EL PASO BAR ASSOCIATION
Founded in 1897

EL PASO BAR JOURNAL

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An Update of Events and Information

September 2011

Why our Legal System is Respected (Mostly)

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"Objection? Over-ruled!!"

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SENIOR LAWYER INTERVIEW

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State Bar of Texas
Award of Merit
1996 – 1997 – 1998 – 1999
2000 – 2001 – 2006-2010
Star of Achievement 2000 - 2008 - 2010
State Bar of Texas
Best Overall Newsletter – 2003, 2007, 2010
Publication Achievement Award
2003 – 2005 – 2006 – 2007 – 2008 - 2010
NABE – LexisNexis Community
& Educational Outreach Award 2007 - 2010

"The El Paso Bar Journal is a bi-monthly publication of the El Paso Bar Association. Articles, notices, suggestions and/or comments should be sent to the attention of Nancy Gallego. All submissions must be received by the Bar office on or before the 10th day of the month preceding publication. Calendar listings, classified ads, display ads, and feature articles should not be considered an endorsement of any service, product, program, seminar or event. Please contact the Bar office for ad rates. Articles published in the Bar Journal do not necessarily reflect the opinions of the El Paso Bar Association, its Officers, or the Board of Directors. The El Paso Bar Association does not endorse candidates for political office. An article in the Bar Journal is not, and should never be construed to be, an endorsement of a person for political office."

THE PRESIDENT'S PAGE

Lawyers Serve All

One day after the Boston Massacre, a 34-year-old John Adams agreed to represent the British captain and eight soldiers accused of murdering the American colonists who had converged on the Custom House in Boston. At trial, Adams argued that the deaths of the colonists were brought about not by the soldiers, but by the actions of the mob itself. He argued that the British soldiers were acting in self-defense and that whatever the passions or wishes of the jurors, "they cannot alter the state of facts and evidence." All but two of the soldiers were acquitted. Adams certainly knew there would be repercussions, and indeed, Adams lost a significant portion of his practice because of his representation. Why did Adams agree to represent the British? According to David McCullough in his book John Adams, Adams accepted the representation because "no man in a free country should be denied their right to counsel and a fair trial." As you can see, Lawyers have a proud tradition of serving those for whom the public has nothing but derision and disdain. This tradition reaches back before the founding of our country, and continues today, as reflected in the order adopting the Texas Lawyers Creed, which notes that "as members of a learned art, we pursue a common calling in the spirit of public service."

It is this tradition of John Adams to which lawyers should aspire. We are fortunate to live in a community in which our fellow lawyers regularly seek to serve the public in a variety of ways. This includes the representation of indigent residents and those for whom the public has little sympathy.

This year, the El Paso Bar Association will be honoring and celebrating these lawyers and judges who seek to serve the community and the profession. The Bar will also continue our service to those in need of legal services through the Access to Justice Fair (October 29, 2011) and the El Paso Lawyers for Patriots Event (November 17, 2011). This year, the Bar will also seek to serve our members and the legal community in general. We are working on a complete overhaul of the Bar's website to make it a valuable tool for local attorneys. Additionally, we will be providing numerous CLE seminars throughout the year, including The Annual Civil Trial Seminar, which will take place in Las Vegas on February 17-18, 2012. We will also be holding a special Law Day event, as well as many other events and presentations throughout the year.

I invite each of you to join us in our celebration of lawyers and their role in the judicial system. In particular, please join us for our monthly luncheons on the second Tuesday of every month at the El Paso Club.

Bruce A. Koehler

Cover Picture: Bo Pelini, head coach of Nebraska, protesting a call by Gene Semko at the Nebraska—Texas A. & M. game last year.

El Paso Bar Association
September Bar Luncheon
Tuesday, September 13, 2011

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

Guest Speakers will be

District Attorney Jaime Esparza and Assistant District Attorney Lori Hughes who will be discussing the new District Attorney Portal.

Approved for 1/2 hour of participatory ethics.

Please make your reservations by Monday, September 12, 2011 at noon at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

CALENDAR OF EVENTS

PLEASE NOTE: Please check the Journal for all the details regarding all above listed events. If your club, organization, section or committee would like to put a notice or an announcement in the Bar Journal for your upcoming event or function for the month of October/November, 2011, please have the information to the Bar Association office by Monday, September 16, 2011. 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, 2011

Monday, September 5 *EPBA Office Closed Labor Day*

Tuesday, September 6 *EPBA BOD Meeting*

Tuesday, September 13 *EPBA Monthly Luncheon*

February, 2012

Friday, February 17 *16th Annual Civil Trial Seminar, Las Vegas, NV*

Saturday, February 18 *16th Annual Civil Trial Seminar*

From Courtroom To Gridiron: A Life on the Line

By Stephanie Townsend Allala

On a beautiful August morning, family law attorney Gene Semko walks briskly into the courtroom--preparing to spar in a divorce hearing. In his designer suit and tie, he's handsome, trim and just GQ enough to turn a few heads. One might never guess when he's not in court, he uses a loud, blaring whistle to get attention.

For 16 years, Gene has split his time between his law office, his family, and his favorite hobby- refereeing Division One College Football. He currently referees as a side judge in the CFO West- the assigning agent for the Big XII Conference (shrunk to only 10 teams this year), the Mountain West Conference and the Southland Conference. He has worked numerous bowl games, most recently the 2011 Fed Ex Orange Bowl. Included on his resume is the 2008 National Championship Game between Ohio State and LSU, the 2007 Sugar Bowl, the 1998 Cotton Bowl and three Big XII Championship Games.

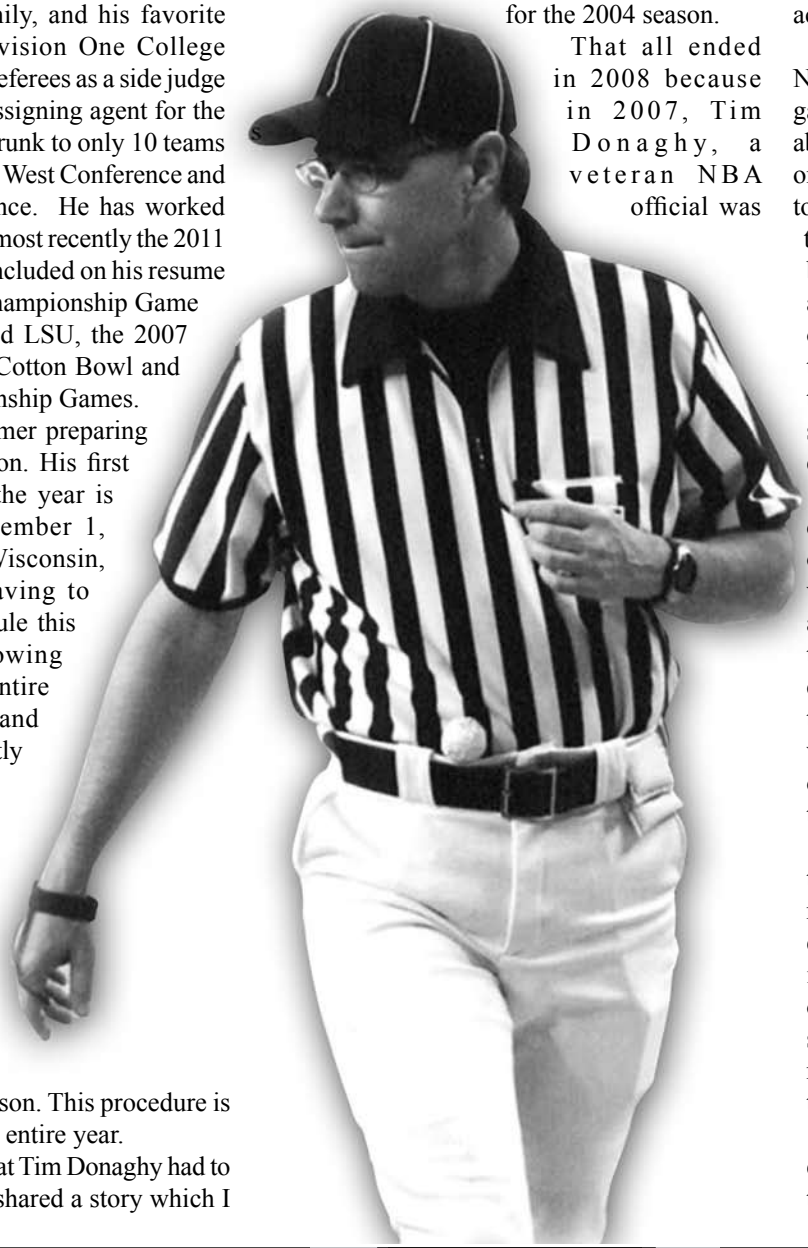
Gene spent the summer preparing for the upcoming season. His first game assignment for the year is Thursday night, September 1, between UNLV and Wisconsin, in Madison. He's having to deal with a new schedule this year- rather than knowing his schedule for the entire season, he must wait and be informed intermittently throughout the season.

