



EL PASO BAR JOURNAL

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An Update of Events and Information

September 2013

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State Bar of Texas Awards
 Award of Merit
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 Outstanding Partnership Award
 Outstanding Newsletter
 Publication Achievement Award
 NABE LexisNexis Awards
 Community & Education Outreach Award
 -2007, 2010 & 2012
 Excellence in Web Design – 2007
 Excellence in Special Publications – 2008

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

PRESIDENT'S PAGE



Honoring our past and building for the future

With the end of the Civil War and the subsequent arrival of the railroads in the area there was a marked expansion of the legal profession in El Paso. The local bar played an important role in the development of the judicial, social, political and economic aspects of the county. During the decade of the 1870's lawyers in the El Paso area considered themselves to be part of a de facto organization

that they referred to as the "El Paso Bar" or "the District Court Bar."

As of 1886, the legal profession of El Paso was still known as the "El Paso Bar" or "the bar." There were 35 lawyers servicing the town of El Paso. The "bar" continued as a loose de facto organization until 1897. Then on June 7, 1897, members of the legal profession met in "the district courtroom" to establish a permanent bar association. The formal name for this permanent bar association was the Bar Association of El Paso County. To be a member, an attorney had to pay a \$1.00 initiation fee and thereafter 25 cents a month.

From 1897 to 1919, this organization was operated loosely and not effectively. In 1919 leaders of the El Paso legal community recognized the need for reorganizing the group and for having a sound constitution to govern El Paso's legal profession. The name of the new organization was the "El Paso Bar Association." With this constitution, the El Paso Bar Association emerged as a strong professional organization. The constitution adopted by the El Paso Bar Association in 1919 stated that the objects of the organization were:

1. To advance the science of jurisprudence;
2. Promote the administration of Justice;
3. Uphold the honor of the law; and
4. Encourage cordial professional dealings among members of the EPBA.

The mission and purpose of the El Paso Bar Association identified in 1919 are still relevant today and continue to guide and direct our association. We have a very solid foundation which has been built over the years and serves us well going forward. As members of the El Paso Bar Association, we all have an obligation and responsibility to mentor those young attorneys coming into our profession and to ensure that we continue to strengthen what those who went before us have built.

The El Paso Bar Association has grown stronger, more diverse and more active over the years. Today, the El Paso Bar Association has over 600 members and conducts several programs which have received numerous awards and have been recognized both on a statewide and national basis.

In bar associations, we find communities of lawyers committed to advancing the highest ideals of the legal profession. That is why I am a member of the El Paso Bar Association.

Randolph Grambling,
President

Cover photo courtesy of Assistant District Attorney Sara Rogness

EL PASO BAR ASSOCIATION
September Bar Luncheon
 Tuesday, September 10, 2013

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

Guest Speakers will be
 UTEP Football Coaches

Door prizes will be given out

Please make your reservations by Monday, September 9, 2013 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

Please make sure you RSVP.

HELP!



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

Good articles, of course, take time, thorough research and clear writing. In some instances, however, the research may be a product of your daily legal work-- researching an issue or writing a brief. We invite you to share your work with the legal community in El Paso and

wherever the Internet may travel. If issues of confidentiality are involved, the work usually can be sanitized to comport with ethical requirements, while at the same time sharing your hopefully brilliant work with the larger broader community.

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



BE OUR COVER:

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

CALENDAR OF EVENTS

September, 2013

Monday, September 2

EPBA Office Closed

Labor Day

Tuesday, September 3

– **Friday, September 6**

5th Circuit Court of Appeals

Oral Arguments

Tuesday, September 3

– **Thursday, September 5**

Settlement Week

Tuesday, September 3

5th Circuit Court of Appeals

Welcome Reception

Tuesday, September 10

EPBA Monthly Luncheon

UTEP Football Coaches

Wednesday, September 11

EPWBA Monthly Meeting

Wednesday, September 11

EPCLSA Monthly Luncheon

Thursday, September 19

4th Annual Child Welfare Law Seminar

Thursday, September 19

EPPA Monthly Luncheon

October, 2013

Friday, October 4

Frontera Land Alliance Seminar

Saturday, October 5

MABA Banquet

FIFTH CIRCUIT COURT OF APPEALS

Oral Arguments in El Paso

U.S. Albert Armendariz, Sr. U.S. Courthouse

525 Magoffin Avenue

Oral Arguments

Tuesday, September 3rd – Friday, September 6th

9:00 a.m. to 1:00 p.m.

Open to the Public

Schedule available at:

[http://www.ca5.uscourts.gov/
clerclalendar/1309/09.htm](http://www.ca5.uscourts.gov/clerclalendar/1309/09.htm)

Special Proceedings Courtroom, 8th Floor

Welcome Reception

Tuesday, September 3, 2013

5:00 p.m. to 6:30 p.m.

Open to all Attorneys

Courtesy of the El Paso Bar Association and the
El Paso Chapter of the Federal Bar Association
Courthouse Lobby, 2nd Floor



Save the Date!!!

18TH ANNUAL CIVIL PRACTICE TRIAL SEMINAR

February 13, 14 & 15, 2014

San Diego, California

Sheridan Suites San Diego

at Symphony Hall

(\$149 a night)

more details to follow

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.

RANDY GRAMBLING, OUR BAR ASSOCIATION PRESIDENT

This year's Bar Association President is a Kemp Smith litigator with deep roots in the local legal community. He has been served as Secretary, Treasurer, and Vice President of the El Paso Bar Association. He is a Life Fellow of the Texas Bar Foundation. He recently served as President of the El Paso chapter of the American Board of Trial Advocates (ABOTA). In previous years he has served as a member of the State Bar Grievance Committee and the State Bar's Professional Enhancement Committee. He was a board member of a number of local organizations such as the YMCA and the Coronado Kiwanis club. He is an enthusiastic sportsman, having been a basketball player and later coaching his sons' basketball and baseball teams.

Randy is a graduate of Coronado High School, Southern Methodist University, and Texas Tech School of Law. His wife of 33 years is Robin Grambling, daughter of former El Paso state representative and senator Frank Owen III and wife Mary Ann. She is a lecturer/professor at UTEP. Randy and Robin have four sons, Holt, Preston, Ryan, and Chase. Holt is married to Michaela Ainsa Grambling an attorney at Ainsa Hutson, L.L.C.

Randy's grandfather, Allen R. Grambling, began practicing law in El Paso in 1913. At that time, the gunfighter era was coming to a close, the El Paso Court of Civil Appeals had only recently begun hearing appeals, the Mexican Revolution was in progress. Allen's son, John A. Grambling, was a named partner in the Grambling, Mounce law firm and he was, during his lifetime, one of the most widely respected lawyers in El Paso. Both Allen R. Grambling and John A. Grambling served as Presidents of the El Paso Bar Association. The Grambling family has practiced law 100 consecutive years in El Paso, Texas.

Meet You Board Leaders

Each issue the Journal will feature several members of the Bar's Board of Directors so that members will know their leaders and representatives.



George P. Andritsos

George P. Andritsos is serving the last year of his term on the Board of Directors. During his service, Mr. Andritsos has led the Bar's Access to Justice efforts. Working with Alberto Mesta, fellow board member and TRLA Branch manager, Mr. Andritsos has coordinated the annual Access to Justice Legal Clinic held in the fall of each year. These efforts have been recognized both locally and statewide; most recently the project was awarded the 2013 Deborah G. Hankinson Award by the Texas Access to Justice Commission. Mr. Andritsos is a solo practitioner with a primarily plaintiff's practice focused on labor and employment litigation. He is a graduate of Texas Tech University School of Law.



Daniel H. Hernandez

Daniel H. Hernandez has been with the law firm of Ray, McChristian and Jeans, P.C., for 18 years. He is board certified in personal injury trial law and maintains a practice in the area of personal injury defense, in areas such as large and complex trucking, auto, construction, premises and products liability, workers' compensation, DTPA, fire, and labor and employment. Mr. Hernandez was previously employed by the City of El Paso City Attorney's office in the trial section. Mr. Hernandez is in his first year on the Board of Directors and is chairing the Annual Civil Trial and Practice Seminar CLE committee, having worked on the program for several years before his appointment. Mr. Hernandez seeks "to give back to our Bar by serving to increase the level of professionalism, education, and our public image." He has been married 33 years to his high school sweetheart, Marissa; they have 3 children and 3 grandchildren, and spend most of their time volunteering in church activities at Calvary Chapel of El Paso.



Melissa A. Baeza

Melissa Baeza is an associate with the Scott Hulse, P.C., firm. She has been practicing four years in commercial litigation and construction law. Ms. Baeza is in her first year of a 3-year term on the Board of Directors. Ms. Baeza is looking forward to sharing her ideas and experiences with the Bar and hopes that by taking a more active role, she can help make the Bar more inclusive. She is a graduate of St. Mary's University and Texas Tech University School of Law (cum laude), where she was on law review. Ms. Baeza and Raymond J. Baeza (Texas Tech 2010, J.D.) will celebrate their first anniversary on October 13, 2014, and are kept busy by their nieces, nephews, cousins and friends.



Donald L. Williams

Donald L. Williams is a solo practitioner dedicating his practice to the areas of family and military law. He was a visiting associate judge under two separate district courts (2009-2010 and 2006-2008), an associate family court judge (1995-99), a criminal law magistrate (1995), associate municipal court judge (1992-95) and a former army JAGC officer. He was appointed to and attended the United States Military Academy at West Point in 1969, graduated from UTEP (1973) and the University of Texas -Austin School of Law (1975). Mr. Williams is serving his last year on the Board of Directors. He is chair of the El Paso Lawyers for Patriots program, which has received local, state and national recognition, including the 2013 Deborah G. Hankinson Award from the Texas Access to Justice Commission. He is involved in numerous church, community and political organizations. He is married to Ruth Garcia-Ybarra Williams, the father of three adult children and two grandchildren.

