



EL PASO BAR JOURNAL

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An Update of Events and Information

February / March 2010

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An Opportunity To Serve The Legal Needs Of Our Immigrant Community

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THE PRESIDENT’S PAGE

“As we express our gratitude (to our military service men and women), we must never forget that the highest appreciation is not to utter words, but to live by them.”

--PRESIDENT JOHN FITZGERALD KENNEDY



On January 13, 2010 the initial meeting of the El Paso Bar Association’s El Paso Lawyers for Patriots Committee was convened. The purpose of the meeting was two-fold: to discuss the operation of the newly created Veterans Mental Health Treatment Court under the jurisdiction of County Court at Law No. 1 (see Cesar Prieto’s article on page 15); and to learn about State Bar President-Elect, Terry Tottenham’s, initiative: “Texas Lawyers for Texas Veterans” (TLTV). The former was created by the Texas Legislature last year for the benefit of active-duty soldiers and veterans who served in combat zones or other hazardous assignments and are suffering from post traumatic stress disorder or other service related mental health illness. The soldier or veteran can opt for mental-health treatment as opposed to pursuing their right to a trial when they have been charged with misdemeanor or less serious felony crimes. The El Paso Veterans Court is the second one in operation in the State.

The State Bar of Texas initiative has as its mission the development of a coordinated network of lawyers to assist veterans, who otherwise could not afford counsel, working through local bar associations and veterans service providers. The goals of this effort are to ensure that veterans have easy access to legal information and legal representation, to monitor the development and implementation of Veterans Courts and, if appropriate, support the expansion of the services provided by these Courts.

At the January 13th meeting, chaired by EPBA Board Member Donald L. Williams, various stakeholders in the operation of El Paso’s Veterans Mental Health Treatment Court were in attendance: Cesar Prieto, Program Director/Administrator for County Court at Law No. 1, attorneys from the legal assistance offices at Ft. Bliss and William Beaumont Army Medical Hospital, as well as attorneys and staff from Texas Rio Grande Legal Aid. Also present were El Paso Bar President-Elect, Chantel Crews as was I on behalf of the EPBA. County Commissioner and EPBA Board Member Anna Pérez has graciously accepted an appointment to serve as the standing EPBA member of the Committee. Chairman Williams is also the EPBA representative to the State Bar’s TLTV Committee, where he serves as Chair of the TLTV’s Family Law Subcommittee.

As Chair of the TLTV Subcommittee, Mr. Williams is responsible for developing a program to address the unique representation of the military in Family Courts throughout the State; and he will be presenting a paper at the EPBA’s 14th Annual Civil Trial Seminar on February 19th and 20th, 2010 at the Wynn Hotel in Las Vegas entitled “Texas Family Law in the Military Combat Zone”.

The first order of business for the El Paso Bar’s Committee is to recruit volunteer attorneys for this project. Attorneys are needed in the areas of criminal defense, consumer, probate, family law, and veterans’ benefits. As the area of veterans’ benefits is specialized, training will be provided in order to obtain certification for this type of representation.

Thus, should you be interested in showing your gratitude for the courageous service and sacrifices our veterans and active military have exhibited, and willing to be placed on a *pro bono* or reduced rate referral list (with the right of refusal) or to attend a legal clinic for the benefit of the military community let us know. There is no doubt that this need will magnify as Fort Bliss continues its explosive growth from 20,000 active duty soldiers to 34,000 by the year 2013, and the current conflicts overseas send more heroes home.

To volunteer, please contact me at cardenas@sibabrahamlaw.com or our Executive Director, Nancy Gallego at ngallego.epba@sbcglobal.net.

Please take care of yourselves, your families, and let’s help those who defend and preserve the laws and rights we, as Officers of the Court, are sworn to uphold.

CARLOS EDUARDO CÁRDENAS

EL PASO BAR ASSOCIATION
February Bar Luncheon

Tuesday, February 9, 2010

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

Candidates Forum

Door Prize will be given

Please make your reservations by Monday, February 8, 2010 at noon by calling Nancy at 532-7052
 or via email at nancy@elpasobar.com

EL PASO BAR ASSOCIATION
March Bar Luncheon

Tuesday, March 9, 2010

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

*Guest Speakers will be the Candidates for
 President-Elect of the State Bar of Texas*

Please make your reservations by Monday, March 8, 2010 at noon by sending your RSVP
 to ngallego.epba@sbcglobal.net or nancy@elpasobar.com

BOSS OF
 THE YEAR
 LUNCHEON

Please join the
**El Paso County Legal
 Support Association**
 as we honor our bosses at a
 luncheon to be held:
Wednesday, March 10, 2010
 at noon at the El Paso Club.
Lunch is \$20 per person

Please R.S.V.P. to Terry Castillo at 533.4424
 or email her at tcastillo@kempsmith.com

**El Paso Bar Association
 Spearheads Haitian Relief Efforts**

The El Paso Bar Association is spearheading an effort to raise money for the Haitian Relief Efforts by the American Red Cross. For the amount you spend on a daily cup of coffee, you can make a difference in the lives of those affected by the devastating earthquake:

Cup of Coffee=\$1.39/day OR \$41.66/month OR \$500/year

Cup of Latte=\$2.78/day OR \$83.33/month OR \$1,000/year

All donations are welcome. You can make a donation at the El Paso District Clerk's Office, the El Paso County Clerk's Office, and the El Paso County Attorney's Office. Checks should be made payable to the American Red Cross and should designate the "Haiti Release and Development Fund" as the desired beneficiary in the memo line of your check.

CALENDAR OF EVENTS

FEBRUARY 2010

Tuesday, February 2

EPBA BOD Meeting

Tuesday, February 9

EPBA Monthly Luncheon

Candidates Forum ~Judicial Candidates

Monday, February 15

Presidents Day – EPBA & County Offices Closed

Wednesday, February 17

Ash Wednesday

Thursday, February 18

Immigration Practice in the Federal Court

Contact Rita Rodriguez @ Federal Public Defender's Office

Friday, February 19

14th Annual Civil Trial Seminar– Las Vegas

Saturday, February 20

14th Annual Civil Trial Seminar – Las Vegas



MARCH 2010

Tuesday, March 2

EPBA BOD Meeting

Tuesday, March 9

EPBA Monthly Luncheon

Candidates for President-Elect, SBOT

Sunday, March 14

Daylight Savings Time Begins

Wednesday, March 31

Cesar Chavez Day –

EPBA & County Offices Closed

APRIL, 2010

Thursday, April 1

EPBA and County Offices Closed

Friday, April 2

Good Friday – EPBA & County Offices Closed

PLEASE NOTE: Please check the Journal for all the details regarding all above listed events. If your club, organization, section or committee would like to put a notice or an announcement in the Bar Journal for your upcoming event or function for the month of April, 2010, please have the information to the Bar Association office by Friday, March 4, 2010. In order to publish your information we must have it in writing. WE WILL MAKE NO EXCEPTIONS. We also reserve the right to make any editorial changes as we deem necessary. Please note that there is no charge for this service: (915) 532-7052; (915) 532-7067-fax; nancy@elpasobar.com - email. If we do not receive your information by the specified date please note that we may try to remind you, but putting this journal together every month is a very big task and we may not have the time to remind you. So please don't miss out on the opportunity to have your event announced.

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LAS AMERICAS IMMIGRANT ADVOCACY CENTER: An Opportunity to Serve the Legal Needs of Our Immigrant Community

■ BY RAYMUNDO ELI ROJAS

“He was lined up against the wall with others and the killer sprayed bullets.” A woman sits in our office and tells us the tale. Her son is the only survivor of a massacre.

Did the incident described by this woman occur in Rwanda in 1994, or maybe the Congo, Christmas Day in 2008? Perhaps Tienamen Square in 1989 or El Mozote, El Salvador in 1981?