"NBA basketball official Tim Donaghy is responsible," he said. "Now, after he works his game on the weekend of September 3, on the following Monday I get my assignment for the fifth week of the season. This procedure is repeated weekly for the entire year.

"When I inquired what Tim Donaghy had to do with any of this, he shared a story which I thought was fascinating and gave me an insight into how much goes on behind the scenes."

When he started refereeing Division One college football in the Western Athletic Conference in 1996, his education began with a three-day clinic. "As long as I performed up to expectations, I would be rehired the following year." That practice continued, including when he was hired by the Big XII for the 2004 season.

That all ended in 2008 because in 2007, Tim Donaghy, a veteran NBA official was investigated for betting on NBA games including some that he personally officiated. He was subsequently indicted and pleaded guilty and sentenced to prison.



An investigation was launched by the NBA in an attempt to determine how Tim Donaghy was able to do what he did over a four year period of time without detection. The investigation provided the following insights, according to Semko:

"First, since Tim Donaghy was given his full NBA basketball schedule, which spans eighty games over a six month period of time. He was able to space out the games he personally bet on or tried to influence--never trying to influence too many games each year. This made it harder to detect since there was no real pattern to be discovered between the games, the teams and the players. The result of this portion of the investigation was a recommendation that all assignments be submitted piecemeal throughout the season so that an official's full schedule would not be provided to him for the entire year.

"In this manner if an official was going to do something that required collaboration with others, it would be harder to disguise as there was a shorter period to plan such treachery. As a result, commencing with the 2008 schedule, the NFL, NBA and most Division One college conferences--including the Big XII--undertook the system of assigning officials only four weeks at a time, which allowed them to make decent travel arrangements while limiting the time available to plan illegal activities.

"Second, each official now is subject to a FBI background investigation prior to receiving any assignments. I get contacted every year now in order to be eligible to work in the Big XII and it is a random process of undergoing a full investigation or just submitting the paperwork that satisfies their requirements. So far, I've only had to submit the paperwork.

"Third, the major legal betting establishments in Las Vegas who establish the point spreads for football games were

enlisted to voluntarily provide information to the FBI whenever anomalies surfaced in betting handles. For instance, Las Vegas Sports Books know that for a Texas/OU football game, there is going to be a lot more money bet on that game than the amounts that will be bet that same weekend for New Mexico State at UTEP. Las Vegas Sports Books can easily detect abnormal increased betting on certain games based upon the type of game and whether it is of national interest or only local interest. As a result, if the Las Vegas Sports Book senses too much money being bet on a game that is abnormal for that type of game, they immediately notify the FBI and inform them that there is 'way too much action being placed on X game. This is not the norm for this type of game.'

"After getting this type of call, the FBI will take note of the teams involved, all of the individual players who played in the game and all of the officials assigned to work that game which is now in question. Maybe it was just an anomaly or maybe something is afoul, but this information will at least be stored for future reference.

Advance Sheet, circa 1532

By Charles Gaunce
Legal Reference Librarian The University of Texas at El Paso

R. v. William Rogers
Trinity Term, 1532

One William Rogers, priest, who had committed various felonies and had his clergy and [was] committed to the ordinary, and made his purgation, robbed a man in the highway, and was taken and indicted for it; but it was not expressed that he had done the felony in the highway. And for this reason if he had been a layman he should have had his clergy by the statute of 23 Hen. 8. But, though he was a priest and had his clergy, yet he should make his purgation, because he was not indicted that he had done the felony according to the statute. So the said Rogers, being incorrigible, made his purgation. Whereas if he had been indicted that he had robbed in the highway he should have had his clergy but [would have] remained without making purgation."

One of the fun aspects of reading the old cases is that each one presents a puzzle of law and procedure that must be solved to fully understand what is going on. The first piece necessary to understanding what is up with William Rogers is what it means to "ha[ve] his clergy." Back in the days of yore, a cleric had a privilege to not be tried in the King's court. While England abolished the privilege in 1827, it survived longer in the American states, such as South Carolina when it was successfully invoked in *State v. Bosse*, 42 S.C.L. (3 Rich.) 276 (1855).

The second piece of the puzzle is what it means to "ma[ke] his purgation." Essentially, this means that the offender swears in court that he did not do the act. In many respects, this swearing was a ritual that, if properly performed, was sufficient to establish that the act charged was not proper and the defendant would go free. While it seems simple, it was somewhat more complicated by the fact that the defendant had to swear on his oath and using a specific set of words denying the charge, and had to have an additional number of other persons (usually 11) also swear, on their oaths **and** using specific words, that the defendant had not done the act charged. If any mistake was made in the recitation of the oaths and statements (loosely referred to today as evidence) then the defendant was adjudged to be guilty.

Thus, William Rogers, who had several times previously invoked his status as a cleric to avoid trial in the King's court, and had successfully avoided punishment by having friends give a full and proper accounting on their oaths, committed highway robbery. Since the indictment failed to allege the act occurred on the highway, the statute granting him the privilege of not being tried in the King's court did not apply and he was required to swear he did not do the act, and have his friends also swear to this in the King's court. Apparently the priest was successful in swearing the oath in an otherwise unfriendly forum.

Why Our Legal System Is Respected Most Of The Time

By Clinton F. Cross

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

Courtrooms resemble churches

A. Introduction

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

There is an ongoing political debate about how far appellate courts should go in reconciling demands for change with established rules. When appellate courts appear to "make law" rather than "interpret" the law for any reason, such as "civil rights" or "law and order," their opinions are sometimes met with disrespect. "John Marshall has pronounced its decision;" President Andrew Jackson once said, "let him enforce it." After *Brown v. Board*, "Impeach Earl Warren" was a popular political slogan in many parts of the country. *Roe v. Wade* remains controversial.

Another problem is the presence of drug laws that are ignored by many, including "respectable" citizens. Widespread disobedience of the law undermines respect for the rule of law.

Finally, there are now television commentators like Nancy Grace and her clones who, for the purpose of entertaining millions of viewers, preside in the name of "court tv" over popular legal "reality shows." These commentators assume both the role of judge and jury and "try" defendants in the court of public opinion without any respect for the presumption of innocence, rules of evidence, or the burden of proof required in criminal cases. When the "bad person" seems to win, respect for due process of law and our time honored rules designed to protect the innocent are put in jeopardy.

B. Why the system is Respected

In spite of these and other problems, the system has great strengths, and its preservation is essential to maintenance of the rule of law and civilization as we know it in the United States.

The well-known teacher Irving Younger claimed the system is in fact usually successful at fairly and accurately resolving disputed issues because it permits cross-examination. "Cross-examination is the signal feature of the common law trial," he said. "It distinguishes a trial in our system from a trial under any other system. It is the greatest engine ever invented for the discovery of truth."