EPBA/County Holiday

The El Paso Bar Association and the El Paso County Courthouse will be closed on the following date: Monday, September 2, 2013 – *Labor Day*

The Texas Prompt Pay Act and ERISA preemption: fighting for timely and correct payment

BY: MIKAL C. WATTS

Health insurance companies are making more money than ever, but at what cost? As depicted in Hollywood movies like *The Rainmaker*¹ and *Sicko*,² insurance companies have a dark history of delaying or denying the valid claims of patients, discriminating based on credit score, and retroactively terminating insurance policies when patients become older or too costly to treat.³ These decisions—made primarily in the name of increased revenues—have directly impacted patients across the country, leading to laws like the Patient Protection and Affordable Care Act.⁴

However, lesser known are the impacts to the healthcare industry. Insurance companies have dubiously sought to save costs and increase revenue by delaying and underpaying payments for services rendered by hospitals, pharmacies, physicians, and other medical support companies and organizations (“medical providers”).⁵ States have promulgated laws to curb this behavior.⁶ Known as the “Prompt Pay” statutes, these laws mandate that all valid claims for payment be paid within a prescribed time period and impose hefty penalties for the failure to do so.⁷

In recent years, insurance companies have argued that such statutes are invalid for the majority of submitted claims for payment—i.e., claims by submitted by medical providers under a patient’s employer-offered insurance plan. Insurance companies have argued that Prompt Pay statutes are preempted by federal Employee Retirement Income Security Act of 1974 (ERISA). ERISA regulates all employer-offered insurance plans and preempts any state law that directly or indirectly impacts such plans. Using ERISA’s preemption provisions, insurance companies have asserted that ERISA preempts the Prompt Pay statutes where medical providers submit claims for payment under employer-offered plans.

This article focuses on the Texas Prompt Pay Act, addressing the question of ERISA preemption. A thorough examination reveals that the Texas Prompt Pay Act should not be subject to ERISA preemption. The Texas Prompt Pay Act does not interfere with the right of payment—an area within ERISA’s exclusive purview—but only affects the timing of payment.

I. ERISA and Preemption

Congress enacted ERISA in 1974 primarily to regulate private employer-sponsored benefits, including health insurance.⁸ Specifically, ERISA governs two-types of health insurance plans: fully-insured plans and self-insured plans.⁹ A fully-insured plan is a health plan purchased by an employer from an insurer or managed care organization who bears the responsibility to pay submitted health claims.¹⁰ By contrast, a self-insured plan is one where an insurer or managed care organization administers the health plan but the responsibility of claim payment is retained by the employer.¹³

ERISA regulates the operation of both plans, including the conduct of the entity charged with paying claims, reporting and accountability, and disclosures.¹² ERISA also specifically addresses healthcare coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹³

To ensure nationwide uniformity, ERISA preempts state law in several respects. ERISA’s “preemption clause,” 29 U.S.C. section 1144(a), supersedes state laws to the extent they “relate to” employer-sponsored health plans.¹⁴ This type of preemption is known as “conflict” preemption and requires evidence that the state law “relates” to the regulation of such plans in order for preemption to occur.¹⁵ As noted by the United States Supreme Court, “ERISA pre-emption of a state claim, without more, does not convert a state claim into an action arising under federal law.”¹⁶

Another form of ERISA preemption is “complete preemption,” which is a jurisdictional doctrine. Complete preemption results where a plaintiff’s state law claims is within the scope of ERISA’s civil enforcement provision, 29 U.S.C. section 1132(a). In other words, where a state law claims seeks the same relief as that permitted under section 1132(a)—that state law claim is preempted.¹⁷

II. Passage of the Texas Prompt Pay Act: ERISA Preemption Considered

The purpose of the Texas Prompt Pay Act is to promote the timely payment of a “clean claim” that has been submitted to an insurer by

a medical provider.¹⁸ If an insurer determines that a clean claim is payable, liability under the Texas Prompt Pay Act is triggered where the insurer (1) fails to timely pay the claim, (2) fails to pay the full, contracted rate for the claim, or (3) untimely underpays.¹⁹

In drafting the Texas Prompt Pay Act, the authors of the various iterations of the Act were concerned with ERISA preemption. As noted by the Texas House Research Organization’s report on the 2001 attempt by the Texas Legislature to pass Prompt Pay Act, the statutes were drafted specifically to avoid ERISA preemption:

Prompt payment regulations should apply to all insurers. Providers should have one set of expectations for all claims, including the time frame for payment. Exempting certain insurers would be confusing and difficult for providers and would be counter to the goal of uniformity and simplification The federal regulations contained in the Employee Retirement Income Security Act program are concerned with the relationship between the insurer and the enrollee. This bill would regulate only the relationship between the insurer and the provider. ERISA covers policies; this bill would cover claims.²⁰

While HB 1862 passed the Texas Legislature, it was vetoed by Governor Perry because HB 1862 did not permit arbitration.²¹ Less than two years later in 2003, the Texas Legislature voted for passage of SB 418, which included a provision permitting arbitrations and was not vetoed by Governor Perry. The legislative record demonstrates that lawmakers understood that including all claims in the TPPA would not create ERISA preemption problems:

The bill would not conflict with federal laws governing the Employee Retirement Income Security Act (ERISA) program. Federal regulations for ERISA address the relationship between insurers and enrollees. SB 418 would regulate only the relationship between insurer and provider. ERISA covers *policies*; this bill would cover *claims*.²²

As the final version of SB 418 came out

of committee, the House Organization Report stated the Legislature's intent:

SUPPORTERS SAY: the bill would not conflict with federal laws governing the Employee Retirement Income Security Act (ERISA) program. Federal regulations for ERISA address the relationship between insurers and enrollees. SB 418 would regulate only the relationship between insurer and provider. ERISA covers policies; this bill would cover claims . . .

OPPONENTS SAY: It is not clear that the changes proposed in SB 418 would stand up to an ERISA challenge. Federal regulations could bar some of SB 418's provisions.²³

Notably, despite the opponents' claims that the Texas Prompt Pay Act might not stand up to an ERISA challenge, the bill had 109 sponsors and co-sponsors in the House, passed unanimously out of the Senate Health & Human Services Committee and unanimously out of the House Insurance Committee,²⁴ and secured overwhelming passage in the floor votes in both the House and Senate, before it was signed into law by Governor Perry.²⁵

III. Judicial Analysis of the Texas Prompt Pay Act and Preemption

Although the authors of the Texas Prompt Pay Act drafted the Act to avoid ERISA preemption, the ultimate decision of the Act's application rests with the Judiciary. A mosaic of legal opinions concerning both complete and conflict ERISA preemption has resulted in confusion as to what state law claims are considered preempted under ERISA. Thorough analysis of ERISA jurisprudence, however, indicates that claims brought under the Texas Prompt Pay Act are not preempted.

IV. Complete Preemption of the Texas Prompt Pay Act? Not So Says the Fifth Circuit

The United States Court of Appeals for the Fifth Circuit, in *Lone Star OB/GYN Associates v. Aetna Health, Inc.*,²⁶ held that self-funded claims under the Texas Prompt Pay Act are not subject to complete preemption under ERISA. In *Lone Star*, the medical provider—Lone Star OB/GYN—entered into a provider contract with Aetna who also served as administrator of an ERISA plan. Lone Star brought suit against Aetna for violations of the Texas Prompt Pay Act in connection with late-paid and underpaid claims under a self-funded ERISA plan. Aetna

removed the case to federal court, arguing that ERISA completely preempted Lone Star's claims arising from the self-funded plan.²⁷

In reviewing the case, the Fifth Circuit addressed whether state law claims that arise out of a contract between medical providers and an ERISA plan are preempted by ERISA.²⁸

The court held in favor of the Lone Star OB/GYN, acknowledging that the issue before the court concerned the rate of payment and not the right to payment.

Though the plan and the Provider Agreement cross-reference each other, the terms of the plan—in particular, those related to coverage—are not at issue in a dispute over whether Aetna paid the correct rate for covered services as set out in the Provider Agreement. While Aetna is correct that any determination of benefits under the terms of a plan—i.e., what is “medically necessary” or a “Covered Service”—does fall within ERISA, Lone Star's claims are entirely separate from coverage and arise out of the independent legal duty contained in the contract and the TPPA.

In so holding, we adopt the reasoning of the Third and Ninth Circuits, and that of a majority of district courts in this Circuit, which have relied on this distinction between “rate of payment” and “right of payment.”²⁹

In further detail, the Fifth Circuit explained—

The TPPA allows a physician or provider to collect the contracted rate plus penalties for “payable” claims that are not paid within a statutorily specified amount of time. A TPPA remedy only overlaps with the ERISA enforcement scheme if there is a dispute over whether a claim is “payable”—whether there has been a denial of benefits because there is a lack of coverage. Again, where claims do not involve coverage determinations, but have already been deemed “payable,” and the only remaining issue is whether they were paid at the proper contractual rate, ERISA preemption does not apply.³⁰

The court also evaluated the issue from a contract perspective, recognizing that “[a] majority of the district courts in this Circuit have held no ERISA preemption of state law claims where there is an underlying contract between the provider and the insurance company and the

claims are not dependent on interpretation of the plan.” The Lone Star court itself followed those courts in the holding it reached.

Based on the Fifth Circuit's analysis, ERISA does not preempt claims under the TPPA for late-paid claims. Because those claims already were determined to be payable, the question of whether the provider had a right to payment is not at issue. As such, does not relate to the ERISA's regulation of the plan benefits. The only issue is whether such claims were timely paid or not—an act not subject to federal government regulation.³¹

V. Federal Precedent Limits the Reach of ERISA's Conflict Preemption Provision.

The Fifth Circuit, in evaluating conflict preemption, has used the same two-prong test it applied in *Lone Star*,³² evaluating if a claim:

- (1) addresses an area of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and
- (2) directly affects the relationships among traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries.³³

Where either prong is met, the claim is considered within the scope of ERISA's enforcement provision, and the claim preempted.