Infamous massacres occurred in all these locations and on those dates, but not the one described by this mother. This slaughter occurred closer to home, in Cd. Juárez, 2009. She asks about the possibility of her son seeking asylum in the United States. She says we are her only hope to save her son from the mass executions in the killing fields of Juárez. “We” are *Las Americas Immigrant Advocacy Center*, which is the only non-profit organization in the region that gives legal representation to asylum seekers.

A person can apply for asylum if they have a well-founded fear of persecution based on religion or political belief, membership in a social group, ethnicity, or nationality. In 1988, *Las Americas* was founded as *Las Americas Asylum and Refugee Project*, and mostly catered to the flood of refugees that came to El Paso fleeing the violence in Central America at the time. Since then, *Las Americas* has represented people from all over the world.

Though other organizations take an asylum case here and there, *Las Americas* bears the brunt of the region’s asylum case load. With the growing violence in Mexico, request for representation in asylum cases has quadrupled. Unfortunately, due to limited resources, *Las Americas* cannot represent every eligible petitioner. For this reason, it has to rely on the bar to do *pro bono* asylum cases. However, the immigration bar in El Paso is neither large nor its members trained, necessarily, in asylum cases. The need in El Paso persists. There are more eligible asylum seekers than *Las Americas* can represent.



BATTERED IMMIGRANT WOMEN

Originally, *Las Americas* was founded to provide asylum representation exclusively, but with the passage of the Violence Against Women Act (VAWA) in 1994, *Las Americas* extended its services to battered immigrant women.

VAWA provides undocumented immigrant women married to an abusive legal permanent resident or citizen a road to getting their residency, rather than relying on their marital status alone as grounds for citizenship, which often leaves them at the mercy of their abuser. Many of these women would have been on the road to residency already but for the domestic violence in their homes.

Las Americas has long held that provision of legal services is not the only solution for addressing its clients’ needs, and so began organizing battered immigrant women within the community to empower themselves. Providing legal representation to these women did not cure the systemic problem of domestic violence. In the late 1990s, *Las Americas* organized a *promotora* program, which is based on the Latin American model of “women promoting” health topics in their own communities.

These women promoted domestic violence awareness and education. Our current

promotoras work with *Las Americas* as well as *Paso del Norte Civil Rights Project* to give presentations on VAWA. *Las Americas* also uses *promotoras* to do presentation on HIV/AIDS as well as its relation to domestic violence. The *promotora* program continues today, still providing outreach and education in the poor areas of El Paso County.

Last year, a local attorney stopped a *Las Americas* attorney in the elevator of the El Paso County Court House. He wondered what our attorney was doing there since, being immigration attorneys who appear in specialized courts, we are seldom seen in the county courthouse.

Our attorney was there because one of our crime victim clients needed desperately to get a divorce from her abuser. For some reason, her uncontested divorce could not be taken by local legal aid. Call after call by our attorney to private attorneys brought no fruit. I gave permission to our attorney to do the divorce for this crime victim, diverting our finite resources from our true mission in order to help the client. That attorney in the elevator later took over the divorce case. Nevertheless, we generally find it difficult to locate attorneys to take uncontested divorces, and unfortunately this is our daily plight.

Las Americas does the immigration part, but at times needs assistance from the private bar for protective orders and divorces. The contributions by attorneys who give *pro bono* service to *Las Americas* is not only appreciated but also provides a great way to meet the obligation of all lawyers to provide legal services to those in need. Moreover, the Texas State Bar and Texas Lawyers Care offer many benefits to those who volunteer with us, such as free CLE courses and CLE tuition waivers for attorneys who do *pro bono* service.

WORKER JUSTICE PROJECT

As an immigrant advocacy center, we receive calls for all sorts of legal questions. As a gateway to the immigrant community, we frequently receive calls from immigrant workers who have not been paid for work they performed. El Paso suffers wage theft among its working poor, especially its homeless or immigrant workers. Most of *Las Americas*' wage claim work has been with day workers who gather at various locations in El Paso, but especially on Oregon Street in the *Segundo Barrio*.

Wage theft is the stealing of a person's wages or labor. Far too many times, an employer will hire immigrant workers, work them, and then not pay them for their work. Because the workers are afraid of deportation, the misconduct is not reported and the employers get virtually slave labor.

At other times, a dishonest employer will promise to pay a worker one wage, then renege on that promise at a later time. A dishonest employer may pay part of the wages due and fail to pay the difference. Others will work their employee's long hours but refuse to pay overtime. Some dishonest employers do not intend to pay a worker at all, and their intent to steal wages exists from the beginning of the

employer-worker relationship.

In 2009, *Las Americas* released a report, *Wage Theft among Low-Income Labor in El Paso*, which showed wage theft to be a major problem in El Paso. *Pro bono* attorneys have assisted *Las Americas* in wage theft cases, whether in small claims court, federal court, or state court. *Las Americas* depends on *pro bono* attorneys to take cases when negotiations with dishonest employers have failed for, as in the situation with victims of domestic violence, the demand for these services reduce the time our staff can spend on the asylum cases which increase every day.

DETAINED UNACCOMPANIED IMMIGRANT CHILDREN

Children may end up in the United States for a variety of reasons. For some, their parents already live in the U.S. and pay a smuggler or *coyote* as we call them here on the border, to smuggle the children in. Other children are caught with their family as they cross the border in search of a better future, but when caught, families are not kept together and are forced apart. Some children are escaping impressment into prostitution or into gangs like the *Mara Salvatrucha* in Central America. Some children are trafficked, moved across the border against their will or through deception, usually for work in indentured servitude or the sex trade.

You may drive past detention centers everyday and not realize that children are held in custody in those buildings. El Paso is one of the largest centers for the detention of immigrant children in the nation. *Las Americas* along with the *Diocesan Migrant and Refugee Services* (DMRS) represents these children in immigration court.

When one visits these facilities and sees a child only knee high, it is a wonder that this

child was crossing the deserts of Northern Mexico and Arizona just a few days before. Many of the smaller children do not understand where they are or what happened to their parents. DMRS runs the *pro bono* project for detained immigrant children, and is able to provide attorneys interested in taking such cases various training opportunities. The need for attorneys to assist in these heart wrenching cases is woefully great.

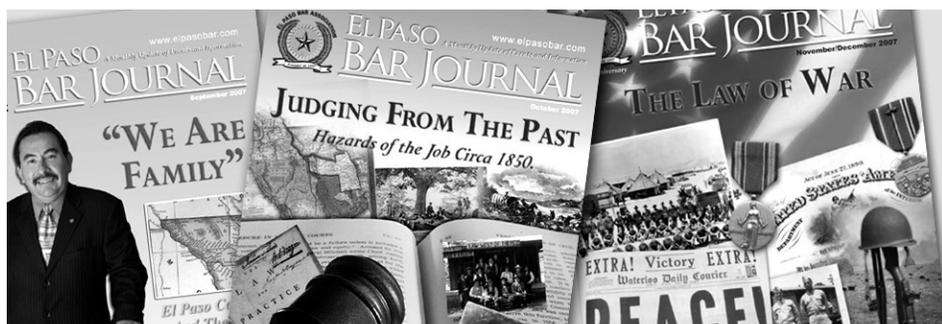
PRO BONO WORK

In some cities, asylum representation providers are run totally on *pro bono* assistance by the bar. These programs use both non-immigration and immigration attorneys.

Pro bono work is more than just taking cases. It includes giving CLE presentations, taking telephone calls or providing quick, simple services. Though serving on nonprofit boards may not count toward your annual obligation of *pro bono* hours, unless the organization provides direct legal services to the poor, nonprofit board service is another area that one can serve, IF you can give the time commitment that such a serious endeavor requires. Attendance at board meetings is a must.

Pro bono work by the bar is a primary building block of meeting the legal services needs of immigrants. We nonprofit legal services providers know that we cannot help everybody. There are only so many cases our staff can take. Nevertheless, we can help many more with the assistance of the private bar. From the woman that walks into our office with a black eye and bruises to the child that is victim of trafficking or the refugee from mass executions or persecution, nonprofit legal services providers and the private bar must form a partnership to fill the gap. The time is now; the need is great.