Of course, lawyers do brag about winning cases they shouldn't have won (otherwise, why brag?). Because the system usually works, lawyers who defeat the system by getting unjust results become famous and make lots of money. By definition, their work is the exception.

1. The Influence of Religion

The notion that the "good guy" should prevail for doing the right thing and the "bad guy" should lose for doing the wrong thing reflects our religious past. The legal system

tries to get people to do the right thing, and discourages people from doing the wrong thing. Although we humans have often failed in our effort to "do good," we cannot afford to quit trying. Most people continue to respect the effort.

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

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

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

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

2. The Parent-Child Relationship

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

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

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

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

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

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

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

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

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

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

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

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

Courtroom culture reflects of the larger community that it represents, in effect a microcosm of the family dynamic that it recreates. If the height of the judge's bench reflects society's attitude about authority, then the height of the bench in courthouses should change in time as cultural values change. Assuming this hypothesis is correct, judge's benches being constructed in today's courthouses should be more often lower today than they were a few decades ago. After all, in today's family culture co-operative parenthood has replaced one man rule. In most homes, not just homes parented by single parent mothers, "time out, let's talk" has replaced "spare the rod, spoil the child."

Although committed to traditional values, our legal system permits critics to constructively "question authority." We honor, for example, the civil rights movement that in many

ways dramatically changed our American culture. In 2004 the American Bar Association celebrated Law Day by focusing on the U.S. Supreme Court decision in *Brown v. Board of Education*. In Texas, courthouses are named after cultural heroes like Heman Sweatt and Albert Armendariz, Sr.

D. Conclusion

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

In 1992 Richard Neely, former Chief Justice of the West Virginia Supreme Court, commented, "The church cannot compel its adherents to obey; it can only elicit obedience. Similarly, the judiciary cannot really compel obedience to its orders, as the current drug and crime epidemic amply demonstrates, and must, like the church, rest in the last analysis on the awe and esteem in which it is held. But it must always be remembered that judges are first, last, and always *lawyers*, so the prestige of the judiciary can never be greater than the prestige of the legal profession as a whole. If judges are priests, lawyers are the deacons, acolytes, and vestry of the temple of the law."

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

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

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

The Jencks Case

By Clinton F. Cross

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

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

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

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

During the Bayard strike, Paul Jarrico, a politically unemployable screenwriter, met Clinton Jencks, one of the union leaders. Jarrico decided to make a movie about the strike. Herb Biberman, one of the "Hollywood Ten," agreed to produce the movie. The movie was filmed in Silver City, New Mexico. During the filming, the press began to publicize the fact that "communists" were making a movie near Los Alamos about the "Mine-Mill" strike. The film was called *Salt of the Earth*.

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

The Taft-Hartley Act, enacted before the strike began, required labor leaders to sign a "non-Communist" affidavit, or lose the bargaining benefits provided by the statute. Clinton Jencks traveled to El Paso and signed such an affidavit. Shortly before filming of *Salt of the Earth* was completed, the FBI arrested Jencks for false swearing.

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

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

Joe Calamia represented Matusow in the contempt proceeding. Matusow hardly served any time because Calamia was able to obtain his release on bond, pending an appeal. Calamia was also victorious in having Matusow's conviction overturned. See, *Matusow v. United States*, 229 F.2d 355 (5th Cir. 1956).

Although Joe Calamia was not lead counsel in the Jenck's case itself, Jenck's attorney worked out of Joe Calamia's office whenever he was in El Paso. It is not disputed that Calamia helped Jenck's attorney in the defense of this case, as he also helped any criminal defense lawyer at any time who would listen to him who could profit from his help, and not because, as he would repeatedly state, he sympathized with Communists.

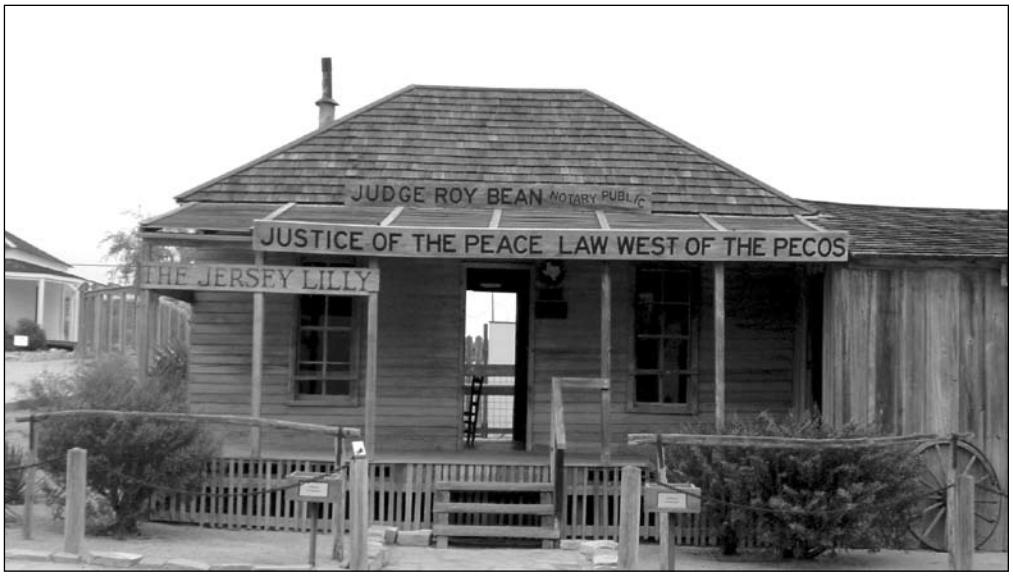
The Supreme Court of the United States ultimately held that Jencks had a constitutional right to to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory state. *Jencks v. United States*, 353 U.S. 657 (1957).

After the Supreme Court opinion was issued, Congress passed the Jencks Act, 18 U.S.C., section 3500. The Jencks Act is mirrored in Rule 615, Texas Rules of Evidence. It is now the law in every state and federal jurisdiction of the United States of America, as well as most administrative proceedings.

Many years later, in 1973, Joe Calamia served as President of the El Paso Bar Association.

The Law West Of The Pecos

By Justice Ann McClure



On July 29, 2011, the court issued its opinion in a cold case which thawed years after a murder. See *Tilford v. State,* No. 08-09-00154-CR, 2011 WL 3273543 (Tex. App.–El Paso 2011, n.p.h.). On May 26, 1989, the nude body of Rosalina Reyes was found in an elevator at the Brookhollow Apartments. She had been stabbed in the torso and vagina and had been strangled with a ligature. Appellant lived in the same building where Reyes' body was found. The El Paso Police Department was unsuccessful in solving the murder but they received new evidence in 1994 when a private investigator forwarded a copy of a letter allegedly written by Reyes' killer. The author identified himself as Keith Larone Jones and the "Pheonix" [sic]. In early March 1995, Detective Joe Zimmerly traveled to Fort Leavenworth where Appellant was serving a nine year sentence for stabbing a woman. During the interview, Appellant denied committing the crime. When Zimmerly mentioned the "Pheonix" letters, Appellant became extremely upset and terminated the interview. EPPD submitted the letters to the FBI's Behavioral Analysis Unit for handwriting analysis along with twenty-three known examples of Appellant's handwriting. With its highest degree of probability, the BAU concluded after an intensive analysis that Appellant was the author of the two "Pheonix" letters. Neither the "Pheonix" letters nor the FBI handwriting analysis was admitted in evidence during Appellant's trial.

On December 4, 2005, a warrant was issued for Appellant's arrest and Detectives David Samaniego and Gonzalo Chavarria of the El Paso Police Department flew to Kentucky. In a written statement, Appellant denied killing Reyes and said someone had sent him the "Pheonix" letters while he was at Fort Leavenworth. He ultimately told police that his girlfriend, Kandis Shirley, had killed the victim by stabbing her with a knife and choking her with the cord from her U.S. Army "hoodie". A jury found Appellant guilty of capital murder.