With respect to the Texas Prompt Pay Act, the Northern District of Texas in *Baylor University Medical Center v. Arkansas Blue Cross Blue Shield*,³⁴ held no conflict preemption of claims brought under the Act. Evaluating the claim under the first prong of the test, the court held that the TPPA does not address “an area of exclusive federal concern”:

ERISA does not preempt generally applicable state laws that impact ERISA plans only tenuously, remotely, or peripherally. In this case, both state statutes require insurers to promptly pay the claims of physicians and other health care providers. Wall's ERISA plan provides only factual background for Baylor's statutory claims; the plan is peripheral to the statutory obligation Baylor seeks to enforce in this case, namely, prompt payment of Baylor for services rendered. The court will not, in the name of ERISA, insulate an insurer from liability against a third-party health care provider seeking to enforce its rights under a state statute that

requires prompt payment of claims.³⁵

As noted by the Fifth Circuit in *Lone Star*, no ERISA preemption arises in the context of late-paid claims because dispute does not implicate the decision of whether the claim should be paid.³⁶ The insurer has already determined the claim to be payable, leaving only the timing payment—an action that is not regulated under ERISA.³⁷ As such, the exclusive area of federal concern—the right to benefits under an ERISA plan—is absent from a valid claim brought forth under the Texas Prompt Pay Act.

Evaluating the Texas Prompt Act under the second prong—whether the claim directly affects the relationships among traditional ERISA entities—the federal courts, including the Fifth Circuit, have again aligned with medical providers by denying that the timely payment of claims affects ERISA relationships.

For example, in *Baylor*, the Northern District of Texas distinctly remarked that claims under the Texas Prompt Pay Act “are governed by state laws that enforce the prompt payment of claims by insurers—not to plan participants or beneficiaries, but to independent health care providers.”³⁸ The *Baylor* court further affirmed that ERISA preemption was not so broad as to bring within its scope all issues related to private insurance:

Nothing in ERISA prevents the Texas legislature from making this determination. By enforcing the Texas statutes at issue, plan participants’ actual obligations under the terms of their various plans would remain constant and the plans’ terms would

be unmodified. Baylor’s statutory claims, thus, do not directly affect the relationship between traditional ERISA entities.³⁹

The Fifth Circuit similarly rejected that the relationship between a medical provider and a self-funded plan satisfies the second prong of the conflict preemption test:

[T]he most important factor for a court to consider in deciding whether a state law affects an employee benefit plan “in too tenuous, remote, or peripheral a manner to be preempted” is whether the state law affects relations among ERISA’s named entities. Courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.⁴⁰

More recently, the Fifth Circuit reaffirmed its position in *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*,⁴¹ stating that “a one-time recovery for Access on its state-law misrepresentation claims will not affect the ongoing administration or obligations of the ERISA plans that UHC administers because the recovery ‘in no way expands the rights of the patient to receive benefits under the terms of the health care plan.’”⁴² The court further noted that:

State law claims of the kind asserted in

[*Memorial Hospital System v. Northbrook Life Ins. Co.*], [*Transitional Hospitals Corp. v. Blue Cross*, 164 F.3d 952, 955 (5th Cir. 1999)], and this case concern the relationship between the plan and third-party, non-ERISA entities who contact the plan administrator to inquire whether they can expect payment for services they are considering providing to an insured. The administrator’s handling of those inquiries is not a domain of behavior that Congress intended to regulate with the passage of ERISA, which “imposes no fiduciary responsibilities in favor of third-party health care providers regarding the accurate disclosure of information, or, indeed, regarding any other matter.”⁴³

Thus, because the claims are not premised on a medical provider’s rights under an ERISA plan—but merely implicate the timing of payment—the Texas Prompt Pay Act does not intrude in an area of exclusive concern nor does interfere with the relationship between traditional ERISA entities. As such, current jurisprudence indicates that claims brought under the Texas Prompt Pay Act are not subject to ERISA preemption.

MIKAL C. WATTS is a partner in the San Antonio law firm of Watts Guerra LLP. The firm focuses on catastrophic personal injury, toxic torts, product liability, automotive defects, commercial trucking negligence, medical device, pharmaceutical, and commercial litigation.

Footnotes:

1. *The Rainmaker*, Francis Ford Coppola, 1997.
2. Sicko, Michael Moore, 2007.
3. See also *Tricks of the Trade: How Insurance Companies Deny, Delay, Confuse and Refuse*, American Association for Justice, <http://www.justice.org/cps/rde/xbcr/justice/InsuranceTactics.pdf> (last visited May 11, 2013).
4. 42 U.S.C. 300gg *et seq.*
5. See, e.g., Alicia Gallegos, *Medical Societies Join to Fight Prompt-Pay Lawsuit*, [amednews.com](http://www.amednews.com), <http://www.amednews.com/article/20121029/government/310299952/6/> (last visited May 12, 2013).
6. See e.g., *Kansas Health Care Prompt Pay Act*, K.S.A. 40-2440 *et seq.*, *Illinois Prompt Pay Act*, 30 ILCS 540/1 *et seq.*, *Pennsylvania Prompt Pay Act*, 62 Pa. C.S.A. § 3921 *et seq.*
7. Errol J. King, J.D., *Prompt-Pay Insurance Laws A Continuing “Hotbed of Activity,”* Federation of Regulatory Counsel, Inc., <http://www.forc.org/pdfs/vol16-ed3-art1.pdf>

(last visited May 12, 2013).

8. 29 U.S.C. § 1144(a).
9. Peter D. Jacobsen, J.D., MPH, *The Role of ERISA Preemption in Health Reform: Opportunities and Limits*, Georgetown Law O’Neill Institute, <http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/ERISA.pdf> at 2; K. A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 *Yale J. on Reg.* 255, 255 (1996).
10. K. A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 *Yale J. on Reg.* 255, 255 n. 7-9 (1996).
11. K. A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 *Yale J. on Reg.* 255, 255 n. 7-9 (1996).
12. K. A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 *Yale J. on Reg.* 255, 255 n. 7-9 (1996).
13. Paul J. Schneider, Brian M. Pinheiro (Editors), *ERISA: A Comprehensive Guide*, 4th Ed., §§ 12.01-12.18, Wolters Kluwer Law & Business (2012 Supplement).
14. Paul J. Schneider, Brian M. Pinheiro (Editors), *ERISA: A Comprehensive Guide*, 4th Ed., §§ 9.01-9.05, Wolters Kluwer Law & Business (2012 Supplement)
15. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).
16. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).
17. See, e.g., *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. California*, 463 U.S. 1, 3-4, 103 S. Ct. 2841, 2843, 77 L. Ed. 2d 420 (1983) (holding no complete preemption where a state tax authorities attempted to collect unpaid taxes on an ERISA-covered benefit plan, stating that “even though the Court of Appeals may well be correct that ERISA precludes enforcement of the State’s levy in the circumstances of this case, an action to enforce the levy is not itself preempted by ERISA”).
18. *Tex. Ins. Code* § 1301.101. A “clean claim” means

one that was submitted, either electronically or non-electronically, by the provider in the correct format with the information necessary to process the claim. Tex. Ins. Code § 1301.131.

19. *Id.* § 1301.137(a-c) (late-paid claims); § 1301.137(d-g) (underpaid claims).

20. House Research Organization bill analysis of HB 1862, <http://www.hro.house.state.tx.us/pdf/ba77r/hb1862.pdf#navpanes=0> at 6; see also House Research Organization bill analysis of SB 418, <http://www.hro.house.state.tx.us/pdf/ba78R/SB0418.PDF> at 8-9 (containing the same statements regarding ERISA preemption) (last visited May 12, 2013).

21. House Research Organization bill analysis of SB 418, <http://www.hro.house.state.tx.us/pdf/ba78R/SB0418.PDF> at 8-9 (last visited May 12, 2013).

22. House Research Organization bill analysis of SB 418, <http://www.hro.house.state.tx.us/pdf/ba78R/SB0418.PDF> at 8-9 (last visited May 12, 2013).

23. See House Research Organization bill analysis of SB 418, <http://www.hro.house.state.tx.us/pdf/ba78R/SB0418.PDF> (last visited May 12, 2013).

24. See Texas Legislature Online – 78(R) History for SB 418, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=78R&Bill=SB418> (last visited May 12, 2013).

25. In a conspicuous show of support, all 31 senators joined as co-sponsors of Senate Bill 418 (the TPPA), and the bill had 104 House co-sponsors out of 150 House members. See Texas Legislature Online – 78(R) History for SB 418, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=78R&Bill=SB418> (last visited May 12, 2013). The strong support of more than 2/3 of the members of each legislative body for the TPPA was likely triggered by Governor Perry's veto of a similar

prompt pay statute, House Bill 1862, passed in the legislative session immediately preceding SB 418. See House Research Organization bill analysis of SB 418, <http://www.hro.house.state.tx.us/pdf/ba78R/SB0418.PDF> at 8-9 (last visited May 12, 2013). With co-sponsors constituting more than 2/3 of the members of each body, the bill was veto-proof.

26. *Lone Star OB/GYN Associates v. Aetna Health, Inc.*, 579 F.3d 525, 530-31 & n.5 (5th Cir. 2009).

27. *Lone Star OB/GYN Associates v. Aetna Health, Inc.*, 579 F.3d 525, 527-28 (5th Cir. 2009).

28. *Lone Star OB/GYN Associates v. Aetna Health, Inc.*, 579 F.3d 525, 529 (5th Cir. 2009).

29. *Lone Star OB/GYN Associates v. Aetna Health, Inc.*, 579 F.3d 525, 530-31 (5th Cir. 2009) (citations omitted) (“A claim that implicates the rate of payment as set out in the Provider Agreement, rather than the right to payment under the terms of the benefit plan . . . is not preempted by ERISA . . .”).

30. *Lone Star OB/GYN Associates v. Aetna Health, Inc.*, 579 F.3d 525, 532 (5th Cir. 2009).

31. And as for underpaid claims, ERISA could preempt them - at least in theory - but only if the underpayment resulted from a determination that part of the claim was not covered. The Fifth Circuit's hypothetical concerning underpaid claims under the TPPA theorizes that a claim may be underpaid due to a coverage determination. However, a valid cause of action under the TPPA arises only with respect to a claim that the insurer has determined to be payable. TEX. INS. CODE §§ 1301.137(a), (d). Therefore, a violation of the TPPA arises only in connection with a claim already determined by the insurer to be covered and, thus, involves no coverage issue that could give rise to ERISA preemption.