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HOW CIVILIZATION CAME TO EL PASO

Pro Bono Et Malo

From Odometers to Divorces

Access to Justice in the Sage Brush and Chaparral Days of the 20th Century

Part II

■ BY BALLARD COLDWELL SHAPLEIGH

... "if you deny people access to process, you in a very practical way have repealed their legal rights."

— CLINTON CROSS,

Texas Observer-March 20, 1981

As Lincoln said, our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. And all men thus created, many insist, should step into a courtroom as one would step into a church – with a certain hush.

Judges not only wear priestly robes, they too are members of an authoritarian hierarchy and conduct their activities in places that resemble temples. A priest ascends to the altar to perform fixed rituals in the same manner that a judge ascends to the bench. This is the environment in which all persons are expected to navigate to the ends of justice, even if they are poor or uneducated.

While recognizing "the tremendous need for legal services for indigent Texans" and urging lawyers to aspire to providing 50 hours of *pro bono* legal services annually, the State Bar of Texas points out that there is a big distinction between *pro bono* work and public service work:

Pro bono service involves two necessary components:

(1) *pro bono* service provided by the attorney must be for a low-income individual or a group that serves low-income individuals

AND

(2) *pro bono* service provided must involve the use of unique legal skills that only attorneys possess.

Consider the following examples, which illustrate the distinction between *pro bono* and public service:

Pro Bono: Counseling a low-income individual on an eviction matter

Public Service: Coordinating a community drive to collect clothing for low-income persons

Pro Bono: Mentoring a new attorney as they handle their first pro bono case

Public Service: Mentoring a student at a school in low-income community

Pro Bono: Serving on the board of directors of a legal aid or volunteer attorney program

Public Service: Serving on the board of directors of a non-profit theatre company.
(See, texasbar.com)

What the State Bar does not mention is the difference between *pro bono* work and the provision of full-time legal services, or legal aid. So how did legal aid get started?

In October 1983, the year after Ray Caballero, Royal Furgeson and the El Paso Bar Association started the mandatory *pro bono* plan due to funding cuts, *Time* magazine noted that, "of all the social programs growing out of the Great Society, there is none that Ronald Reagan dislikes more than the Legal Services Corporation." As Governor of California in the 1960s, Reagan had advocated elimination of all federal subsidies for free legal services to the poor in civil cases, and had tried to block a grant to California Rural Legal Assistance in 1970.

Time reported that his dislike grew to the point that the new Legal Services president, a Reagan appointee, "ordered a bizarre set of raids" on his own regional offices in search of evidence showing questionable practices by his predecessors. Reagan's animosity dated from the late '60s when as Governor of California he could not restrict some state social programs because of legal aid lawsuits.

In Texas, the debate over legal aid and *pro bono* work was encapsulated in two quotes that appeared in one article in the *Fort Worth Star-Telegram* on July 18, 1982. Clinton Cross, then the director of Texas Legal Services Center

(and now an assistant county attorney and the editor of this journal), said, "How much justice can you afford? If you can't afford the lawyer's fees, then you're not going to get much justice."

Phil Gramm, then a U.S. Representative (D-College Station) saw it differently. He was quoted as saying, "I don't believe we are going to solve the problems of this country in the courts. If you look at it objectively, legal services has used taxpayers' funding to promote causes that went far beyond the legal needs of the needy.... The question is basically philosophical. How far should the government go in providing legal services? The government does not have a bottomless pocket."

In the early days, the arguments pro and con were uniform and predictable. Legal aid lawyers would claim that ninety percent of the cases they dealt with were routine civil suits dealing with basic, humdrum, day-to-day hassles – divorces, custody, child abuse, food stamps, evictions and consumer fraud – not the dramatic civil right's controversies that raised the hackles of conservative opponents.

"Here in the El Paso office," says Clinton Cross, "consumer law was the least of the top priorities. Housing was number one; juvenile perhaps number two. I can't remember what was number three. I got there last, so I got what no one else wanted – the latrine detail as we say in the Marines. We all had to do family law."

Opponents, on the other hand, claimed that legal aid lawyers would hunt for attention-getting class action suits and high profile civil rights cases, engage in social engineering by pursuing a "host of politically inspired activities," and stir up other radical trouble.

A congressman from Marshall, Texas introduced a bill to abolish legal services, contending that poor people with ordinary legal problems were being ignored as legal aid lawyers were seeking to win benchmark cases, build their reputations and cause social change.

Phil Gramm suggested that lawyers in private practice should provide free legal services to the needy. Gramm's opponents saw it differently - they argued that the private bar could not do as good a job since the private bar rarely handled cases using those laws because poor clients could not afford their fees.

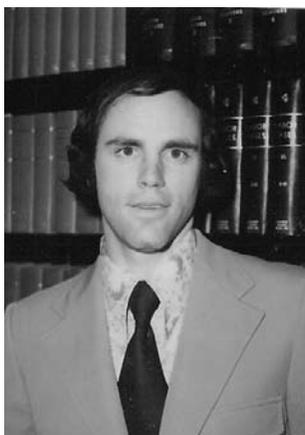
Texas legal aid lawyers were directly responsible for many landmark decisions. In *Gomez v. Perez*, for instance, the U.S. Supreme Court declared unconstitutional a Texas law which said a father has no obligation to support an illegitimate child. The decision resulted in the Texas legislature enacting for the first time a paternity statute. In *Tate v. Short* the U.S. Supreme Court extended the right to counsel to indigents in criminal cases.

In *Castaneda v. Partida*, the U.S. Supreme Court found selection of grand jury panels in Hidalgo County to be unconstitutional because over a ten-year period the panels were underrepresented of Mexican Americans by 40%. In *Kamarath v. Bennett*, the Texas Supreme Court overturned centuries of established landlord-tenant law by providing tenants with a contractual implied warranty of habitability. In *Morales v. Turman*, an El Paso case brought by EPLAS attorney Steve Bercu, the Fifth Circuit found that the Texas Youth Council violated the constitutional rights of children entrusted to its care by not affording them effective rehabilitative treatment, a decision that resulted in many Texas Youth Council reforms.

In *Bullock v. Carter*, 405 U.S. 134 (1972), a case argued by the late Joe Calamia, legal aid lawyers intervened representing a poor person who wanted to vote for Bill Pate, a candidate who could not afford the filing fee to run for office. The U.S. Supreme held that high filing fees for public office in Texas were not rationally related to the state's interest in permitting only serious candidates on the ballot as some serious candidates could not afford to pay the fees while some frivolous candidates could.

During oral argument, one of the justices confronted Calamia with this assertion: "You have not provided this Court with one case to support your position that the right to seek elective office is covered by the Fourteenth Amendment," to which Calamia replied, "Well, that's true Your Honor, but two hundred years of error does not make the rule a correct one."

Free legal services came to El Paso in 1969 in the form of the El Paso Legal Assistance Society (EPLAS), a non-profit corporation. The original incorporators were Mark Howell, George McAlmon and Armando Peralta. Besides these three, the other lawyers who sat on the



L-R: Kent Morrison circa 1969; Hector Uribe, circa 2009 and Federico Peña as Mayor of Denver, circa 1983.

original board of directors included M.A. Alvarez, Paul T. Caruthers, Paul C. Moreno, J.B. Ochoa, Jr., Robert J. Galván., and Jack Ratliff. (Interestingly, Ratliff became Professor Emeritus at U.T. School of Law and now practices law in Austin with Malcolm Harris, who was President of the El Paso Bar Association from 1980 to 1981, immediately preceding Ray Caballero's term.)

Fred Weldon was the first executive director of the Legal Assistance Society. The five original staff lawyers were Robert Millard, Michael Mendelson, Kent Morrison, Stuart Abelson, and Clinton Cross. Clinton Cross was the last "original hire" in October 1969. Cross came recommended by Sam Houston Clinton, who later served as a justice on the Texas Court of Criminal Appeals and whose 1,094 opinions are the second most ever written by a judge on that court.

