facebook.htm> and read the articles. Or, just go to elpasolaw.com and click on the second link on the left hand side "Facebook".

One last issue, I have disabled my Facebook account because it has become a fertile source of attempted fraud on me by data mining information to pilfer my bank account and/or the minuscule deposits therein. My niece, who lives in Austin, had "Friended" me on her



Facebook site (and I accepted the invitation). I did not accept many "Friend" requests. Recently my email data was obtained from my niece's site by a hacker who sent me an **emergency** email which purportedly was from my niece asking for \$2,450 and promising a quick payback after the emergency was remedied. I knew it was a scam immediately, but the hacker had sent the same email to many relatives who panicked and I spent probably over two hours getting in touch with them to forgo the Western Union tender that several were preparing to send. The Facebook protections are ephemeral and are constantly changing as are the techniques of the brilliant hackers who are often at least one step ahead of the legitimate creators/users of this social networking site. Facebook has just advised that they have half a billion users, well half a billion minus one.

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▶▶ ASSOCIATION NEWS

El Paso Young Lawyers Association

♦The El Paso Young Lawyers Association will hold its September meeting on Thursday, September 9, 2010 at 6:00 p.m. at Carlos and Mickey's, the guest speaker will be Judge Robert Anchondo. There will be a board meeting prior to the general meeting. The EPYLA will also host a Happy Hour on Friday, September 10th.

♦EPYLA Annual Gold Tournament will be held in Late September/Early October.

The El Paso Paralegal Association

♦The El Paso Paralegal Association is hosting its 1st Annual Golf Tournament on November 12, 2010 at the Vista Hills Country Club. Tee off: 8:00 a.m. (shotgun start). Sign in: 7:00 – 7:45 a.m. Format: Scramble (4 person teams). Individual Golf Registration: \$75.00. Team Registration: \$300.00. Prizes to 1st, 6th and last place

& closest to the pin! Goodie bags for participants, door prizes & drawings! Proceeds from this event will go to support EPPA and its charitable efforts. For more information please visit our website at: www.elppa.org or you may contact our Tournament Directors: Valerie Olivas 252-7110 or Manny Caro at 472-2191.

Mexican-American Bar Association

♦The Mexican American Bar Association will hold general elections at the El Paso County Courthouse, Rm. 306 on Friday, September 10, 2010 from 12:00 p.m. until 1:00 p.m.

El Paso Women's Bar Association

♦The El Paso Women's Bar Association will meet the second Wednesday of every month with the next meeting on Wednesday, September 8, 2010 at 5:30 p.m. Call Yvonne Acosta at 533-2493 for location.

Judicial Spotlight

Name:

David C. Guaderrama

Court:

243 District Court

Education:

B.A., Police Science; B.A.,
Psychology, University of
New Mexico, 1975
J.D., Notre Dame, 1979


Judicial Experience:
243rd District Court, 1995-present
Court Coordinator: Elena De Anda

Court Reporter: Mary Ann Marin

What did you do before you became a judge?

I was in private practice with Bonnie Rangel for seven years. From 1987 to 1996 I served as the first director of El Paso County Public Defender Program.

What are you most proud of accomplishing as a District Judge?

I was the first adult district drug court judge; I started a pilot program that held arraignments of defendants who were held in jail by video; and I helped develop innovated procedures that improved local jury selection procedures. I am presently working on developing e-warrant procedures that I believe will improve our current practice. And while doing all this, I have as a judge tried over three hundred jury trials and also presided over numerous bench trials. I have only been reversed three times.

Any advice for young lawyers?

If you want to be a trial lawyer, learn the rules of evidence and try cases. I would also pass along the advice Orba Lee Malone gave me when I was fresh out of law school, "If you want to be a lawyer you need to learn the rules and get your #! kicked in every court in the building."

What is your favorite movie?

The mini-series, *Band of Brothers*.

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