Among other issues, Appellant challenged both the sufficiency of the evidence to establish his identity as the perpetrator of the offense. The State may prove the defendant's identity and criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. The State conceded that its case against Appellant was entirely circumstantial.

The Evidence

In May 1989, Rosalina Reyes lived with her sister, Lydia Rodriguez, in an apartment on Timberwolf near Magruder Street. On the evening of May 25, the two women walked to a nightclub where they drank beer and danced. They began walking home at approximately midnight. Reyes began lagging behind since she was not used to wearing heels. Rodriguez walked ahead while telling Reyes to hurry up. Rodriguez cut through the Brookhollow Apartments because they were well lit but she became disoriented and lost sight of Reyes. Rodriguez eventually arrived at their apartment at around 1:30 a.m. where she waited for Reyes for about forty-five minutes before going to bed. At 5 a.m., a man who lived in the Brookhollow Apartments found Reyes' nude body in an elevator on the third floor of the apartments. The medical examiner determined that Reyes had been stabbed multiple times in the torso

and vagina while alive but her death was caused by ligature strangulation. The knife wound to the left upper chest penetrated the left lung and the wound in her left flank lacerated the kidney and renal artery. The assailant had also stabbed Reyes in the vagina six times. The ligature wound was consistent with the cord from a hoodie.

At the time of the murder, Appellant was stationed at Fort Bliss. He lived on the second floor of the building where the body was found. The police found a blood smear on the threshold of the elevator floor. They also found two blood smears on the second floor of the same building. Samples from all three blood smears were collected and submitted to the FBI lab for forensic testing. The blood from the elevator threshold and from the concrete flooring of the second floor matched the victim's DNA. Appellant's DNA was not found on the victim or at the scene.

Following Appellant's 2005 arrest in Kentucky, the police interviewed him. Appellant believed the police no longer suspected him in the 1989 murder. But Detective Chavarria bluffed and said his DNA had been found at the crime scene. He did not provide any details of the offense nor did he specify whether the source of the DNA was blood, hair, saliva, or semen. In his written statement, Appellant explained that his girlfriend Kandis had a habit of pulling his body hair and throwing it everywhere around the apartment building, including the elevator. He also chewed tobacco and regularly spit everywhere, including the apartment elevator. Appellant wrote on the back of his typewritten statement that his hair brush and "spit bottle" were missing from his truck on the day of the murder in El Paso and Kandis had used the truck.

After returning to El Paso, the detectives spoke with Appellant again and he gave a lengthy video-recorded statement. For the first time, he admitted knowledge of the murder but he accused Kandis of the crime. He and Kandis had been living at Brookhollow Apartments for about a week before the murder. Consistent with his written statement, Appellant related that Kandis had pulled out head, arm, chest, moustache, and pubic hairs from his body and thrown them on the floor of the elevator. On their first day at the apartment, Kandis told Appellant that "some bitch" had made her angry and that she would take care of it.

According to Appellant, one of his army buddies, Harry Short, visited the couple the night before the murder. Around midnight, Kandis and Appellant drove Short back to the barracks. When they returned, Kandis saw the same woman and threatened to run over her. Appellant believed Kandis had driven home in his truck, but when he heard "hooping and hollering" and car horns outside, he got up to check on it because he realized that he had not heard his truck leave the parking lot. He dressed and staggered down the stairs. The driver-side door of his truck was open. He heard a noise at the elevator and heard Kandis angrily call someone a bitch from inside the elevator. The elevator door opened and Kandis exited and ran toward his truck. She was carrying the Uncle Henry knife Appellant kept in his truck. The knife had a four-inch blade. He recalled that Kandis was wearing a U.S. Army sweatshirt that evening.

Appellant then saw a naked woman lying on her back on the elevator floor. He described her as Hispanic, approximately 5' 5" tall with dark wavy hair. He did not notice any injuries and he did not see any blood. As he looked at the body, Kandis hit him on the head and he fell on top of the woman. He rolled off of her, and determined that the woman was not responsive and did not have a pulse. Panicked, he ran up the stairs toward the apartment. Kandis followed him with the knife still in her hand and told him to keep his mouth shut or she would harm their unborn child. Appellant did not tell the police Kandis had committed the murder because he wanted to protect his children. Appellant denied helping Kandis commit the offense.

Appellant also claimed Kandis related details to him about the murder. She had seen the woman outside of the apartment complex and yelled at her. Kandis led her into the elevator and attacked the victim from behind. Kandis stabbed her in the side while holding one hand over the victim's mouth. She knew that stabbing a person in the kidney was one way to kill a person. Kandis then stabbed the victim once in the chest with the intention of hitting the heart. The stab wound to the chest was horizontal between the ribs and Kandis moved the knife back and forth in an effort to cut the heart. Kandis also claimed to have stabbed the victim in the eyes. Kandis next removed the cord from her hoodie and wrapped it around the woman's neck. Kandis even stomped on the woman's neck to make sure she was not breathing. Kandis did not put a knife in the victim's vagina but instead put her hand inside of the victim and "ripped" the vagina to make it look like she had been raped. Appellant told the police that the woman he saw in the elevator was the same woman Kandis wanted to run over with the truck. The interview concluded.

Later that same morning, Appellant asked to speak to Detective Samaniego again. He continued to state that he did not kill the victim, but he admitted for the first time that when he had heard all of the noise downstairs and went outside of his apartment, he saw the victim on the second floor of the apartment building. She did not answer his questions. Appellant later became concerned about the woman and went to check on her. He found her dead in the elevator. He re-positioned her body so she would be more comfortable.

The State presented evidence to refute Appellant's statements. Harold Shirley, testified that his daughter, Kandis lived with him in May 1989. She had been engaged to Appellant for about four months. Shirley routinely required Kandis to wake him when she arrived home after being out in the evening to let him know she had returned and was safe. He recalled that Kandis did not stay out after midnight during that time period.

Kandis testified that even though she was pregnant and engaged to Appellant, she lived with her father in May 1989. After discovering she was pregnant in April, Kandis and Appellant began looking at apartments. After renting an apartment at Brookhollow, she began setting up the apartment and moving things into it, but she did not spend the night at the apartment until after they were married. She recalled seeing Appellant at the apartment on May 25, 1989, but she left in Appellant's truck at around 6 p.m. after they had an argument and she returned to her father's house where she was living. She returned to the apartment complex the following morning because they had errands to run. She noticed yellow police tape around the building and saw police cars and emergency vehicles. She parked the truck and took the stairs to the apartment. Kandis could not open the door with her key because Appellant had engaged the chain lock from the inside. Appellant opened the door and Kandis noticed that it was extremely dark in the apartment because the curtains were drawn and all of the lights were turned off. Appellant was wearing only his military shorts. Kandis asked Appellant what was going on outside but he said he did not know what she was talking about. She noticed that he was jittery and not acting normal.

Harry Short testified that he met Appellant when they both lived in the barracks. The first time Short ever went to Appellant's apartment was after the murder. Short recalled that there was police tape across the elevator and he asked what happened.

Circumstantial Links

A number of circumstances linked Appellant to the murder and supported the jury's finding of guilt. First, Appellant had the opportunity to commit the crime. He lived on the second floor of the apartment building where the body was found and her blood was found on the second floor near the elevator. Appellant was at the apartment when Kandis left with his truck at around 6:30 that evening. He claimed he saw the victim alive on the second floor of the apartment building sometime after midnight.