32. *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376

F.3d 420, 432 (5th Cir. 2004) (finding conflict preemption where doctor's claim questioned denial of coverage under ERISA plan).

33. *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 432 (5th Cir. 2004) (finding conflict preemption where doctor's claim questioned denial of coverage under ERISA plan).

34. 331 F. Supp. 2d 502 (N.D. Tex. 2004).

35. *Baylor Univ. Med. Ctr. v. Arkansas Blue Cross Blue Shield*, 331 F. Supp. 2d 502, 511 (N.D. Tex. 2004) (internal citation omitted); see also *Quintana v. Lightner*, 818 F. Supp. 2d 964, 970 (N.D. Tex. 2011) (“[L]awsuits against ERISA plans for commonplace, run-of-the-mill state-law claims, although obviously affecting and involving ERISA plans, are not preempted by ERISA.”).

36. *Lone Star*, 579 F.3d at 530-32 (recognizing the distinction between rate of payment and right to payment).

37. TEX. INS. CODE §§ 1301.137(a), (d).

38. *Baylor Univ. Med. Ctr. v. Arkansas Blue Cross Blue Shield*, 331 F. Supp. 2d 502, 511-12 (N.D. Tex. 2004).

39. *Baylor*, at 511-12 (citation omitted).

40. *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 249 (5th Cir. 1990).

41. *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 385-86 (5th Cir. 2011), *reinstated on reh'g*, 2012 WL 4747260 (5th Cir. Oct. 5, 2012) (en banc).

42. *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 385 (5th Cir. 2011), *reinstated on reh'g*, 2012 WL 4747260 (5th Cir. Oct. 5, 2012) (en banc).

43. *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 385-86 (5th Cir. 2011), *reinstated on reh'g*, 2012 WL 4747260 (5th Cir. Oct. 5, 2012) (en banc).

Sequestering Justice: How the Automatic Federal Budget Cuts are Affecting El Paso

BY KRISTIN KIMMELMAN & RONALD BANERJI

El Paso courts, attorneys, and clients are struggling to absorb the automatic budget cuts that came into effect on March 2, 2013. Without congressional action, these cuts will curb access to justice even more in fiscal year 2014, which begins in October 2013.

Perhaps the first victim of sequestration was Texas Rio Grande Legal Aid (TRLA), a non-

profit organization providing low-cost legal services in civil cases to low-income residents of South and West Texas. Prior to sequestration, TRLA was funded to provide one lawyer for every 20,000 eligible clients (compared to one lawyer per 10,000 eligible clients in the late 1970's). In early April, TRLA announced that federal budget cuts forced the organization to

lay off staff, adopt a reduced hour work week, and cut employee benefits. TRLA estimates that approximately 3,000 fewer families will be helped by the organization this year, including 500 in the El Paso area.

In mid-April, the impact on low-income defendants accused of federal crimes became apparent as well. The Office of the Federal Public

Defender (FPD) in El Paso instituted “Furlough Fridays,” closing the office on alternate Fridays to cut costs by decreasing employees’ salary by ten percent from mid-April through September 2013. The furloughs were scheduled in addition to other cost-saving measures such as cancelling attendance to national trainings, applying extra scrutiny on requests for transcripts, experts, and other expenses, and carpooling to detention centers for client visits.

In support of the FPD’s Office, judges ceased scheduling criminal matters on the Furlough Fridays.¹ Sequestration eliminated all funds previously allocated for psychiatric and substance abuse treatment for federal offenders as the U.S. Probation Office also struggled to cut costs without resorting to Furloughs. The end result: Indigents accused of federal crimes cannot reach their appointed lawyers on certain Fridays; they are likely to stay in pretrial detention longer; and finally these probationers also have less access to resources to help them reenter society.

Recently, law enforcement officials have expressed concerns that cuts in federal funding have decreased their ability to prosecute crimes. Federal grant programs to help state agencies enforce drug laws and aid prosecution, such as the Edward Byrne Memorial Justice Assistance Grant, have been cut by thirty-four percent.² Texas will lose approximately \$1.1 million in Justice Assistance Grants that support law enforcement and prosecution and approximately \$543,000 in funds that provide services to victims of domestic violence.³ Specifically, the Department of Justice (DOJ) Bureau of Justice Assistance notified Texas counties that they will only reimburse Texas counties in fiscal year 2013 for the prosecution of offenders apprehended by federal agents, and not for the detention of said offenders.⁴ Recently, Sheriff Arvin West stopped accepting cases for state prosecution from the federal agents at the Sierra Blanca checkpoint due to the lack of reimbursement.⁵ Sequestration is also likely to affect border patrol work by reducing funding for overtime pay directly, and indirectly when such overtime is paid by federal grants to local and state agencies.⁶

On the incarceration end, the DOJ is also looking at how to reduce costs.⁷ Attorney General Eric Holder issued a memo on August 12, 2013, instructing prosecutors not to seek mandatory minimum sentences in cases lacking aggravating factors, such as the use of violence or a firearm, in part due to the cost of incarcerating such individuals at the expense of investigating and prosecuting other crimes.⁸

In September, private criminal defense

attorneys who are appointed to represent the indigent accused pursuant to the Criminal Justice Act (CJA) will also feel the impact of sequestration. Voucher payments for appointed counsel will be delayed until the new fiscal year begins in October. The hourly rate for CJA panel attorneys will decrease from \$125 per hour to \$110 per hour effective September 1, 2013, through September 30, 2014. Meanwhile, CJA panel attorneys may also have to accept more appointments, if the FPD’s Office has to decrease its case load and decline cases that require extensive resources. Unlike FPD’s, who must pay for experts and other costs from the FPD budget, CJA panel attorneys can request such funding from the court, but one might expect greater scrutiny on these requests since judicial funding has also suffered cuts.⁹

The Bleak Future

These past few months have only been a taste of what is to come. Due to Congress’ inaction, federal agencies are struggling to plan under a budget that has not yet been adopted. The general consensus is that the budget will provide fewer funds for federal agencies in 2014 than provided in the budget for the fiscal year 2013.

The El Paso Division of the Western District of Texas thus far has avoided furloughs and closures. However, in fiscal year 2014, the El Paso federal courthouse will likely be closed every other Friday. Since approximately eight-five percent of the cases filed in the El Paso Division are criminal—and since the criminally accused have certain constitutionally-protected rights that ensure the appointment of counsel if necessary and speedy hearings and trials—it is also likely that more of the available time will be dedicated to the criminal docket, decreasing the availability of court dates for civil cases. Additionally, fewer jurors will be allocated to in civil cases.

Based on current projections, nationwide Federal Defender Offices’ budgets will be ten percent lower than requested for fiscal year 2014. Some FPD employees have already accepted buyout and early retirement offers, but further cuts—including layoffs—are on the table. As the FPD’s budget shrinks, the number of cases appointed to CJA panel attorneys will increase, and those attorneys will face increasing voucher delays at the end of each fiscal year.

DOJ employees, including the United States Attorney’s Office in El Paso, are also facing financial challenges. The U.S. Attorney’s Office may have to implement Furlough days while continuing to prosecute the large number of federal criminal offenses that occur in El Paso.

The Rub

These cuts threaten the Rule of Law by limiting litigants’ access to justice and constitutionally-mandated services. The criminally accused have a right to a speedy trial and representation by competent counsel without regard to financial considerations. Congress’ failure to fund the Judiciary and the DOJ does not nullify the Fifth, Sixth, and Eighth Amendments or the statutory laws that federal and state prosecutors are responsible for enforcing.

We have nine incredibly hardworking federal judges in El Paso. In fact, the Western District of Texas is consistently one of the three busiest districts in the nation. The El Paso Division, in particular, has a criminal docket that includes not only federal immigration offenses and drug crimes, but also sex offenses, bank robberies, firearms offenses, and corruption cases.¹⁰ Without adequate funding from Congress, the judicial boat is likely to capsize.

Sequestration does not make budgetary sense. The judiciary prudently uses one dollar and eighty-nine cents (\$1.89) for every one thousand dollars (\$1000) of federal spending, or \$7 billion out of \$3.7 trillion.¹¹ Of that amount, the Western District of Texas uses three pennies, or \$100 million. Nevertheless, the cuts could ultimately result in longer pre-trial detention, longer delays in resolving civil cases, and increased costs to litigants and the courts if such delays spur other litigation. It could also result in more repeat offenders due to the decreased resources for U.S. Probation to supervise and treat offenders.¹² Indeed, cuts to the FPD’s Office will result in the comparatively more costly appointments to CJA panel attorneys and, on average, longer imprisonment—all at taxpayers’ expense.¹³

While Congress could remedy this problem it created, El Pasoans are beginning to realize that tight federal budgets appear to be the new normal. What we can do while waiting for Congress to act is to make the best use of our limited resources and find other support where possible. For instance, some experts are cutting their fees or even working *pro bono* on cases. Many assistant FPDs work on furlough Fridays. U.S. Probation provides substance abuse training in-house for offenders through the voluntary efforts of some probation officers. The Federal Bar Association (FBA) and the FPD are renewing their efforts to support CJA panel attorneys, with the FBA revamping its CJA mentorship program and the FPD instituting monthly CLEs for FPD employees and CJA panel attorneys. Private attorneys can volunteer with TRLA to help address the need for indigent

civil representation despite funding cuts. El Paso has a professional, respectful legal community that will hopefully continue to provide quality services and legal representation to those most in need of those services in spite of today's national financial crises.