Abelson and Morrison were "Reggies," or recipients of the Reginald Heber Smith Fellowship, named for the father of modern legal aid in the United States. Reginald Heber Smith became the director of the Boston Legal Society straight out of Harvard Law School and, in 1919, published *Justice and the Poor*, a groundbreaking study of the vast differences in the quality of justice available to the rich and the poor. His exposé led to endeavors to narrow the gap, including the establishment of the first national legal aid organization.

Reggies often came from out-of-state law schools like Harvard (Stuart Abelson) or Yale (Kent Morrison). They were given one or two year fellowships at various legal service offices around the country. Following his Reggie year in El Paso, Abelson left to work for the Children's Defense Fund in Boston. After three years at EPLAS, Morrison was recruited by the Office of Economic Opportunity (OEO), the

federal agency that funded and administered the national legal services program, to become Director of the Evaluation Division of OEO's Office of Legal Services. He also chaired an Office of Legal Services committee appointed to review and evaluate the entire Reggie program, after it came under attack.

After his time with EPLAS and OEO, Morrison signed on with Jones Day before splitting off to help found and manage Crowell & Moring in 1979, the firm from which he has just retired. It now has over 500 lawyers in eight cities and three countries. He has been named to an annual list of the best doctors and lawyers in Washington, D.C., but, as he told his former colleague Clinton Cross, that list now includes 800 lawyers which is "twice as many attorneys as there were in all of El Paso when we were there together."

But, according to Morrison, nothing was better than EPLAS. "The people in my increasingly 'big deal' law firm, which I love and am very proud of," he says, "will probably never understand that my most significant contributions as a lawyer were right out of law school."

He still remembers "the people who were on our side and against us," and events with a particular El Paso flavor like "the fistfight between Stu Abelson and Joe Morgan at the Paso Del Norte hotel at the reception that George Rodriguez held for his father, Judge Rodriguez," and allies like "the wonderful John Karr, Joe Foster and Royal Furgeson."

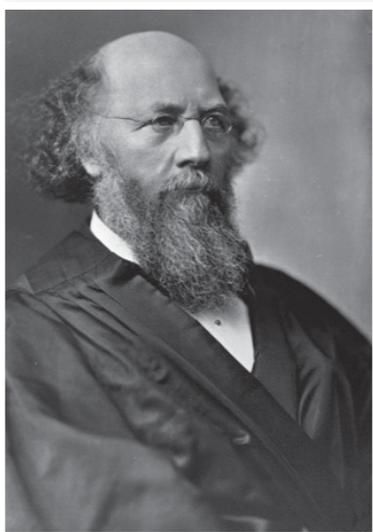
The most prominent of the Reggies who passed through the El Paso office was Federico F. Peña, a future mayor of Denver and Clinton Administration Secretary of Transportation and of Energy. In fact, Peña took over the apartment that Morrison vacated when Morrison left El Paso. Known as "Fred" in his El Paso days,

Tales Of Impetuous Romances With Clients

BY COLBERT NATHANIEL COLDWELL



Sarah Althea Hill



U.S. Supreme Court Justice Stephen J. Field



David S. Terry

Courtesy U.S. Marshal Service- <http://www.usmarshals.gov/history/neagle/neagle5.htm>

Lawyers are conditioned to fight for the interest of their clients, but it is a very short and treacherous step from zealous representation to head-over-heels infatuation. When that happens, it is usually bad for the lawyer.

The specific function of the U.S. Marshal Service to protect judges and impose court security is said to originate with an infamous altercation which came to involve a former El Paso lawyer and my great uncle, Nathaniel Colbert Coldwell. On August 14, 1889, Deputy U.S. Marshal David Neagle shot and killed David S. Terry after Terry had been ordered to stop assaulting U.S. Supreme Court Justice Stephen J. Field.

Based on this incident, the U.S. Supreme Court eventually held that the President holds the power, through the Attorney General, to direct a United States Marshal to accompany and protect federal judges from threatened assaults, and that federal agents, acting within the scope of their authority, are not liable to answer in state courts for their actions- a significant expansion of federal executive authority. See, *In Re Neagle*, 135 U.S. 1 (1890).

Appointed to the United States Supreme Court by Abraham Lincoln in 1863, Field sat on the court for thirty-four years, outlasting eight presidents and three chief justices before resigning in 1897 and is the second longest serving justice after Willam O. Douglas. While serving on the Supreme Court, he twice ran for the Presidency of the United States, but he never had to resign his seat in order to do so.

Sarah Althea Hill was arguably the most dangerous *femme fatale* client known to the annals of law. While litigating in the 1880s, in both federal and state courts in California, her claim of marriage based on an alleged letter contract with rich, former U. S. Senator from Nevada, William Sharon, her alleged husband died. David S. Terry,

one of her attorneys, a former Chief Justice of the California Supreme Court, promptly married her.

Terry, much older than his bride, had previously engaged in a duel with David Broderick, a U. S. Senator from California. Terry was upset over public comments made by the Senator about Terry's integrity. Terry got his revenge by killing Broderick. Terry escaped any prosecution for that affair of honor, and subsequently fought for the Confederacy in the Civil War.

When the appeal in federal court regarding her alleged marriage to the late Senator Sharon went

badly for her claim, Sarah and her new husband, David Terry, both reacted violently to a perceived affront to her honor. United States Supreme Court Justice Stephen Field, who had previously sat on the California Supreme Court with Terry, was delivering the 1888 appellate opinion from the bench, in which the U. S. Court of Appeals sustained the finding of the federal District Judge Sawyer that the letter that Sarah claimed as proof of marriage was a forgery, when Sarah interrupted and yelled, "You have been paid for this decision. How

much did (the other side) pay you?"

Field ordered Sarah removed from the courtroom. When U.S. Marshal J. C. Franks approached Mrs. Terry, she slapped him in the face. Sarah's overly supportive husband sprang into action. At 6 foot 3 inches, and nearly 250 pounds, David S. Terry was a formidable man. Mr. Terry yelled, "Don't touch my wife." As Franks continued to escort Sarah from the courtroom, Terry punched the U.S. Marshall in the face. Other deputies jumped into the fray. Terry tried to pull out a Bowie knife; he was finally subdued and led into custody in the marshal's office.



David Neagle

After some deliberation, the judge sentenced David Terry to six months and Sarah to three months confinement for contempt of court. In jail interviews, the Terrys continued their verbal abuse of Justice Field and the entire federal judiciary, and the tabloids had a field day.

Later, the Terrys, whether by accident or design, boarded a train in San Francisco where they encountered Judge Sawyer, who was the original U. S. District Judge on Sarah's case. As she was passing Judge Sawyer on the train car, Sarah Terry took hold of his hair, and shook his head. Some accounts claimed that her husband laughed or threatened Judge Sawyer as Terry led his wife away.

Not surprisingly, when Justice Field returned to California to "ride circuit," the U.S. Marshal saw fit to provide the justice with a bodyguard. He assigned David Neagle the responsibility of protecting Justice Field. Neagle had been a town marshal in Tombstone, Arizona, with a reputation as a quick gun.

In 1889, while on a train ride passing through the San Joaquin Valley, Justice Stephen Field, accompanied by Deputy Marshal Neagle, stopped to dine at a railroad station restaurant. His former colleague, Chief Justice David S. Terry, who was at the restaurant at the same time, spotted him. Terry confronted Justice Field and struck him "a violent blow in the face followed instantaneously by another blow." Neagle drew his gun and shot Terry twice, killing him.

Sarah draped herself over her dead husband and remonstrated, "If my husband had killed Justice Field, the crowd would have lynched him." And she screamed to shocked onlookers, "and now, you will not help me punish the murderers of my husband."

Both Neagle and Field were arrested later for murder by the Sheriff from Stockton, Stanislaus County, California, but charges against Field were promptly dropped.