Second, Appellant had ready access to and knowledge of the type of weapon used to stab Reyes and the weapon used to strangle her. He admitted to the police that he had collected knives since he was a child and at the time of the murder, he carried a knife in his truck for protection. He was in possession of several knives at the time of his arrest. He also told the police that Kandis retrieved his Uncle Henry knife from his truck and stabbed the victim with it. That knife has a four-inch blade and is consistent with the medical examiner's testimony that the stab wounds were inflicted with a knife having a blade length of three-to-four-inches.

Third, Appellant's nervous demeanor and suspicious behavior the morning after the murder could have been construed by the jury as a consciousness of guilt. When Kandis arrived at the apartment the morning after the murder, she noticed a considerable commotion with the police and emergency vehicles present outside of the apartment. When she got up to the apartment, she found that it was quite dark because all of the curtains were drawn and the lights were off. Appellant claimed to not have any awareness of the "commotion" downstairs.

Fourth, Appellant's story changed over time and was refuted or contradicted by other evidence. For years, Appellant denied any knowledge of the murder or the victim, but when the police told him in 2005 that his DNA had been found at the scene, Appellant began changing his story. His version of events was refuted by Harry Short and Kandis. While Appellant claimed that he was with Short and Kandis until midnight on the night of the murder, Short testified he had never been to the apartment until after the murder. Kandis testified she had gone home around 6:30 or 7 that evening after an argument with Appellant and she did not return until the following morning.

Finally, Appellant had knowledge of details that only the assailant would know. He knew that the victim had been stabbed in the chest and kidney before being strangled. The order in which the injuries were inflicted would not have been apparent to an onlooker. While the stab wound to the chest was visible, the stab wound in the left flank was not visible and an onlooker certainly could not know that the knife lacerated the kidney. Appellant also knew that the assailant had inflicted stab wounds to the victim's vagina. Likewise, Appellant's assertion that the victim had been strangled with the cord from a hoodie was consistent with the medical examiner's findings. Finally, Appellant knew that the victim was intoxicated, spoke English, and was barefoot. There is no evidence any of the police officers ever revealed any of these details to Appellant during their interviews.

Finding that the combined force of all of the incriminating circumstances was sufficient to allow a jury to conclude beyond a reasonable doubt that Appellant committed capital murder as alleged in the indictment, the court affirmed the conviction.

Legal Literati

This month the El Paso Bar Journal literary page presents a poem by Marilyn B. Hererra Paralegal-Office Manager with Lipson & Dallas, P.C.

You Were There

First published in 1997 in "A View from Afar" by The National Library of Poetry.

When it seemed my life was breaking up
As waves upon a rocky shore, you were there.
When life was a dark tunnel of abuse,
With no light at the end, you were there.
When the weight of the black shroud of despair
Was too much to bear, you were there.
When all the fun was gone, when my sense
Of humor deserted me, you were there.
When my soul felt as empty
As two holes in a mask, you were there.
When the anger threatened to overwhelm me
And I raged within, you were there.
When I was battling my own personal demons
And trying to keep them at bay, you were there.
When the time came to put the pieces
Of the puzzle of me back together, you were there.
Whenever I have really needed you, a friend,
You were there.
I have been, am now,
And always will be, your friend. I am here.

Senior Lawyer Interview

Don Studdard

By Clinton F. Cross

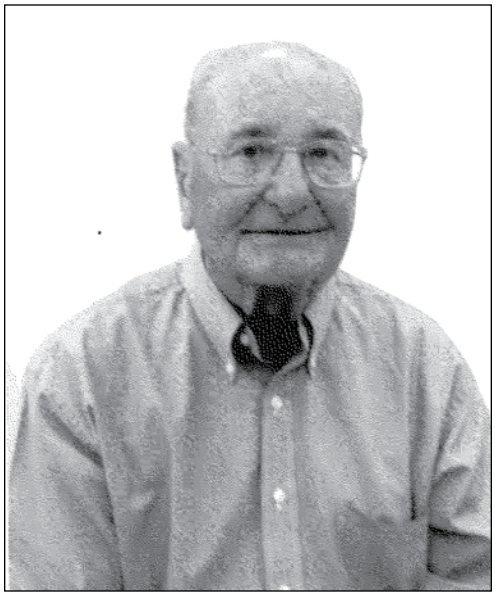
CROSS: Tell me about your family and your childhood.

STUDDARD: I was born in Brownwood, Texas, and grew up there. I started playing tennis in high school and still enjoy the sport today.

My mother and father divorced when my brother and I were very young.

CROSS: During this time, did your mother work outside the home?

STUDDARD: My mother and also my grandmother ran a boarding house during the depression and during World War II. The boarding house was located across the street from Howard Payne College. After the war, my mother and her second husband opened a cafeteria, which she called Studdard's cafeteria.



Don Studdard

CROSS: Where did you go to school?

STUDDARD: My brother and I graduated from Brownwood High School. Our mother and step-father encouraged us to continue our education by going to college.

I went to the University of Texas at Austin. I had to work to make ends meet, delivering the school newspaper (*The Daily Texan*), working in a cafeteria, and then working in an accounting office. I graduated in 1953 with a Bachelor's degree in Business.

After I graduated, with the Korean conflict still going on, I was drafted into the army. I served in the Third Infantry Regiment at Fort Myer, Arlington, Virginia until 1955, when I was discharged. With the help of the GI Bill, I went to law school and graduated in 1958. I then moved to El Paso.

My older brother Ken went to business school and graduated from the University of Texas School of Law in 1957. He joined an accounting firm in Houston.

CROSS: Tell me about your legal career here in El Paso.

STUDDARD: A number of my law school classmates came to El Paso after graduation, including Judge Harry Lee Hudspeth, Fred Morton, Ronald Calhoun, Don Cotton, Taylor Nichols, Jim Garner, John Steinberger, Frank Hart, Sam Blackham, Bill Deffebach and Jim Speer. Sadly, Cotton, Nichols, Garner and Blackham have now all passed away.

I worked for the El Paso firm of Potash, Cameron, Potash and Bernat for approximately ten years. In 1969 I started my own law firm with John Melby. Our partners over the years included Jonathan Schwartz, Jr., Brainerd Parrish, Harold Crowson, Chris Johnston, Thor Gade, Steve Nickey, Ernest Cisneros, Jeff Weikert and others. John Melby died at an early age in 1985. His daughter, Elizabeth Ruhmann, is an attorney in the El Paso City Attorney's office. In 2005 I closed the office and retired.

CROSS: Any particularly interesting cases that you recall?

STUDDARD: I recall a case that involved a dispute between two businessmen. The plaintiff was suing my client for money. In the course of that dispute, the plaintiff, who was represented by Charles Jones with the Scott-Hulse firm, demanded that my client produce his income tax returns. We objected, claiming that that the request was too broad. Judge Mulcahy, at that time judge of the 41st District Court, ordered us to produce the tax returns. This case ended up in the Texas Supreme Court. The Court reversed the trial court, holding that we did not have to produce the returns because Judge Mulcahy did not attempt in any way to separate the relevant and material parts of the returns from the irrelevant and immaterial parts. *Maresca v. Marks* 362 S.W. 2d 299, 301 (Tex., 1962).

I represented a woman by the name of Gretchen Smith in an interesting divorce proceeding. Her husband was in the army at the time. She wanted her husband to share some of his retirement benefits with her. At first he agreed, and Judge Cunningham adopted the settlement agreement entered into between the parties. Shortly thereafter, however, Mr. Smith wrote the Retired Pay Division of the U.S. Army and directed it to mail his retirement check to his post office box in El Paso. He declined to send his former wife any of the money. We were unable to collect the retirement benefits from the former husband because he moved and then disappeared.

We then sued the United States government in the U.S. District Court for the Western District of Texas, trying to collect from the government the benefits we could not collect from the former husband. The U.S. attorney pleaded governmental immunity. Judge Guinn, who presided over this case, found in Gretchen Smith's favor, and ordered the government to pay her. The U.S. Attorney then appealed to the Fifth Circuit.