Footnotes

1. Sequestration reduced federal judiciary funding overall by nearly \$350 million below fiscal year 2012 levels. *U.S. Courts, Federal Judiciary Braces for Broad Impact of Budget Sequestration*, Mar. 12, 2013, <http://news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration>.
2. Nat'l Criminal Justice Ass'n & Vera Institute of Justice, *The Impact of Federal Budget Cuts on State and Local Public Safety: Results from a Survey of Criminal Justice Practitioners*, <http://www.navaa.org/budget/13/docs/NCJA-sequestration.pdf> (last visited June 25, 2013).
3. The White House, *Impact of March 1st Cuts on Middle Class Families, Jobs, and Economic Security: Texas 2*, <http://www.whitehouse.gov/sites/default/files/docs/sequester-factsheets/Texas.pdf> (last visited June 25, 2013).
4. G.W. Schultz & Andrew Becker, Center for Investigative Reporting, *Border Drug Busts Putting Strain on Texas*

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County's Budget (Aug. 6, 2013), <http://www.npr.org/2013/08/06/209578981/border-drug-busts-putting-strain-on-texas-countys-budget>.

5. Andrew Becker, Center for Investigative Reporting, *Border Drug Busts Putting Strain on Texas County's Budget on All Things Considered* (Aug. 6, 2013), <http://www.npr.org/2013/08/06/209578981/border-drug-busts-putting-strain-on-texas-countys-budget>.

6. *Id.* at 3-4.

7. Incarcerating an offender with the Bureau of Prisons costs the tax payers approximately \$25,895 per year. *Costs of Imprisonment Far Exceed Supervision Costs*, THIRD BRANCH NEWS (May 12, 2009), http://www.uscourts.gov/News/NewsView/09-05-12/Costs_of_Imprisonment_Far_Exceed_Supervision_Costs.aspx (last visited Aug. 14, 2013).

8. Memorandum from Attorney General Eric Holder to U.S. Attorneys on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in

Certain Drug Cases (Aug. 12, 2013), <http://big.assets.huffingtonpost.com/HolderMandatoryMinimumsMemo.pdf>.

9. Compare 18 U.S.C. § 3006A(g)(2)(A) with (e).

10. See Hon. Fred Biery, United States District Court for the Western District of Texas, 2011 Fiscal Year Statistics at 1 (Oct. 15, 2011), <http://www.txwd.uscourts.gov/general/statistics.asp>.

11. FBA, *Congress Should Provide Supplemental Funding to the Federal Courts to Mitigate Sequestration*, <http://www.fedbar.org/Advocacy/Congress-Should-Provide-Supplemental-Funding-to-Federal-Courts-To-Mitigate-Sequestration.aspx> (last visited June 25, 2013).

12. See *id.*

13. Interview with Federal Public Defender Maureen Franco by Paul Flahive, *The Source: Cuts at the Federal Public Defender's Office* (July 9, 2013), <http://tpr.org/post/source-cuts-federal-public-defenders-office-contemporary-islamic-art-sama>.

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Lawyers: Modern Day Knights

BY JUDGE OSCAR G. GABALDÓN, JR., CWLS

A few years ago, in an essay entitled *Lawyers: Knights and Junkyard Dogs*,¹ Chicago attorney John Scott Hoff commented, “The legal profession is giving much current lip service to the importance of ‘civility.’ Rambo-style litigators are being branded and disparaged by the legal profession. Yet the truth is that most clients don’t give a damn about their counsel’s interpersonal behavior. In fact, most want war. They want a mean, junkyard dog to carry their cause. The client wants an attorney to reflect his own belligerent attitude toward the enemy. In short, clients want a warrior to do battle for them against their adversaries.”

Hoff describes an unfortunate reality that exists today in the legal profession. Clients, and all too often their lawyers as well, adhere to the notion that today’s lawyers are expected to win at all costs. The nobility of civility is just an illusion. Professionalism is akin to weakness. Respect for the rule of law is often disregarded.

In short, lawyers are expected to adhere to a high standard of ethical conduct in both their personal and public lives. The role they play is about human relations because the law is all about people! Since people are indeed sacred by virtue of their existence and humanity, it follows that how lawyers handle themselves with other lawyers, with their clients, with the judiciary, and with other individuals is critical in defining and identifying the respectable and honorable lawyer...today’s modern day knight.

Lawyers are far from perfect, for they are first and foremost human. As such, the lawyer is subject to human frailties and human challenges. In the same way, the physician is first a human being and thus subject to the weakness of men and women. The priest is first a man before he is a priest, and, therefore, also subject to human limitations. However, all these professions call their members to higher standards of conduct in spite of the members’ occasional tendencies, precisely because of their humanity, to behave in less than ideal ways.

Since the professional objective of lawyers is to serve people within the administration of justice, and since people are worthy of the highest respect, lawyers and other professionals must comport themselves in accordance with the highest ideals and standards of conduct.



Failure to conform to ethical standards of behavior can risk injury to those the profession seeks to serve.

Lawyers might, for example, compromise the legal cases they have been entrusted to handle for their clients. In fact, inappropriate lawyer behaviors adversely compromise the legal profession itself. It tarnishes its members, the profession, and even the overall good will that may have been nurtured and generated through the years of hard and dedicated work of many outstanding lawyers.

C.S. Lewis once said that “You cannot make men good by law; and without good men you cannot have a good society. Lawyers must act honorably at all time. They must be good men and women, for this is necessary in order to truly have a good society.”

Since by virtue of their profession lawyers are key stakeholders in helping to maintain the existence of a good modern day society, they have a duty, ethical and otherwise, to consistently champion the cause for a free and just society. They, in the same spirit of the knights of old, are to honorably engage in the fair fight that assures the rule of law always prevails. Their speech, their mannerisms, their conduct, in short, their entire being should always reflect their ardent pursuit of superior ideals such as integrity, good character, and fair play.

Also along these lines, lawyers, like their medieval counterparts, the knights, also have the seven knightly virtues as noble principles to adhere to. These eternal virtues transcend all periods of civilized societies. Jennifer Walker, in her article *How to Live the Chivalric Code*,²

describes these seven knightly virtues as being courage, justice, mercy, generosity, faith, nobility, and hope. The lawyer that lives and breathes these virtues in the everyday practice of law is unquestionably a “lawyer’s lawyer,” a true knight in shining armor.

Thus, when the honorable modern day knight goes to trial, it can be a magical experience to behold. Perhaps this sense of magic is best described by personal injury attorney Gregory S. Cusimano’s writing entitled, *Tribute to Trial Lawyers*.³ Cusimano eloquently describes the magic: When a trial lawyer rises to speak for the cause of the victim, something mystical occurs; a regalness, genteelness, and gentleness in countenance; compassion, passion, and fire in spirit; eloquence, energy and logic in word; anger, warmth and love in emotion. An intoxicant permeates the air.

The modern day knight is indeed the genuine good lawyer. American essayist Ralph Waldo Emerson described such a lawyer in this manner: “The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartily, that he can get you out of a scrape.” Every lawyer comes to the cross road where the important question must be asked and answered – whether to be or not to be a modern day knight? That is the defining question in a lawyer’s career. The answer to that question will determine that lawyer’s destiny.

Footnotes:

1. Hoff, John Scott, *Chivalry Today, Lawyers: Knights and Junkyard Dogs*, Chivalrytoday.com/lawyers-knights-junkyard-dogs.
2. Walker, Jennifer, *How to Live the Chivalric Code*, www.ehow.com/how-2091281_live-chilvaric-code.html.
3. Cusimano, Gregory S. *Tribute to Trial Lawyers*. www.alabamatorlaw.com/files/tribute_to_lawyers.pdf.

OSCAR GABALDÓN is an Associate Judge of the 65th District Court responsible for overseeing the trial of Child Abuse and Neglect cases. He is certified by the National Association of Counsel for Children and the American Bar Association as a Child Welfare Law Specialist (CWLS). He was recently recognized for his work in eliminating racism, disproportionality and disparities in the Texas foster care system.

SENIOR LAWYER INTERVIEW

BILL HARDIE JR.

BY CLINTON F. CROSS

I met with Bill Hardie, Jr. in my office one day last month and spent the good part of an afternoon discussing his career as a lawyer and mediator in El Paso. I only regret we didn't meet in a bar, but we had so much fun—at least I did—that it seemed like we were in one.

CROSS: Tell me about your family.

HARDIE: My mother's father, Walker Morrow, came to El Paso because he had tuberculosis. He became El Paso's City Attorney and then served as President of the Board of Directors of the El Paso Independent School District. Walker died when he was still a young man, leaving a widow and four children. My paternal grandfather, Thornton Hardie, joined the Jones and Jones law firm, purchasing a partnership. The Jones and Jones firm evolved into the Hardie, Grambling, Sims, and Galatzan firm, which then morphed into the Mounce, Green firm.

CROSS: How did that happen?

HARDIE: Thornton Hardie and Allen R. Grambling were both in the Jones and Jones firm, and they never left. Thornton had one son, William B. Hardie, who joined the firm. Alan Grambling had a son, John, who also joined the firm. Thirty-seven years later, my father left the firm to join me and Pablo Sergent and Dan Armstrong. A few years later, John Grambling left the firm with his son Randy to form their own law firm. The old Hardie, Grambling, Sims, and Galatzan firm was thereafter re-born as Mounce, Green.

CROSS: Did any of your illustrious ancestors distinguish themselves in any way that can be repeated?

HARDIE: Thornton was Chairman of the Board of Regents of the University of Texas; he consulted President Lyndon Johnson in connection with the Chamizal Treaty; he argued five cases before the United State's Supreme Court.

CROSS: Tell me a little bit about one or two of those cases.

HARDIE: On case involved a boundary



Bill Hardie, Jr.

dispute between the State of New Mexico and the State of Texas.

CROSS: Where did you go to school?

HARDIE: I went to El Paso High, then the College of William and Mary where I focused on basketball. I then transferred to the University of Texas where I majored in Finance.

CROSS: What did you do after you graduated?

HARDIE: I was recently married and needed a job so I went to work for North Loop Middle School as an athletic coach. After a year, I went to University of Houston School of Law, graduating in 1972.

CROSS: Then what?

HARDIE: I had a wife, Jane, and a daughter, Allison, and I needed both experience and a guaranteed income. So I came back to El Paso

and went to work for Steve Simmons doing appellate work. The big guns in the D.A.'s office at the time were Jim McNutt and Duane Baker. Shortly thereafter, I went to work for the William Sessions at the U.S. Attorney's office where I stayed for eight years.