Neagle's case was finally resolved on writ of habeas corpus by the United States Supreme

Court which held he was immune from state prosecution because he was carrying out his duty as a federal officer. Historian Paul Kens notes that "Field, displaying a rare concern for conflict of interest, did not participate." See, Paul Kens, *Justice Stephen Field* at 283 (University Press of Kansas, 1997).

Ordinarily, resolutions adopted by bar associations upon the death of eminent legal practitioners are perfunctory and sonorous. Not so when Justice Terry was killed. A hot debate by members of the Bar followed in Terry's hometown of Fresno.

Nathaniel Colbert Coldwell, who served as county attorney and district Attorney in El Paso in 1876, led the losing faction that favored a resolution emphasizing the positive achievements of former Justice Terry, and ignoring the outrageous conduct of the decedent which had brought about his own untimely death.

Coldwell was quoted in the Fresno newspaper as objecting to trying Judge Terry *post mortem*: "The recovery of \$10 or \$20 could not be had from him without him having the opportunity of defending himself. I am opposed to the trial of Judge Terry here."

Soon thereafter, Coldwell was retained as the attorney for the Administrator of Justice Terry's estate.

Sarah Althea Hill Sharon Terry was beautiful, litigious, combatively vulnerable, and newsworthy. From time to time, N. C. Coldwell had private meetings with Sarah about the administration of Judge Terry's estate. Coldwell made the mistake of writing her a few romantic letters. When Sarah later appeared in court to contest the Administrator's actions in the case, she published the correspondence. The newspapers reported at length and verbatim the soulful yearnings of the well-known, married member of the bar.

Based on the scandal, Nathaniel Colbert's wife, Ellen Amanda Coldwell, promptly sued for and obtained an uncontested divorce. In due

time, she apparently forgave her husband. The couple reconciled and remarried.

Ellen Amanda Coldwell had been previously married to Ike Stockton, a desperado cattle rustler and man killer, originally from Texas, leader of the notorious Stockton-Galbreth gang. Ike Stockton was killed in 1881 by Sheriff Barney Watson in Durango, Colorado, while resisting arrest for murder on requisition from the Governor of New Mexico.

As a further footnote to this affair, Nathaniel Colbert Coldwell was sometimes subject to derision by members of his profession. One of his adversaries, Brody by name, in open court pointed out Coldwell's involvement with "that crazy lady." My great uncle spat in his face and Brody head-butted him back, in turn bloodying Coldwell's face.

All of these eminent lawyers would have done well to check their impulse to merge the practice of law with personal feelings, vainglorious honor and romance.

Nathaniel Colbert Coldwell was the father of another Colbert Coldwell of San Francisco, who founded Coldwell Banker Company. We frequently visited this Colbert Coldwell, my father's first cousin, when we were in San Francisco.

He was a prominent, wealthy, real estate developer who criticized my brother for not being properly attired because he was not wearing a hat. He had two Stockton half-siblings, but never mentioned the widow Terry or the criminality of his own mother's first husband, Ike Stockton.

Although his father wooed and wed his mother, the widow Stockton, less than a year after her first husband Ike was shot and killed on the streets of Durango, Colorado by the sheriff while resisting arrest for murder and cattle rustling, Colbert Coldwell persisted in claiming that Ike Stockton was a victim, killed by unidentified outlaws.

Such are the tales of impetuous romance as passed down from generation to generation.

EL PASO COUNTY DISPUTE RESOLUTION CENTER MEDIATION:

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SENIOR LAWYER INTERVIEW

BRUCE PONDER

■ BY CLINTON F. CROSS

Not wishing to overlook the work of the El Paso County Public Defender's office, I decided this month to focus on one of their many interesting "senior lawyers," Bruce Ponder.

CROSS: Tell me about your childhood.

PONDER: My father was in the Army Air Corps after WWII and was assigned to Biggs Field in 1946.

I was born in Abilene. I stayed there with my mother until my father was able to purchase a house in El Paso, on Idalia Street. I was six months old when my mother, my brother and I moved to El Paso to be with my father.

CROSS: Where did you go to school?

PONDER: I grew up in the Fort Boulevard area and went to Rusk Elementary, Bassett Middle and Austin High. I graduated in 1965 and enrolled at the University of Texas in Austin. I received a BA in government in 1969. I entered law school at UT but dropped out, convinced law was not my gig. I didn't have a gig, to be honest, so I piddled around until my wife got pregnant. Then I got serious and returned to law school. I had to work nights my first year, while at the same time trying to be a husband and a new father and a law student, leaving me a gibberish-muttering fool.

I graduated in 1972, passed the bar, and moved back to El Paso in early 1973.

CROSS: Legal career?

PONDER: Early on I practiced in the office of Ben Endlich, a wonderful and generous man as well as a fine lawyer, who helped me more than anyone to establish my practice. He allowed me to develop skills as a labor lawyer representing union locals in arbitration and other proceedings. He referred criminal cases to me and let me to try several civil cases with him. I also practiced with Mike Gibson, a wild and crazy guy and a fine criminal lawyer. Mike was and is a resourceful and creative lawyer. I learned how to try criminal cases during my time with Mike.

I took off eight years beginning in 1991 when I had a really big heart attack. I worked as a neutral, mediating and arbitrating, and serving as the hearing officer for the Civil Service



Its sole purpose is to represent the indigent accused in criminal proceedings. Under Clara Hernández our office has created specialized units to handle juvenile cases, mentally ill clients, appeals and capital murder.

Commission for the City of El Paso. I taught classes at UTEP in labor relations and criminal justice. I became a member of the roster of labor arbitrators for the Federal Mediation and Conciliation Service, one of the highlights of my legal career. I have traveled all over this part of the world resolving labor disputes.

CROSS: What are you doing now?

PONDER: I am a Senior Trial Attorney

in the County Public Defender's office. I presently handle appeals and *habeas corpus*. I am also a member of the Capital Murder Unit as the appellate lawyer.

CROSS: Why should we support a public defender program?

PONDER: The federal constitution mandates the right to counsel in criminal cases. Arguably, the most important decision of the 20th century was *Gideon v. Wainwright*, extending this 6th Amendment right to persons accused who cannot afford a lawyer. This right is so fundamental that it is enshrined in the 14th Amendment's due process clause.

Since its inception in the 1980's, the office of the Public Defender has delivered consistently high-quality legal services to the citizens of the County. Its sole purpose is to represent the indigent accused in criminal proceedings. Under Clara Hernández our office has created specialized units to handle juvenile cases, mentally ill clients, appeals and capital murder. We have investigators on board, as well as social workers and a mitigation specialist who investigate death penalty cases. We maintain an ongoing monthly CLE program open to private lawyers. It is our mission not only to provide quality legal services ourselves but also to assist attorneys in the private bar who represent indigent defendants.

Our office is active in the Texas Criminal Defense Lawyers Association. Two of our lawyers serve on the board of directors. We have been involved in the seminars in Ruidoso and El Paso, including the annual Indigent Defense seminar put on by TCDLA.

We don't do this work to win popularity contests. We lawyers are not generally loved, and we criminal lawyers are loved least of all. We are targets of ignorant and vituperative attacks in editorials. But we are not here to win popularity contests. We are here to represent our clients to the best of our abilities.

CROSS: Most interesting cases?

PONDER: Two cases come to mind. One involved the conditions of the El Paso County Jail in 1974. A client of mine filed a civil case in State court complaining of the conditions in the jail. At the time the jail was located in the back of the old courthouse. It was a medieval facility, dangerous to inmates and guards. The sheriff did the best he could, but the place was a mess.

Eventually, the local ACLU requested several local lawyers to undertake a *pro bono* representation of my client. I recall that included Bruce Hallmark, Sidney Diamond and Ruth Kern. There were several others, but memory fails me. We dismissed the state case and filed a complaint in federal court. It was entitled *Smith v. Sullivan*. Judge Sessions certified it as a class action lawsuit and it went to trial in 1975. Bruce Hallmark and another lawyer represented the plaintiffs. Judge Sessions granted sweeping relief in his judgment. Of course, the sheriff appealed.