Prior to argument, one of the judges noted that that the entire United States' government appeared to be against Gretchen. As I began my oral argument, I remember feeling that I had a mighty hill to climb. As it turned out, I did. The Fifth Circuit held that the District Court had no jurisdiction to hear the case, and that Texas law was therefore of no consequence. *United States of America v. Gretchen Smith*, 393 Fed. 2d 318, 321 (Fifth Circuit, 1968). Congress subsequently changed the law to provide for the division of military retirement benefits.

I represented Wholesome Dairy in another particularly interesting case. The company wanted to make an imitation milk product, which at the time was illegal. My client sued the State of Texas. The case was filed in El Paso, and landed in Judge Cunningham's court, the 65th District Court. The State removed the

case to Austin. We had a long, spirited non-jury trial before Judge Jim Meyers, with many expert witnesses testifying for both parties. Judge Meyers ruled in our favor, but the other side appealed. The Court of Appeals reversed, holding the statute constitutional. So in the end we lost the case. *Martin v. Wholesome Dairy, Inc.*, 437 S.W. 2d 586, 600 (Tex. Civ. App.--Austin 1969, ref'd n.r.e.). I believe, however, that the law prohibiting the selling of imitation milk was subsequently changed, and that with proper disclosures our client was thereafter allowed to make and sell it.

CROSS: Any community service work during your legal career?

STUDDARD: I was President of the El Paso Bar Association in the Fall of 1977, serving through the Spring and Summer of 1978. When I was President, we still held our annual banquet which was attended by many lawyers from all over the State of Texas. We also sponsored a well attended statewide conference for judges.

I was recognized in 2001-2002 by the El Paso Young Lawyers Association as the Outstanding Senior Lawyer. I was also a volunteer worker with the United Way, Boy Scouts of America, and the El Paso Christian Home for Girls.

I am today a Life Fellow of the Texas Bar Association and the El Paso County Bar Association.

CROSS: Your family?

STUDDARD: I met my wife Susan when we were both students at the University of Texas at Austin. We married in 1957, and today more than fifty years later we remain happily married.

My wife obtained a degree in education, and thereafter taught school at Crocket Elementary and Putnam Elementary. She was Student Activities Director at Coronado High School. We have three children. All three graduated from the University of Texas at Austin, and all three are married. I have four grandchildren.

CROSS: Church?

STUDDARD: I am a member of Western Hills United Methodist Church. I served on the administrative board and on the board of trustees.

CROSS: How has the practice of law changed since 1958?

STUDDARD: The profession has dramatically changed in a number of ways. We have at our disposal many technological tools that did not exist when I began to practice law. The practice is more specialized. In the civil arena at least, there is more pre-trial discovery, but fewer trials. There is more mediation, arbitration, all kinds of "alternative dispute resolution."

CROSS: What advice would you give a young lawyer beginning his or her practice today?

STUDDARD: The world is a complex place. It needs people who do not see that world in black and white and who are able to sort through the complexities of the law and human nature, think creatively, and find solutions to their clients' problems. Approach your cases with a fresh, open mind, without preconceived biases, with a willingness to learn. And of course your highest priority must always be your client's best interest.

Old Lazy Lawyers Get Beat By Six-Year Olds

By Stephanie Townsend Allala

On a crisp Spring Saturday morning more than 50 students gathered in the community center of St. Clements Anglican Church. Only a handful of lawyers answered the call of duty.

While the attorneys may not offer much in the way of a challenging chess game, the lesson is not lost. "I beat two lawyers. It felt great," said Vincent Yang, a six-year old first grader from Cove Elementary School. "It's really fun. I might be a lawyer some day and help people. I could help people play chess."

Ben Reiners is a 14-year-old seventh grader at Walter Clark Elementary. He started playing chess with his dad when he was three years old. "I practice by myself, and when I get a chance I play my dad." When asked who usually wins, he says "My dad sometimes. And then I beat him."

Paul Grajeda is a Business Litigation Attorney in private practice. "I played when I was a kid. Then for the longest time I didn't play. Then I started back up about a year ago." He said this was his first year at the event. And he readily admits he's responsible for at least one of the young chess players who was walking around with a large gold medal tied with ribbon around his neck that reads: "I beat a lawyer."

Attorney Omar Carmona getting beat by Little Kids

Attorney Clinton Cross recognizing Vincent Yang for defeating Omar Carmona at Law Day Chess Tournament

Organizer and Assistant County Attorney Clinton Cross says his only wish is that more attorneys would make time for chess and for the kids. "It's something you do as a child. We don't have time when we become lawyers. It requires quite a bit of practice to be decent. Now we practice law, we don't practice chess. But what is really important is that we encourage kids to believe they can successfully compete with people like us, who they see as not only older but successful. When they play us and win some of the games they should get a message of hope, that they too can be winners in life if they will only try."

A Test of Greatness: Rising Above the Federal Supremacy Clause and Such Things

by Judge Oscar G. Gabaldón, Jr., CWLS

"I believe that the first test of a great man is his humility. I don't mean by humility, doubt of his power. But really great men have a curious feeling that the greatness is not of them, but through them. And they see something divine in every other man and are endlessly, foolishly, incredibly merciful." This insight by Victorian art critic and social thinker John Ruskin provides us with the sense that a truly great person is often unaware of his or her greatness, particularly because it is his or her humility that often shelters that person from such grandiose feelings. Such a person recognizes the realness of his human condition, and that no one is superior to anyone else, since all are worthy of respect and dignity by virtue of their human existence.

In the practice of law and in the everyday life of the judiciary, the matter of greatness often surfaces. Hence, we hear statements such as "She is a great lawyer!" or "That judge has a great temperament." It is not uncommon to hear a client exclaim that her lawyer gave a great argument to the Judge, or to hear a lawyer tell another lawyer that the Supreme Court rendered a great decision in a given case. However, when it comes to a lawyer or judge actually being great in the purest sense of that term, what are we talking about?

For starters, perhaps some would agree that simplicity is a necessary quality of greatness. Ralph Waldo Emerson once observed that "Nothing is more simple than greatness; indeed, to be simple is to be great." The idea of simplicity as an element of greatness is rooted in the fact that a great individual need not be ornate in his manner or speech to draw attention to his or her views. That individual prefers clarity and brevity to better assure that his or her communications with others is not ambiguous and pretentious. The focus is on the other, not on the self. That is, the individual desires to communicate plainly and simply for the sake of meaningful and mutual understanding with another. The poet Shams-ud-din Muhammed Hafiz describes it this way: "Greatness is always built on this foundation: the ability to appear, speak and act, as the most common man."A great lawyer, therefore, prefers simplicity, as does the great judge.

Great lawyers and great judges center their actions and prudence on the needs of the people, that is, on what is most important and worthy of attention, action, and consideration based on the circumstances as they may exist. For example, if an attorney has been provided a court setting for a "major" legal proceeding in a state or county court, and later that same attorney is notified that a federal court has set a case for a "minor" federal legal proceeding on the same day and time as the state or county setting, it is possible that a federal court judge may be unwilling to reset, continue, or otherwise accommodate the attorney's scheduling conflict. This federal judge may even make reference somehow to the federal supremacy clause as a basis to justify his or her federal right or entitlement in refusing to accommodate the state or county trial setting. The authentically great judge, that is, the judge that is more concerned about service and the needs of others rather than on status and other mundane concerns, will "rise above" clinging to federal supremacy clauses, and such things, and will do the right thing --- assess the needs of those coming to the courts, evaluate their relative importance, and then pursue a course of action that places those needs first. In our example, this may mean the federal judge will agree to reset the federal proceeding in favor of the state or county proceeding. That judge would be willing to work his or her schedule around the needs of those coming to the court, not the other way around. That judge would recognize the immutable truth that courts are there to serve, not to be served. Judges are servants of the people, not kings and queens to be catered to. They are public servants, and should always act accordingly. Both lawyers and judges have a moral duty to pursue justice for all in a helpful, courteous, and service-oriented mentality. The law profession is all about people helping people. The kind of leadership lawyers and judges are expected to engage in is nothing less than servant leadership. Only then is greatness attainable. An unknown author once observed that greatness lies not in trying to be somebody but in trying to help somebody. Thus, servant leadership entails humane approaches. Perhaps, Mahatma Gandhi best articulates this sentiment when he says: "The greatness of humanity in not in being human, but in being humane."