CROSS: I understand you may have had a problem after you got the job. What happened?

HARDIE: After my interview, I called my wife Jane. I asked her what she wanted first—the good news or the bad news. She said, "the good news." I told her I had gotten the job. She then asked, "So what's the bad news?" I said, "Fire the maid."

CROSS: Any interesting cases?

HARDIE: I prosecuted a big time ring of bank robbers who were responsible for robbing at least six banks over a two year period. The total take for that series of robberies was approximately \$50,000.00. The ring-leader was known as "little Jaime" who was eleven years old when he first organized the gang of bank robbers. A few of the older members of the gang, between 14 and 16 years old, were enlisted to drive getaway cars. The inside man was "little Daniel," Jaime's ten year old brother. Another member of the gang would distract the tellers and then Daniel would sneak behind the teller's cages, and then take all the cash he could get his hands on. One time he was spotted climbing out of a vault. When confronted, he said "I'm playing like I am a puppy." Unbeknownst to them, he had \$6,000.00 in his pants pockets when he left the bank. At the U.S. Attorney's office, we thought bank employees were embezzling the money. We asked some employees to take lie detector tests, and one flunked. We then began to get reports of kids spending a lot of money, one kid buying two St. Bernard puppies for \$500 cash. So we shifted our focus. It turned out the kids were stealing all the money and the employee was innocent.

When "little Jaime" was in jail awaiting trial, he stole another \$2900.00—this time from the

evidence locker in the El Paso County jail.

CROSS: Why did you quit that job?

HARDIE: I had to make a choice—becoming a career prosecutor or gambling on private practice. So I went into practice with Dan Armstrong and Pablo Sargent. Shortly thereafter I talked my father into joining us. Then other lawyers were added to the firm, which became known as Hardie, Hallmark, Sargent and Hardie. Some of the lawyers who were in the firm included Rodney Baxter, Frank Gonzalez, Mark Hedrick, Linda Kirby, Sue Kurita, Frank Brown, **Marcos** Lizarraga, Jaime Olivas, Carl Ryan, Ballard Shapleigh, Ken Slavin, and Al Weisenberger. After a number of years, we decided to dissolve the firm because we did not think we were large enough to be a full service firm and compete with the other larger firms in El Paso.

CROSS: Where did you end up?

HARDIE: About fifteen years ago, I began exploring alternative dispute resolution. Four or five years ago, I became a full time mediator and arbitrator.

CROSS: What do you think is more enjoyable, trying or mediating disputes?

HARDIE: I miss the actual courtroom work, but I do not miss the stress involved in winning or losing. I enjoy mediation because every day I am confronted with a new problem involving not only the law but also the human dynamics which are often factors in attempting to resolve the dispute.

CROSS: Family?

HARDIE: I have been married forty-four years. I have two daughters and a son, all

of whom live in Austin. My oldest daughter Allison is a director of Hill & Knowlton, a public relations firms, and married to a lawyer, Gregg Knaupe, with Knaupe Strategies. My other daughter Brooke is a lawyer practicing probate and estate law with the firm of Saunders, Norval, Pargaman and Atkins. My son Bradford is married to his wife Stephanie and teaches science at O'Henry Middle School. My daughter Allison has two sons, so I am a grandfather. I am very proud of all of my children.

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

Why join a Bar Association: commentary

As we begin another year of Bar Association activities under President Randy Grambling and with new members on the Board of Directors, we revisit the goals of our Bar Association-- What is our mission? What do our members have to gain by participating? What benefits does the Bar provide?

We share these thoughts by some members:

I belong to the El Paso Bar Association to support the profession in which we each are privileged to share, recognizing that the common good of all our individual efforts enriches our community and our nation.

U.S. District Judge Phil Martinez

I joined the EPBA after passing the bar to get to know my colleagues and the legal community in El Paso. I now stay involved because I have made strong friendships, and it's important to me to give back to our community that has given me so much.

Nicole Anchondo

RAY, McCHRISTIAN & JEANS, P.C.

Each one of us is a participant in and therefore in some small but perhaps significant way a trustee of our legal culture. We cannot fulfill this role as a trustee of our culture by acting alone; we can only do it by inter-acting with others. Success is a team effort.

Clinton F. Cross

EL PASO COUNTY ATTORNEY'S OFFICE

The reason I believe attorneys should join the El Paso Bar Association are the frequent continuing education opportunities, networking possibilities, and numerous occasions to participate in community service. Also, our members have access to and receive a monthly bar bulletin and/or e-mails with updates that focus is on the EPBA activities, policies and decisions of the Board of Directors, legislation affecting attorneys, and other issues impacting lawyers and the legal professionals. It also includes information on decisions or input from the history of our bar and attorneys, Eighth Court of Appeals, etc. along with many CLE opportunities, members' and committees' accomplishments, and various community and association activities.

Charles Ruhmann

RUHMANN LAW FIRM, P.C.

To be honest, early in my career I had no desire to participate in any Bar activities; state or local. After accepting a nomination to be a Board member by Judge Dinsmoor, my eyes were opened to all that I missed. Because of my

involvement in the Bar I befriended colleagues and judges I would not have otherwise met, I learned from the continuing education courses and luncheon programs the Bar offers its members; and simply stated I believe the Bar has aided my development as a professional in the calling I share with others who went to law school to make a difference.

Carlos Eduardo Cardenas

LAW OFFICE OF JOSEPH (SIB) ABRAHAM

I joined the EPBA because it was a good way to meet members of the legal community coming from a out of state school.

I stay active because I think that the bar association does a lot for the the community generally and for its members. I wanted to participate in that. Plus, I really like the people. I think that others should join because I believe that as a profession we have a responsibility to improve our professional and our community. The EPBA gives us an opportunity to do that.

Jessica Vazquez

EL PASO DISTRICT ATTORNEY'S OFFICE

TEXTING with Your Voice the Inexpensive and Easy Way

BY DAVID J. FERRELL
DJF@ELPASOLAW.COM

TEXTING on my smart phone is difficult. The keyboard is small; thumb-typing is an acquired skill especially if you were never a typist. Even though I use technology for almost everything in my law practice, communicating with staff, colleagues, and myself (cyber notes) using the ubiquitous techno-gadget that is with me all the time—my Android smart phone—is a challenge.

A couple of months ago I was asked to “beta test” or evaluate the Olympus DS-7000, a hand-held portable dictation device.

I returned the Olympus DS-7000 just after a month, advising that I could not provide a detailed evaluation for an over-priced product (originally \$699.00, now listed at \$499.00) that did not provide any service not already available by my techno-gadget smart phone. The audio captured by the DS-7000 was in the OLD proprietary Olympus format (DSS)¹ and not in the standard formats used today, *i.e.*, WAV and/or mp3. It is also a problem to remember to carry two devices when only one is necessary. There were many other drawbacks, in my opinion, but I will now focus on the positive alternatives.

While I occasionally use my smart phone occasionally as a phone, I use it heavily as a hand-held scanner, voice recorder, research device, GPS access point, etc. and as such it is

a much more convenient and affordable option for voice recording to transmit voice messages to staff, colleagues and for taking my own note files to transfer to a desktop computer.

The android application that I use is called “Tape-a-Talk Pro.” There is a free basic version at the Google Play Store and the pro version cost me \$1.30. A one touch button turns on the app, you speak the information then turn off the app again with one touch. The “Tape-a-Talk” app then saves the audio in WAV (large) format and the message or dictation can be sent as an attachment to an email. If the audio material is attached to a message, the audio is converted automatically by the phone’s text messenger to an MP3 (small) file, which shrinks the audio for phone transmission. When audio is sent, it can be typed to a written message. Audio morphs into a written message that the speaker never has to type. The written message along with the audio file can be saved in the appropriate place.

There is great demand for a dictation app that converts our dictation to written form without having to re-edit the material. Dragon Naturally Speaking 12 attempts to accomplish this, but, there are always, albeit few, mistakes. The basic version of Dragon costs \$99, but can be purchased at a lower price if you shop.

There are many Iphone or android apps that

convert voice recordings to text. The “Tape-a-Talk” app is the easiest to use and while it does not convert to written text, it still saves time trying to thumb text my messages.

Desk top computers can receive voice messages leaving assignments for staff. Voice messages can be sent to one or more staff members at the same time so that even while directing only one to complete the assignment copying all staff encourages collective efforts.

1. In 2002, I purchased the Olympus DS-2000 hand-held dictation system and wrote an article evaluating the technology, Digital Dictation - Do You Want To Save a Ton of Money?. The best feature of the DS-2000 was the ability to dictate and transmit audio over an office network or to a digital dictation company by attaching the audio file (DSS format) to an email. This was also my first experience with out-sourcing. I would get the typed dictation returned without delay (the slowest turnaround time was fourteen hours) and it was almost always without errors.

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

Water, Wildlife and Natural Resources and How They Can Help Your Clients

You are invited to get up-to-the-minute information on various ways to conserve water, wildlife and natural resources that may benefit your clients. Guest speaker, David Braun, of Braun & Gresham, PLLC, will share the many conservation tools that are available. Topics include: Estate Planning; Conservation Easements 101; Farm and Ranch Properties: Family Legacy or Liability; What Landowners Need to Know about Intrusion on Surface Use—Oil and Gas, Pipelines, Power Lines and Condemnation; Wildlife Management for Property **Friday, October 4, 2013, El Paso, Texas, Double Tree Hotel from 8 a.m. to 4 p.m.** To RSVP Contact: *Janae@FronteraLandAlliance.org* or call 915-351-8352.

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- General Public: \$40.00 (includes venue & materials)

What I Didn't Learn From Law School or Studying for the Bar Exam: The *Practice* of Being an Attorney and Counselor at Law

BY: COREY SHERI SAINZ

Two years ago, I had no idea what area of law I would practice; I just knew that I wanted to be an attorney. I was pulling out my hair, stressing out over whether I could understand what I was studying and if I would remember enough for the Bar Exam. I was determined to pass the Bar Exam on my first try.