Ruth Kern and I co-wrote the brief for the plaintiffs. I flew to New Orleans to argue before the court, a really big deal for a young lawyer. Judge Sarah Hughes, the Dallas Federal judge who administered the presidential oath to Lyndon Johnson aboard Air Force One on November 22, 1963, was assigned to the case and wrote the opinion. The court for the most part affirmed the trial court judgment. The decision contributed to the eventual construction of the downtown

jail. You can find the court's opinion at 553 F.2d 373.

I also served as counsel along with Ben Endlich in the world-famous "duck suit." A local hunters' group called the El Paso Coalition of Sportsmen hired us to fight federal regulations closing duck season in the El Paso area because of hunting pressures on a peculiar bird known as the Mexican Duck (seriously). So we sued the Secretary of the Interior in federal court in El Paso, alleging violation of the federal Administrative Procedure Act. The closing was in fact a response by the Department of the Interior to placate anti-hunting folks, who had recently won a judgment in a Washington D.C. court. I'm sure they looked at the map and said to each other, "Look, no one lives in El Paso and southern New Mexico. Let's close their duck hunting."

The judge in our case was John "Maximum John" Wood, who, it turned out, was an avid waterfowl hunter. The judge's clerk asked me to draft an opinion for the judge, so I wrote something down on scrap paper. The judge approved my draft. The court's 1978 opinion can be found at 453 F. Supp. 1037.

CROSS: Have you been active in the community?

PONDER: I have served on a number of non-profit boards over the years. Most recently I served on the Board of Directors of El Paso Recovery Alliance, a non-profit corporation

that provides assistance to persons recovering from alcoholism and drug addiction. It is a unique program in El Paso because it is based on the concept of peer assistance. I'm very excited about it.

I have been involved in Democratic Party politics over the years as well. That is public service to me.

CROSS: Family?

PONDER: I have three children from my first marriage. My oldest, Amy Silva, is married and lives in Houston with her husband Steve and their three children, Gianna, Jonathon, and Ashlyn. Amy is active raising those beautiful kids and running a children's ministry in a church there. Laura teaches at Texas A&M-Kingsville. She lives in Corpus Christi and has an exuberant daughter named Ella Elizabeth. My son Russell lives in Corpus Christi with his wife Rosie Ramirez. They are enthusiastic Harley riders. Rusty has played drums since junior high and continues to play in area bands. They haven't realized yet they want to have children.

Clinton, allow me address one more matter. I am relieved my wait is over and you have honored me as a geezer lawyer. You know there is only thing we older lawyers fear more than hearing the receptionist say that 60 Minutes is in the lobby and wants to interview us, and that is that Clinton Cross wants to interview us. It is a heavy burden you carry and you certainly do it well.

Your El Paso



has received a grant from the Texas Bar Foundation to train arbitrators for the BBBF/El Paso County Arbitration Program.

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BBB AUTO LINE is an out-of-court program to resolve disputes between consumers and automobile manufacturers. BBB AUTO LINE arbitrators must be attorneys or professional arbitrators.

- Arbitrators must have Internet access, an email address, access to a fax machine and a valid driver's license.

The **FREE** trainings consist of 4 online webinars on the following dates:

- Wednesday, February 17th 12:00 - 1:30 (central time)
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 - Wednesday, February 24th 12:00 - 1:30 (central time)
 - Friday, February 26th 12:00 - 1:30 (central time)
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 - *Am I looking for ways to expand my career portfolio?*

More information about the program and an arbitrator application can be found at <http://us.bbb.org/bbbautoline>

Mike Torres: A Model of Excellence In The Service of Others

BY JUDGE OSCAR G. GABALDÓN, JR.

In the same week of the historic Woodstock festival, on August 11, 1969, Francisco Javier Torres and Carmen Torres were elated with the birth of their son, Mike Torres. Mike's father, who grew up in Jalisco and Michoacan, worked as a supervisor in some of El Paso's steel mills. Mike's mother, originally from Hidalgo del Parral, Chihuahua, a city many affectionately referred to as "The Capitol of the World," was a hardworking and dedicated homemaker. While reflecting on his good fortune of having had supportive and loving parents, Mike recalls former President Bill Clinton's sagacious observation that "a child's chances of success in life increase measurably if they have one person in their life that believes in them."

However, Mike is also grateful for the support and love of his two siblings, namely his brother, Frank, who owns a dental laboratory and his sister, Angie, who is a nurse at the University Medical Center (Thomason Hospital). The family also includes Mike's nephews, Kiki

and Malcolm.

Mike attended the Canutillo public schools. A 1987 graduate of Canutillo High School, Mike was named the school's Outstanding Ex in 1999. Having won a national essay-writing contest and an internship on Capitol Hill working in the office of then El Paso Congressman Ron Coleman, Mike later became a district assistant for Congressman Coleman. Highly impressed by Coleman and Coleman's legislative assistants, who all had law degrees, Mike made it his goal to pursue a law degree. After he received a Bachelor of Business Administration degree, with Honors, from New Mexico State University in 1991, Mike went on to receive his law degree from the University of Texas at Austin in 1995.



A highly regarded attorney, Mike was honored last year with the El Paso Bar Association's Professionalism Award. Humbled by such a prestigious award, Mike stated that he is "impressed by the level of civility and courtesy" the local bar consistently exhibits.

Mike was also recently named by the United States Sentencing Commission to serve as representative at large in the Practitioner's Advisory Group. As the only member from the border area, Mike believes he can represent the border federal criminal practice perspective by providing commentary and input to the United States Sentencing Commission during the commission's annual process of amending the Federal Sentencing Guidelines.

A staunch supporter of bar activities, Mike said, "I have always been involved in bar activities, particularly with the Mexican American Bar Association. My involvement with the El Paso Bar as a board member is more recent. The Bar is involved in so many activities that are important to our profession and community. I think it is our obligation to both that has always called to me as a lawyer to participate in bar activities. My involvement in the Bar has been very helpful to me professionally, by helping meet and develop professional contacts with bar members in practice areas different than mine. I might not otherwise meet some of these outstanding lawyers. I think it is very worthwhile, and I encourage all lawyers to become active with the El Paso Bar, as well as other bar associations. Our community and our profession are worth it."

County Court At Law Number One Veterans Mental Health Treatment/Intervention Program

BY CESAR F. PRIETO

On any given day, veterans account for nine of every hundred individuals in U.S. jails and prisons. At the present time, veterans are not over represented in the criminal justice system. However, the unmet mental health service needs of veterans involved in the justice system are of growing concern as more veterans of Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) and the war in Afghanistan return home with combat stress exposure resulting in high rates of Post Traumatic Stress Disorder (PTSD)

and depression and other mental conditions. Thousands of returning combat veterans are struggling to readjust to civilian life. Many expect that this will result in an increase of crime related offenses.

In light of these concerns, County Court at Law Number One has proposed to develop and establish a Veterans Mental Health Treatment/Intervention Court Program to meet the mental health needs of both the combat veterans and active military members who come in contact with the criminal justice system. The court's goal will be to address the challenges of crimes committed by combat veterans and active

military service members who suffer from post traumatic stress disorder, traumatic brain injuries or other mental health illnesses by linking the alleged offenders to rehabilitative services, pursuing incremental reductions in the number of law enforcement contacts with combat veterans and active military members, and reducing the amount of time veterans spend in jail. Additionally, the court intends to provide combat veterans and active military service members with substance abuse, alcoholism and mental health treatment. The court also hopes to help participants obtain employment and stable housing and constructively pursue their

life's goals. To assist each participant towards a successful transition, the Veterans Mental Health Treatment Court will also implement a Veteran Peer Support Group

PROGRAM PARTICIPATION IS ON VOLUNTARY BASIS

ELIGIBILITY REQUIREMENTS:

1. The defendant is a combat veteran or active military service member of the United States Armed Forces, to include a member of the Reserves, National Guard and State Guard.