In the journey towards greatness, many who are truly great will be envied and ridiculed. Such is the folly of many men and women who believe they are great men or great women by virtue of their positions, their professions, their wealth, their perceived self-importance, and the like. They envy and covet that which they are not. They look down upon and despise men and women that exhibit genuine greatness. Along these lines, Albert Einstein remarked "Great spirits have always encountered violent opposition from mediocre minds." Regardless, everyone has the potential to be great; however, they must nurture those ingredients that make for greatness: simplicity, humility, focus on the needs of others, perseverance in doing what is good and right, willingness to place others first, and a belief in the great value of every human being.

C. JoyBell C., a prominent poet, novelist, and author spoke of greatness. She gave us a thoughtful idea of how our greatness leaves its mark on others. She said, "Our key to greatness lies not in our ability to project ourselves to others as if we are putting ourselves onto a projector and creating an image of ourselves on a projector screen. Rather, our key to greatness lies in who we are which we can give to other people in a way that when they walk away from us, they are able to say in their hearts that they have taken away something with them quite extraordinary." Every lawyer and every judge has the potential to do precisely this. In so doing, perhaps it can then be said that their journey towards greatness is well under way.

Why El Paso Is In Texas, Not New Mexico.

A Divided Nation, Political Compromise, And El Paso County

By Clinton F. Cross

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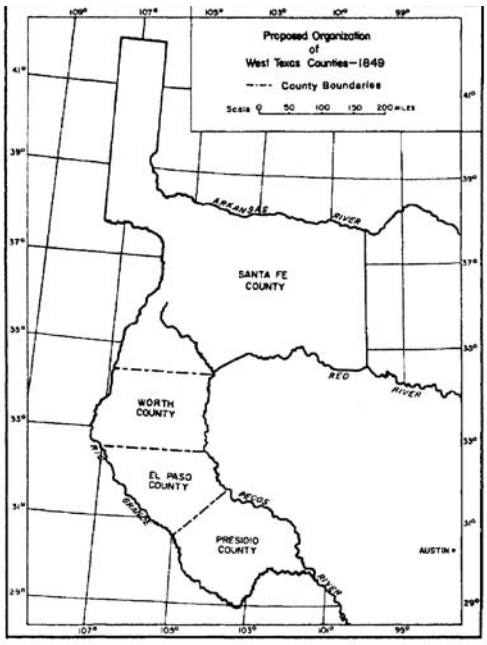
Our nation, divided, stands on the brink of political disaster. On one side of the aisle, political leaders refuse to raise taxes. On the other side of the aisle, political leaders refuse to cut spending for social programs. Strong interest groups support each political camp. There are few moderates willing to consider compromise in either camp.

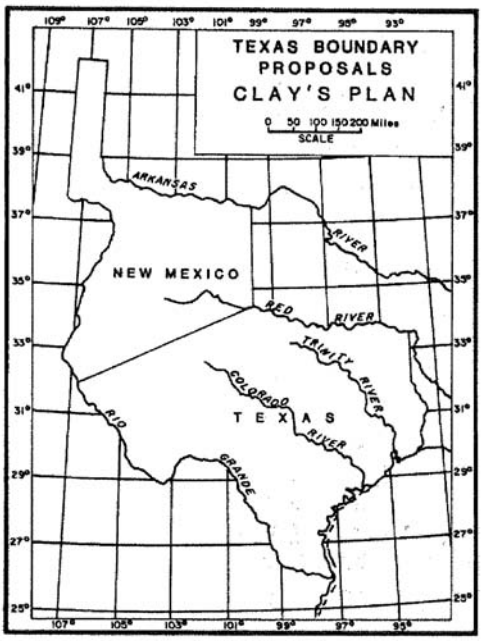
While there are obvious distinctions, the current political deadlock has some unpleasant similarities with the political battle that resulted in the Compromise of 1850. Today, "tea party" advocates believe that they are waging a moral crusade to end "economic slavery" by cutting taxation. Others, equally adamant, argue that the moral crusade is largely motivated by selfish interests, and that our national deficit crises should be addressed by a mixture of tax reform and government spending cuts.

The crises of 1850 was caused by the admission of the Republic of Texas into the union as a state in 1845, the Treaty of Guadalupe-Hidalgo, and California's subsequent request to be admitted into the union in 1849. With the smoldering issue of slavery underlying much of the debate, these events threatened immediate civil war. Surprisingly, the trigger was likely to be the border dispute between Texas and New Mexico.

The Republic of Texas was admitted into the union in 1845. However, the new state's boundaries were subject to being disputed. Based on the Treaty of Velasco, which is now stored in the El Paso Public Library, the Republic claimed its Southern boundary was the Rio Grande. Mexico claimed it was the Nueces River. The Republic also claimed that its territory included land in what is now part of New Mexico, Colorado, Oklahoma, and Wyoming.

Texas attempted in 1848 to advance its claim to parts of New Mexico by organizing Santa Fe County. New Mexico military and civilian leaders then petitioned the federal government to organize their area into a federal territory. Texas Governor George Wood asked the legislature to give him the power to assert the claim of Texas to New Mexico "with the whole power and resources of the State."





Unless indicated otherwise, the source for all maps in this article is William Campbell Binkley, The Expansionist Movement in Texas, 1836-1850

When in 1849 California applied for admission to the union as a free state, the issue of how to admit not only California but also the other territories obtained from Mexico, some of which were claimed by the state of Texas, presented itself to Congress. Texas, a slave state, claimed boundaries that included populations that did not want to be part of the new State and wanted to limit Texas' boundary claims as much as possible. As a matter of fact, U.S. troops stationed in Santa Fe and many of its residents claimed that New Mexico extended eastward almost to San Antonio.

In January, 1850 seventy-three year old Henry Clay came out of retirement and presented a proposal to the Senate to resolve the Texas-New Mexico border dispute. When after several months, the matter remained unresolved, the Senate appointed a Committee of Thirteen to resolve all questions involving the slavery issue. Among other things, the proposal recommended that Texas relinquish its claims to lands in New Mexico, Colorado and Oklahoma in exchange for federal assumption of Texas's unpaid debts, totaling $10,000,000.00. Clay's proposal ignited an eight month debate in Congress. Daniel Webster, the North's most spellbinding orator, threw his support behind Clay's compromise. "Mr. President," he began, "I wish to speak today not as a Massachusetts man, nor as a Northern man, but as an American…."

Opposition to compromise was fierce. On March 4, 1850, twenty seven days before his death, John C. Calhoun delivered through a proxy his last political speech, pointing out that division of the newly acquired territories from Mexico threatened the "equilibrium between the two sections in the government" and that failure to address the problem would result in disunion.

As Congress debated what to do about the new territories, Texas Governor Peter Bell commissioned Robert Neighbors to travel to what is now West Texas and New Mexico for the purpose of organizing four Texas counties.

When Neighbors arrived in San Elizario for

the purpose of organizing El Paso County, he was met by Charles A. Hoppin, a lawyer and former mayor of Mobile, Alabama. Hoppin had written Governor Bell in 1849 asking for a copy of the Texas statutes, and asking the Governor to take steps to organize the region as a part of the State of Texas. With Hoppin's support, Neighbors had little difficulty in organizing El Paso as a Texas county.

But when Neighbors went to Santa Fe and surrounding areas, he found himself and his proposals for organization of three of the four counties as Texas counties unwelcome.