One year ago, I was a newly minted Texas attorney with a shiny new bar card. I was enthusiastic, nervous and eager to begin to practice law and counsel clients. I always knew I wanted to be a lawyer. Whenever someone would ask me what I wanted to be when I grew up, I would excitedly respond, "A lawyer!" During high school and as an undergraduate at UTEP I focused on my goal: Getting into law school, passing the bar and becoming an attorney with an office in an old house on Montana Avenue. I participated in the Law School Preparation Institute (LSPI) at UTEP and I got into law school, the Thomas M. Cooley Law School in Lansing, Michigan.

After graduating from law school in the fall of 2011, I began studying for the bar exam. I felt I was ready to take the legal world by storm. I made it a point to fall off the planet for the entire months of January and February, not spending any time with family or friends. My one and only job was to study, study, study! My whole life I had studied with only one goal in sight: pass the bar and become an attorney! And I was at the home stretch!

After taking the Texas Bar Exam, while driving into the barren, sand-colored horizon from Lubbock back to El Paso, I felt a sense of accomplishment I had never experienced before. At the same time, I felt a sense of anxiety and fear. What if I hadn't studied enough? Did I fully answer the Secured Transaction essay question? What if the bar examiners can't read my answers?! Side bar—Yes, I opted to forgo technology and hand wrote all 12 of my essays. I told myself if I didn't pass the test this first time, next time I would type the exam!

After realizing I now had to wait roughly three months to get my bar exam results, the

focus of my anxiety swiftly changed from how I had performed on the Bar Exam to what my next step was going to be. I plan my life in advance. I am slightly obsessed with making lists. I suddenly realized I had NO LIST! At that time my list should have looked something like this:

- (1) Ice down writing hand.
- (2) Don't think about or talk about the law to anyone.
- (3) Remember, just because you studied for the bar does not mean you KNOW the law. Good luck reminding family and friends that you are not an attorney and cannot give them legal advice.
- (4) Get a Job.

The list immediately boiled down to one three letter word: GET A JOB?!?! It's amusing just how powerful and frightening three little letters can be to someone. J-O-B. I soon began to think about my future. How would I ever pay off my law school debt? What kind of lawyer did I want to be? What kind of law did I want to practice?

Luckily, a month after graduating from law school I began working as a law clerk for my current boss, Kristina Voorhies Legan. Kristina welcomed me to her family law practice in October 2011. She was very considerate when I had to study for the bar exam, requiring me to work only 10 hours a week.

As Kristina's law clerk, I soon realized that the lists I had assembled for the practice of law were worthless. I also recognized that law school and studying for the bar had failed to prepare me for the practice of law. My education may have taught me how to think like a lawyer, but I still really had absolutely no idea how to "lawyer."

If I had to give advice to newly admitted attorneys, it would be this: Try to find a trustworthy, knowledgeable and well-respected, experienced mentor. Also, celebrate being a new "baby" attorney! Don't be afraid to ask questions. You must be willing to ASK for help in order to receive it. Clerks, court administrators, bailiffs, and other lawyers will

help you; and believe me, they can! Judges will also help you. Show everyone respect, and be appreciative.

Kristina's insight has been most valuable. I will be forever grateful to her for hiring me and trying to teach me how to "lawyer." I continue to grow and learn something new each day in my profession.

Aside from growing professionally and becoming more familiar with the law, I also have had to face the unnerving task of balancing my professional life with my personal life. Initially, I had a difficult time separating my work life from my home life. I began to allow work to ooze into my heart and soul, maybe even into my veins. For instance, I started viewing life in terms of billable hours. If I spent an hour in traffic, I didn't just lose one hour—I also lost \$120.00!

At work I often feel like my client's life is in my hands. It can be frustrating because I can rarely "fix" what really needs to be "fixed" in my client's life. I have also learned that I cannot always make my client happy, even when I get her everything that as a lawyer I could get for her. . . perhaps because what I can get for her as a lawyer will be never enough to make her really happy.

Until I became an attorney and began practicing family law, I never quite understood why lawyers referred to themselves as "Attorneys and Counselors at Law." In my area of law, clients often need guidance through an emotionally devastating life experience. I sometimes feel like a glorified babysitter! Perhaps therapists often feel the same way.

It feels magnificent to know I accomplished the goals I initially laid out for myself back in college: Pass the Texas Bar? Check! Have an office on Montana Avenue? Check!

But I have learned that check lists have their limitations. I never know exactly what to expect when I get to the office in the morning. Every day is a new adventure. Even after practicing over a year, being a year older, and I like to think wiser, the issues I find myself advocating for or against never cease to amaze

and humor me. Law school and studying for the bar definitely didn't prepare me to deal with some of the peculiar and outlandish disputes my clients present to me.

As an attorney, I hope to hone my skills to effectively represent my clients. My work is a never ending marathon of advocating, compromising, and learning something new

COREY SHERÍ SAINZ is an associate in the Kristina Voorhies Legan law firm.

Chicago Pediatrician to Present at the 4th Annual Child Welfare Law CLE

BY: TRACY C. ALMANZÁN, ASSISTANT COUNTY ATTORNEY

In 2011, child protection agencies throughout the country received 3.4 million referrals for the abuse or neglect of over 6.2 million children. During the same year, in El Paso, Texas, Child Protective Services investigated over 5,310 allegations of child abuse or neglect, which included nearly 2,500 confirmed victims of child abuse.²

The El Paso County Attorney's Office is dedicated to the safety of El Paso's abused and neglected children. A team of five Assistant County Attorneys represent Child Protective Services in El Paso County. The focus in cases involving Child Protective Services is always the best interest of the children. As part of the office's efforts to prevent child abuse, we are proud to host the 4th Annual Child Welfare Law CLE for all interested attorneys. As the keynote speaker, we welcome Dr. Ira Chasnoff M.D., from the

Children's Research Triangle in Chicago, IL to provide his expertise in the field of fetal alcohol syndrome. Dr. Chasnoff has been nationally recognized for his work in the field of alcohol and drug use during pregnancy. Additionally, Dr. Cheryl Sawyer, Associate Professor from the University of Houston at Clear Lake will be presenting on Speaking to Abused Children.

The CLE will take place on Thursday, September 19, 2013, from 8:30 a.m. to 5:00 p.m. at the UTEP Tomas Rivera Conference Center in the Union Building. The seminar includes presenters on other topics such as, the effects of domestic violence on children, ethics in CPS cases, and a caselaw update. The cost of the seminar is \$50 and this cost includes a CD with the day's presentations, breakfast, and lunch. The Seminar is currently pending approval for 7 hours of CLE, including 1 hour of Ethics.

Child abuse and neglect affects our entire community. As a community, we should join together to find a way to end child abuse and neglect. Nelson Mandela once stated that "there can be no keener revelation of a society's soul than the way in which it treats its children." The 4th Annual Child Welfare Law CLE is the means through which we gain and expand our knowledge of the horrible impact that child abuse and neglect has upon our community. Only when we better understand child abuse and neglect, can we work together to prevent it.

Please contact Martha Alvarado at (915) 546-8160 or Martha.alvarado@epcounty.com to register or if you have any questions.

TRACY C. ALMANZÁN is an Assistant County Attorney responsible for prosecuting child abuse and neglect cases.

New ABA President James R. Silkenat pledges work on access to justice and legal jobs

James R. Silkenat, a partner in the New York office of the national law firm of Sullivan & Worcester and a member of its Corporate Department, took office today as president of the American Bar Association at the conclusion of the ABA Annual Meeting in San Francisco. He will serve as president until the close of the ABA Annual Meeting in August 2014.

During his term, Silkenat will lead the ABA's development of a Legal Access Job Corps, which seeks to address both the country's growing unmet legal needs and the underemployment of recent law graduates. "Instead of looking at the dearth of jobs and the large number of unmet legal needs as two separate silos, we will find ways to match young lawyers who need practical job experience with disadvantaged clients who need legal assistance," Silkenat said.

"For every client served by a Legal Services Corporation-funded program, another person who sought help was turned down because LSC did

not have the resources to help them," Silkenat said, emphasizing the importance of the coming initiative.

Silkenat said the ABA would continue its advocacy for proper funding of state courts and warned of the consequences of across-the-board budget cuts, known as sequestration, on the federal courts.

Sequestration "particularly imperils the delivery of effective legal representation to poor people accused of federal crimes," he said, noting that "the \$350 million reduction in the federal judiciary's budget for fiscal year 2013 has resulted in an 8 percent cut to the network of high-quality federal defender offices around the country. It has forced the layoffs of many experienced lawyers who have devoted their professional careers to the underappreciated and underpaid work of representing indigent federal defendants."

"This is a deep embarrassment for a nation grounded on the rule of law," Silkenat

continued.

Silkenat also will urge the ABA's involvement in legal education reform and will work to mobilize lawyers to educate policymakers and the public on legal issues, and he will seek policy solutions concerning immigration, gun violence and election law.

On curbing gun violence, Silkenat will work with Congress on gun violence legislation, specifically seeking out better, more comprehensive background checks and effective tools to prosecute straw purchases of guns. "Inaction comes at the cost of life," he said. "The voices of the children who died at Sandy Hook and the memories of those who died in other such tragedies have been silenced."

On the issue of immigration, Silkenat said that "as the national voice of the legal profession, the ABA has a unique interest in ensuring fairness and due process in the immigration enforcement and adjudication system."

Bequest Gifts to Charitable Organizations

MARK S. BROWNING, C.T.F.A., *guest columnist*

Gift Planning professionals with non-profit entities and foundations value the relationship they have with the attorneys and tax professionals they work with when planning charitable gifts with donors in their estate plans. I like to think of the three legged stool when I mention this relationship because without all three effectively working together, the stool will tip over or not be well balanced. One area that can sometimes cause that three legged stool to get off balance is the issue of documenting planned gifts. In particular, documenting bequests (as well as other planned gifts such as trusts, life insurance or account beneficiary designations) to the charitable organization is crucial to the process. While the focus of this article is on bequests, the justification for documenting all types of planned gifts in a donor estate holds true.