2. Misdemeanor/Felony Offenses: Cases that are accepted are those screened by the El Paso County District Attorney's Office.

ROLE AND DUTIES OF THE VETERANS MENTAL TREATMENT COURT

1. Eligible Court Participants will be provided with legal counsel.

2. Eligible Court Participants will be allowed to withdraw from the program any time before a trial on the merits has been initiated.

3. Each Court Participant will be provided with an individualized treatment plan to address both mental illness and substance abuse issues.

4. Jurisdiction of the Veterans Mental Health Treatment Court will continue for a period of not less than six months but will not continue beyond the period of community supervision for the offense charged.

Those who are referred to the Veterans Mental Health Treatment Court are homeless,

helpless, in despair, suffering from alcohol and drug addiction, and others who have serious mental illnesses. In many cases, their lives have been out of control for a long time. Without the collaboration of Veterans Affairs Health Care System, William Beaumont Army Medical Hospital, Peer Support Group, along with a coalition of Community Health Care providers, many will continue to have their illnesses go untreated and will continue to suffer the consequences of the traditional criminal justice system of either jail or prison. The collaboration of these special partners will provide these veterans an opportunity to regain stability in their lives. Hopefully, families will be strengthened, the homeless will be housed, the employable will be employed, and dignity will be restored. Our veterans deserve no less.

EPYLA STAR OF THE MONTH

Alyssa García Pérez

■ BY PATSY LÓPEZ

This month the El Paso Young Lawyer's Association is happy to acquaint the Bar with Alyssa García Pérez. Alyssa is an Assistant District Attorney, a position she has held since graduating from St. Mary's law School in 2007.



Alyssa is still a resident of her home town, Canutillo, Texas where she was raised by her grandparents; Sofia and Gonzalo "Chalo" Garcia. Although her grandmother provided for everyone's needs in the home she was also very active in the local church, school district, and politics--teaching Alyssa to challenge traditional limits associated with gender and ethnicity. Alyssa's grandfather, an inductee to the first class of the El Paso Baseball Hall of Fame and one of the founders of the Canutillo Independent School District, also valued the importance of education and community service. It is through their example that Alyssa learned the importance of hard work and perseverance in all aspects of life.

Alyssa knew she wanted to be an attorney from an early age as she watched her uncle, better known to the rest of us as the Honorable Gonzalo Garcia, head off to Houston to attend law school. While Alyssa was in law school she inevitably had memories of him visiting on school

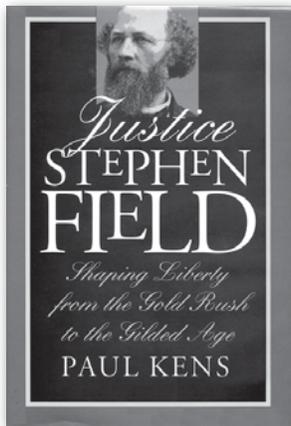
breaks and instilling in her the importance of education and standing up for others. Alyssa credits her uncle with teaching her the hard work it takes to achieve a successful professional career, while not losing sight of her roots and acknowledging those who have helped her succeed.

Alyssa embodies these values and leads by examples like her role models. The current Vice President of the El Paso Young Lawyer's Association, Alyssa can always be counted on to run a project or help out in anyway she can. She is a fixture at all of EPLYA's community events and this year alone has assisted in coordinating the EPLYA Golf tournament and raised nearly one quarter of all funds collected for the EPLYA Night at the Comic Strip.

Although she is a diligent worker Alyssa does have an incredible means of balancing work, family, and recreation. She has been to more U2 concerts in the last 10 months than anyone I've ever met and loves going to movies, having dinner, and going out with friends. Never forgetting her family, one of Alyssa's favorite things to do is dote over her 6-year old godson Emilio, who lives in Mexico City. Alyssa is an invaluable member of EPLYA and we look forward to her continued success in EPLYA and in her legal career.

The Book Review

This month Colbert Nathaniel Coldwell reviews two books, both about justice in the gilded age and both written by lawyer and historian Paul Kens.



Justice Stephen Field: *Shaping Liberty From the Gold Rush to the Gilded Age*

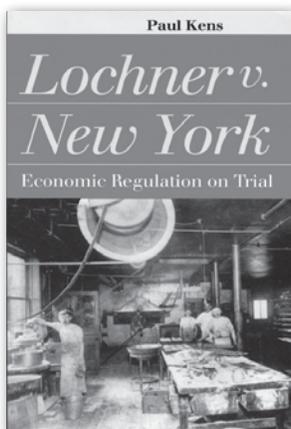
By Paul Kens

Why bother to read about old cases by dead jurists?

The conclusion that I draw from Texas State University professor, Paul Kens, is that legal decisions that nullify progressive legislative enactments on specious constitutional grounds are nearly as threatening to our Democracy as George III. Supreme Court Justice Louis Field rose from California 49er *alcalde* to champion his concept of “liberty” during his 1863-1897 terms on the California and U.S. Supreme Courts.

“Field believed regulation was appropriate to protect the public health and safety, to enhance its morals, and to preserve order. But he refused to accept the reformer’s proposition that government regulation could be used to balance disparities in economic and political power and thus preserve individual liberty...Field denounced such efforts as ‘class legislation.’” Kens, *Justice Stephen Field*, at p. 267 (University of Kansas Press, 1992).

Field’s rationale, common in his dissents, ultimately bore fruit in *Lochner v. New York*, 198 U.S. 45 (1905) where the Court in a five to four decision struck down a state statute providing a ten-hour maximum work day and sixty-hour work week in bakeshops, which had passed the New York House and Senate without a dissenting vote. The rationale of the Court was that New York’s Bakeshop Act interfered with “liberty of contract” between employer and employee. The New York Attorney General had made but a feeble effort to justify the Act under police powers. The majority opinion by Justice Peckham saw little connection to the protection of the health of the bakery workers to justify interference with the rights of workers and bakers to bargain freely for work hours. Justices Harlan and Holmes each authored



Lochner v. New York: *Economic Regulation on Trial*

By Paul Kens

hard-hitting dissents to the majority opinion.

The era of “laissez faire” constitutional bias lasted long enough to threaten to derail the New Deal. For example, in 1935 the Supreme Court struck down federal laws as “improper delegation” of national authority, such as the right of a regulatory agency to maintain prices, wages and hours, and standards of hygiene in the poultry industry in *Schechter Poultry Corp vs U.S.*, 295 U.S. 495. Mr. Schechter remained free from criminal prosecution under the Live Poultry Code of the National Recovery Act to exercise his “liberty” to purvey unfit chickens at cut rate prices.

As commented by one text the “improper delegation” constitutional dodge was “a concept that has had no place in cases before or after this period.” Present day strict constructionists conjure what the Constitutional Framers must have been thinking in order to limit the laws of Congress and states and local governments.

The *Lochner* majority and Justice Field similarly grasped at a slippery concept of “freedom” and skillfully honed it to slash at good government.

While Stephen Field’s concept of freedom and liberty may still be supported by many today, Kens is critical. He concludes: “Although Field and the later opponents of regulation may have been true to some aspects of the Jacksonian tradition, their opposition to class legislation turned the tradition on its head. Implicit in their charges of class legislation was the idea that wage earners, farmers, artisans and laborers represented the entrenched forces of political privilege and that corporations and powerful business interests were the oppressed.” Kens, *Justice Stephen Field*, at p. 271 (University of Kansas Press, 1992).

Justice Field, and the *Lochner* and *Schechter* majorities, provide all of us with a great lesson in “judicial activism” gone awry.

Readers are invited to submit book reviews for publication in the El Paso Bar Journal. Books reviewed should be available for checkout in the Robert J. Galvan Law Library. Readers are invited to contribute books to the library, or recommend their purchase.