Neighbors issued a report regarding the results of his efforts was issued in June, 1850. Texans were outraged. Some advocated the use of military force to secure the state's claims; others urged secession. Bell called a special session of the Texas legislature. Before the Texas legislative session began, New Mexicans ratified a constitution for a proposed state specifying boundaries that included land claimed by Texas. The State of Texas threatened to send its militia to Santa Fe. In response, the federal government reinforced its military garrison.

On the 4th of July, Washington politicians remained stubbornly divided; compromise appeared to be dead. But then on July 9, President Zachary Taylor died of gastroenteritis.

President Taylor's successor, President Millard Fillmore, supported compromise. The speaker of the house, Howell Cobb, ancestor of Zach Lamar Cobb, who practiced law in El Paso one hundred years ago, and Howell "Chip" Cobb, who practiced law here a decade ago, also supported compromise.

In Congress, Senator Stephen Douglas led the fight for compromise, and split Clay's proposal into five separate bills. The third proposal by Senator James A. Pearce of Maryland dealt with the hotly contested issue of the Texas-New Mexico border. Although there was not enough support to pass Clay's original package, with shifting votes and alliances for each bill, in the end each bill passed.

Logically, El Paso, closely linked historically, culturally and economically to the Southwest, should have been included in the New Mexico territory. By the time Congress voted on the Texas-New Mexico boundaries, however, El Paso had already been organized as a Texas county. As a result, the drafters of the Compromise of 1850 had little choice but to include El Paso within the boundaries of the state of Texas.

What lessons can we learn from the Compromise of 1850?

First, politicians tend to postpone really tough decisions until they have no alternative but to "bite the bullet." The founding fathers, for instance, compromised on almost every issue they faced. They also postponed ultimate resolution of the most difficult issue, the issue of slavery, because at the time they met ultimate resolution of that issue was impossible. Likewise, the Compromise of 1850 postponed resolution of the issue of slavery to a later date. The recent Congressional vote regarding reduction of our deficit also postpones some critical decisions to a later date.

However, many important decisions are made as the result of compromise. The constitutional convention of 1787 gave the United States of America a constitution. The Compromise of 1850 drew the boundaries of the State of Texas and the Territory of New Mexico, and left El Paso in the state of Texas.

Finally, sometimes there may be a benefit to postponing resolution of difficult decisions to a later date. If the Civil War had begun in 1850, rather than 1861, the South may have won that war. In the years between 1850 and 1861 the North's population and industrial base grew dramatically, factors that played an important role in the North's final victory over the South.

El Paso Bar Association's Technology Committee

BY DAVID J. FERRELL
djf@elpasolaw.com

Our new El Paso Bar President, Bruce A. Koehler, has hit the ground running and has made it clear that he wants the El Paso Bar Association to be on the cutting edge of legal technology. One of his first official acts was to create a "Technology Committee". He has appointed a diverse group of El Paso Attorneys and one judge to implement a vision that will enable us all to move forward in technology areas that will facilitate law office and litigation management, communication, research and presentation in the multifaceted legal arena that is of great importance to the El Paso legal community.

So, where do we start? The committee is composed of Brock Benjamin, the Honorable Kathleen Cardone, Mario Franke, Fernando D. Gireud, Audrey Hare and me. Bruce Koehler and Nancy Gallego have attended our initial meetings and our first focus is the El Paso Bar Association website. You will see a change there soon and that by itself will be a good reason to retain membership in the El Paso Bar. If you are not a member you will want to join.

There are many areas of legal technology that will be discussed by the committee and it is anticipated that Technology CLEs will be on the agenda at each committee meeting. Other important views on legal technology must come from El Paso Bar members.

WHAT WOULD YOU LIKE to be the topic(s) of CLE presentations? Will YOU attend and support these anticipated CLEs? Send me an email at the above email address.

We are ready to go forward and we anticipate that the El Paso Bar Association will continue to help its members in many areas, including the legal technology area where we all need a concerted view of the path we need to take for the Bar, ourselves and our clients with 21st century tools.

Michele Locke

Name:
Michele Locke
Court:
65th District Court Family Violence Court
Years on the Bench:
6 months on the bench
Years in practice:
9 years in practice
Education:
BBA/Finance UT Austin 1999, JD Texas Tech 2002
Your view of the role of the court system in our society.
Our system of government is there to provide everyone, no matter their individual station in life access to justice. The Court's duty is to provide this access.
What characteristics and qualities are important to be a judge?
First and foremost – Fairness. Compassion. Understanding of individual plights.
Describe a day when, as lawyer, judge, or justice, you felt particularly proud or satisfied.
As a judge – I feel particularly proud when I am able to provide protection to victims of family violence, to see the relief on a victim's face when they receive their protective order. As a lawyer– The moment I was most proud of – I was able to assist a terminally ill patient with delaying the eviction process long enough that she could die in peace and not on the streets. I just wanted to make sure she had some peace and dignity before she died. For me, that is what being a lawyer is all about
What is your favorite way to spend free time?
With my children.
Tell us about your family. Family – Husband Rick Locke, Assistant District Attorney, children Mason (8), Jean-Noel (5), Nicole(16) and Molly (14) Locke

Locke with- Jean-Noel (5) is on the left and Mason (8) is on the right

SAVE THE DATE!!!!!

February 17 & 18, 2012

We are going back to Las Vegas for the 16th Annual Civil Trial Seminar

Complete details in the next issue of the journal.

Classifieds

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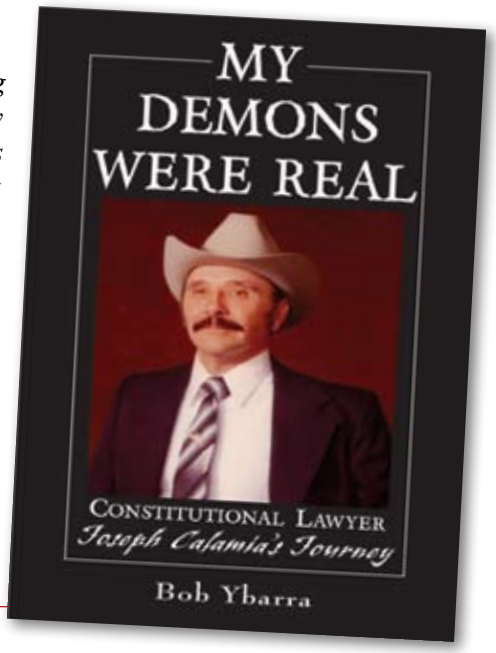
My Demons Were Real

About the Book

Joseph Albert Calamia began his career as a criminal defense attorney in El Paso, Texas, in 1949. He was a crusader for justice, considered by many to be akin to Don Quixote, tilting at windmills. But he disagreed, "The big difference is that my demons were real." His demons were the institutionalized practices that favored expediency over the rights of individuals; he spent his lifetime fighting to ensure peoples' rights were not trampled by law makers and enforcers.

Over the course of his long career, Calamia successfully challenged a host of attacks against civil liberties, including police undercover tactics and the constitutionality of searches and seizures in drug, immigration, and other cases.

Published as part of the Hispanic Civil Rights Series, this enlightening book documents the efforts of a man who devoted his life to protecting the Constitution and the Bill of Rights.



Upcoming book singining events:

Saturday, September 10, 2011
1:00 p.m. - 2:30 p.m.
El Paso County Historical Society
Burges House
603 West Yandell
El Paso, Texas 79902

Saturday, September 17, 2011
10:00 a.m. - 12:00 p.m
COAS Books, Inc.
317 North Main Street
Las Cruces, New Mexico 88001

October 22, 2011
3:30 – 5:30pm
The Law School Preparation Institute
Homecoming Tailgate Event
University of Texas at El Paso – Glory Field –Tent
UTEP Miners vs. Colorado State Rams – 6:00 pm