There are several good reasons to document a bequest with a charitable organization. First and foremost, it allows the charity to say thank you. This can be an invitation to an annual appreciation dinner, tickets to events, a sneak peek at a new building or program or as simple as a cup of coffee or lunch when traveling through the donor's town. Donors are usually published in annual reports and listed at the charity's headquarters thanking them for their support. Revocable gifts such as bequests,



beneficiary designations and life insurance can be amended so a charity never wants to be in the position of having never thanked the donor often enough. Our experience is that donors like to become engaged with us and our programs so to leave them out of these activities and programs deprives them of enjoyment.

Documenting bequests can help prevent problems down the road. For example, getting the charitable entity's proper name into documents is crucial. Astute attorneys and planners will check in advance with the charity for the proper legal name. However, I have often seen a surprise bequest come in with incorrect wording in the charity name. This frustrates the donor's intent and can require legal action to modify in the most extreme case. As a former trust officer, I can recall the remainderman language in a charitable trust that called for the trust principal to be left to an out of state charity that raised money for research on heart disease. The name

was close but did not match the actual names of several such charities in that state. Legal action was required to determine the proper recipient. Some of the funds that the donor intended to be spent for heart disease research instead were spent on additional legal costs.

Last, documenting the bequest will make sure that the provisions of the planned gift match the ability of the charity to carry out the donor's passion and wishes. Indeterminable criteria, planned gifts to programs that no longer exist or provisions that violate a charity's internal policies will necessitate corrective, after the fact legal action as referenced above. In one example, a realized bequest was hard to implement as it called for a scholarship recipient to be from a remote area of my state and was otherwise drafted with too restrictive criteria. This resulted in funds being underutilized, which is not what the donor had intended. Documenting the planned gift in advance plus work with the donor and advisor would have allowed us to make constructive and practical suggestions as to implementation.

Mark S. Browning, C.T.F.A., is a Planned Giving Officer with the Texas A&M Foundation a nonprofit corporation organized in accordance with the laws of the State of Texas for the purpose of supporting Texas A&M University, an educational institution, located at College Station, Texas.



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ADVANCE SHEET, circa 1190 - 1500 A.D.

BY CHARLES GAUNCE

Exempt assets.

The Constitution of the United States provides, in Article 1, Section 8, Clause 4, that the Congress has the power to enact "uniform laws on the subject of bankruptcies throughout the United States." On the other hand, anyone who has spent even a minimal time dealing with bankruptcy is aware that there exist two classes of exempt assets under the current bankruptcy statutes: Those assets that are exempt under the bankruptcy code, and those assets that would be exempt under the bankruptcy code but for the fact that the state legislature has adopted what it perceives as a better deal for its bankrupt debtors. This dual exemption status was one of the legislative compromises that permitted the Congress to actually pass the Bankruptcy Act of 1978.

It turns out that there is a long history of local variations of exempt assets in the law.

Consider Chapter 21 of volume 1 of the Northampton *custumal* (circa 1190) that provided:

Of the distresses which reasonably may be taken. No one may take a milch-cow, or bread, or fresh meat, or a mill-horse, or a raw hide, or a horse that leads water in town, except for his own debt which a foreigner owes, and if the debt is due from a neighbor, such distress should not be taken.

Clearly the intent of this provision was to maintain peace within the community as you simply did not take food from your neighbors or deprive the community of the ability to provide community services. If the obligation was owed by someone outside the community, then the local custom was to take their food and source of livelihood.

Compare that with Chapter 32 of the *Leges Quatuor Burgorum* (the boroughs of Edinburgh, Sterling, Roxburgh, and Berwick in Scotland) (circa 1270):

To take distress from an outsider for debt. If the debtor sits on his horse, he cannot be put down from it.

The later Scottish position was not based on the functional use to which a person's horse was put, but rather on the person's actual use of the horse as transportation at the time the seizure of the animal was attempted. If the horse is being ridden at the time the seizure is attempted, no seizure is permitted.

Further compare the customs of the borough of Sandwich in the 1400's:

The bailiff ought to see to it that the distress be reasonable, for if the said stranger in the said vill should have a horse and should be upon said horse, the horse cannot be distrained while the man rides it, for that would be an attachment, and no attachment can be made within the said liberty for debt, even though the debtor may have bound himself according to the form of statute, for new statutes do not alter the free customs of the said town.

While it may be tempting to conclude that some localities simply wanted to encourage deadbeat outsiders to leave the vicinity without even bothering to dismount, the earlier view from Northampton was that foreigners (meaning those who did not live locally) should be forced to pay their just debts without regard to the difficulties such enforced payment would cause, and that one simply should not force one's neighbor into destitution.

Somehow it is comforting to know that in the long march of the development of the law, matters of local concern still have a preferred standing.

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

ANNOUNCEMENTS

8th Court of Appeals

Chief Justice Ann McClure of the 8th Court of Appeals has been elected Presiding Judge of the Council of Chief Justices. Comprised of the chief justices of the fourteen intermediate courts in Texas, the Council coordinates legislative appropriations and technology demands.

For additional information contact:

Denise Pacheco, Clerk of the Court, (915) 546-2240

Settlement Week - El Paso County, Texas

*** September 3-5, 2013**

In conjunction with the Dispute Resolution Center and Darling Mediation, the El Paso Bar Association's ADR Section has been working to revive Settlement Week. With the support of the Council of Judges, a pilot program will take place the first week of September. The goal of Settlement Week is to offer a neutral forum for the cost-effective and efficient resolution of disputes. We expect to expand the program in the spring. Here are the details for Settlement Week 2013:

* Two-hour mediations (8:00am, 10:30am, 1:00pm, 3:30pm)

* Cost: \$200 per party for Private Mediators;
Dispute Resolution Center mediators are free

* For additional details and to schedule your mediation, visit mediate4elpaso.com

Please consider whether any of your civil or family cases are good candidates for Settlement Week mediations. Ideal cases are 2-party disputes with a limited number of unresolved issues. To schedule a mediation, visit mediate4elpaso.com or call Rad Sanchez, 546-8189 or Steve Darling, 383-8200.

Spotlight on Success

Judge Robert Anchondo, El Paso County Criminal Court at Law #2, and the DWI Drug Court Intervention and Treatment Program Team were honored with the **Spotlight on Success Award** for their implementation of DWI Court Guiding Principle #5 -- Developing Community Partnerships. By reaching out to community colleges, health and wellness facilities and work placement agencies, the El Paso DWI/Drug Court has been able to provide a variety of services to their program participants.

Association News

El Paso Association of Legal Professionals

■ The El Paso Association of Legal Professionals f/k/a El Paso County Legal Support Association will hold its next education meeting on Wednesday, September 11, 2013 at noon at the El Paso Club, 201 E. Main, 18th Floor. Guest Speaker will be Al Melendez who will speak on Medical Malpractice. Please RSVP by Monday, September 9th to Carol Gutierrez at cgut@scotthulse.com.

The Mexican American Bar Association

■ The Mexican American Bar Association will hold its annual banquet on Saturday, October 5, 2013. The theme is "Shattering the Barriers." We will be honoring the founding members of the organization. The event will be at the El Paso Country Club. Cocktail hour at 6:00 pm and dinner will be at 7:00 pm. Contact Laura Enriquez at 915-532-2000 or at enriquez@mgmsg.com for tickets.

El Paso Women's Bar Association.

■ Regular Meetings start on on September 11, 2013, at Noon in Rm 306;
■ The EPWBA will meet October 9, 2013 at noon in Rm LL 106.
■ Fall Fling Party in October, details to be announced!

The El Paso Paralegal Association

■ The El Paso Paralegal Association will hold its September general meeting on Thursday, September 19, 2013 from 12:00 noon to 1:00 p.m. at the El Paso Club, Chase Tower, 201 E. Main St., 18th floor. Speaker: Jed Untereker from Paso Del Norte Civil Rights Project. Topic: Civil Rights. The cost for lunch, which is optional, is \$16.00 buffet or \$10.50 salad bar. Please RSVP for the luncheon with Mariann Porter at 915-760-6880 or mporter@goldmanlawtx.com.

■ The El Paso Paralegal Association will be celebrating "Texas Paralegal Day" (officially recognized by Senate Proclamation No. 1144 on October 23 each year) at its general meeting on Thursday, October 17, 2013, noon to 1:00 p.m. at the El Paso Club, Chase Tower, 201 E. Main St., 18th floor. Speaker: Frank Kinson of El Paso Electric Co. Topic: Attorney Client and Attorney Core Work Product Privileges. The cost for lunch, which is optional, is \$16.00 buffet or \$10.50 salad bar. Please RSVP for the luncheon with Mariann Porter at 915-760-6880 or mporter@goldmanlawtx.com

November



EXTRA! EXTRA! READ ALL ABOUT IT!!!

EPCLSA has changed its name from **El Paso County Legal Support Association** to **El Paso Association Of Legal Professionals** and will now be known as **EPALP**.

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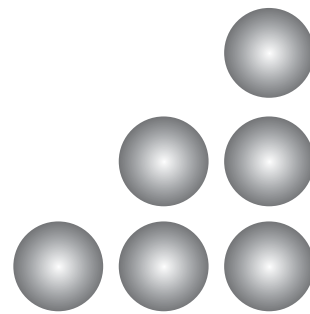
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Henry has handled appeals before the Supreme Court of Texas, the United States Court of Appeals for the Fifth Circuit, and the United States Court of Appeals for the Tenth Circuit.

Thanks, Henry, for believing in **The Value of Commitment.**



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EL PASO BAR ASSOCIATION
and the
ETHICS COMMITTEE *present*

Ethics Seminar

Thursday, September 26, 2013

12:00 - 2:00 p.m.

Ceremonial Courtroom

El Paso County Courthouse, 12th Floor

Featured speaker will be

Robert Dinsmoor

Approved for 2.0 hours of Ethics

FREE to EPBA Members

\$75.00 for nonmembers

For more information contact Nancy
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