DYNAMITE

Demand Letters and Portfolios

■ BY DAVID J. FERRELL
djff@elpasolaw.com

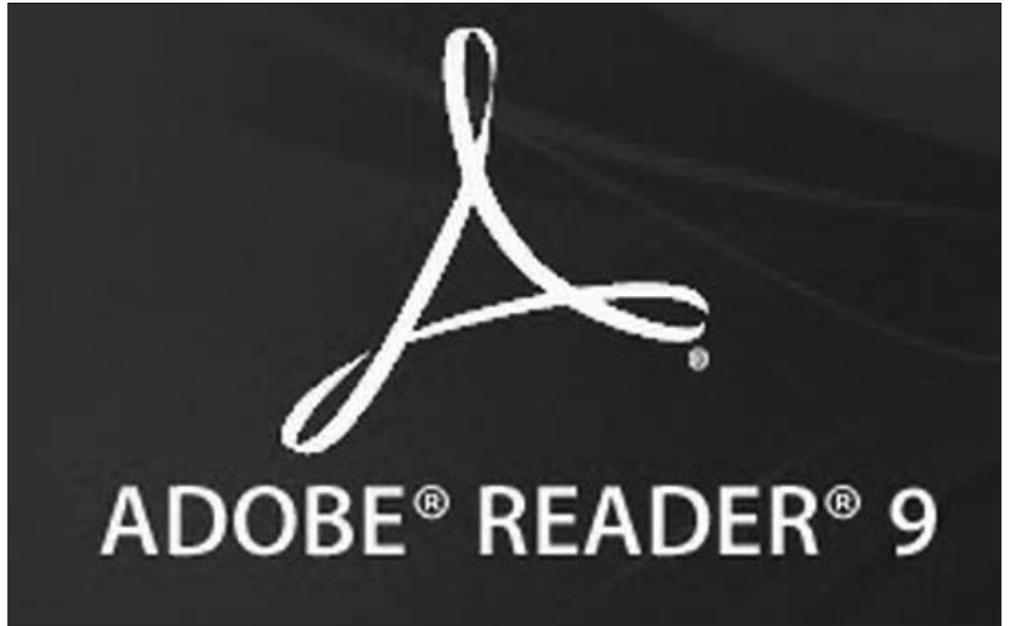
An artfully drafted demand letter can resolve a case fairly and quickly by showing the opposing party and her lawyer what a jury might see if the case is litigated. Technology has created the tools to absolutely try the case in the demand letter itself. This is done by inserting the relevant evidence which you can enhance with photos, maps, video, audio and 3d depictions of the offending product, location, etcetera.

What I am talking about is Dynamite software called "Adobe Acrobat 9 Professional Extended". We all know that the Portable Document File (PDF) is the document language of collaboration and the Internet. It doesn't matter if you use a Windows, Apple document system or whatever, your PDF document looks and prints the same on either side of the communication corridor.

Now, with Adobe Acrobat 9 Professional Extended, you can embed multimedia in that PDF file. You can write your demand letter like a BOOK, an E-BOOK, and these PDF books are very impressive. They are called "Portfolios" and can be designed to be VERY persuasive since the rules of evidence do not inhibit your creativity and embellishing skills. The prejudicial effect of your media may outweigh its probative value but, who is going to overrule your presentation. If the opponent is shocked by your demand letter, and the data/media contained therein is true, after the lawsuit is filed, let the opponent complain to the judge and maybe the jury. Be careful to not give the opponent something that will offend a judge and/or jury.

Court is theater, the facts and law already exist but the method of delivery often determines outcome. Isn't it the fear of unknown results that settles most cases? So, your demand letter is a tool to express (your client's) perspective of "outcome".

Adobe Acrobat Reader 9 (right now 9.2 for Windows Vista) is free to download and use (<http://get.adobe.com/reader/>). You cannot view multimedia items in Adobe Acrobat 8 nor



Adobe Acrobat Reader 9 (right now 9.2 for Windows Vista) is free to download and use (<http://get.adobe.com/reader/>). You cannot view multimedia items in Adobe Acrobat 8 nor earlier versions. So, you have to make sure your demand letter recipient has "at least" the free Adobe 9 reader installed on his computer.

earlier versions. So, you have to make sure your demand letter recipient has "at least" the free Adobe 9 reader installed on his computer.

Since most demand letters go to an alleged offending party, REMEMBER you have two targets for the DYNAMITE Demand Letter, the offending party and the lawyer who will represent said party.

Your first tactical approach is sending the demand letter by e-mail, and hold off on the snail mail version. A multimedia PDF file will not present on paper. If you need to actually send the letter using the postal service, send it on a data CD, DVD or thumb drive with written instructions on the Acrobat 9 reader. You can even include a copy of Adobe Acrobat 9 reader on your CD, DVD or thumb drive. If the PDF portfolio file is too big to e-mail, read my article

in the previous issue of this publication.

In a DTPA case I recently settled, I sent photos of an automobile engine that was ruined by an improper oil change. Our newly hired mechanic who would have been our fact and expert witness on this specific engine, disassembled the engine and we photographed the autopsy for inclusion in the demand letter. We included the work order for the negligent oil change, and other documents all in a demand letter portfolio. My client received a new engine and attorney fees.

To see examples of a demand letter and a presentation portfolio go to elpasolaw.com and click on the third tab on the right margin (El Paso Bar Jrnl) or type the following URL in your browser http://elpasolaw.com/el_paso_bar_jrnl.htm.

ADVANCE SHEET, circa 1397

BY CHARLES GAUNCE

Legal Reference Librarian University of Texas at El Paso

From the Coroner's rolls of Worcestershire comes the following case, begun in 1394 and concluded in 1397:

"Inquest was taken at Bedwardine, near Worcester, before John Bradwell, one of the king's coroners in the county of Worcester, on Tuesday next after Holy Cross Day in the Eighteenth year of King Richard the Second, on view of the body of Thomas Dawe, by the oath of twelve jurors. They say on their oath that John Neode and John Carpenter lay in wait and slew Thomas Dawe. Neode had no chattels; Carpenter had chattels worth forty shillings. Both were at once arrested, and taken to the gaol in the castle of Worcester. And be it known that afterwards at Worcester, on Friday the feast of St. Margaret the Virgin in the twenty-first year of King Richard the Second, the said John Neode and John Carpenter separately placed themselves on a jury of the country and were acquitted of the said felony before John of Hull and Hugh Huls, royal justices assigned to deliver the king's gaol in the castle of Worcester."

Why should this case be of any interest to us? Is it because it represents a delay of justice of nearly three years while the two accused men sat in jail awaiting their day of justice, only to be vindicated? Is it because the two sat in jail for this extended life vacation because they were largely without funds to pay for the justice that was denied to them?

While these are both valid concerns to the due process minded among us, the truly interesting aspect of the case is prison overcrowding. The explanatory note is the phrase, "assigned to deliver the king's gaol." For most of history, a jail has not been a place of punishment, but a place of confinement until the decided upon mode of corporal or capital punishment was carried out. It wasn't until the 19th century and the ideas of Jeremy Bentham that the act of confinement as a form of punishment took hold. Prior to that, the accused were held until punishment was determined and then the convicted were sold as slaves, transported to overseas penal colonies, or put to

work on public projects such as galleys. There were occasional political embarrassments who were imprisoned for extended period without trial (a situation that, unfortunately, still exists) but those unfortunates were never expected to be tried anyway. If you were unable to post bail to assure your appearance, and you were unable to otherwise get your case moving along, you would spend years in jail waiting.

Over time, jails would fill up with the accused of all kinds, who took up space and resources. Periodically, the jails would be cleared of these people through a process known as jail delivery. Judges would be appointed and trials would be held for all of the prisoners at a given jail for the offenses each was accused of having committed.

John of Hull and Hugh Huls were appointed by the crown to clear the cells at Worcester jail. The two of them proceeded to hold trials of all the prisoners on their charges.

And so, after nearly three years, John Neode and John Carpenter were acquitted of the charge of killing Thomas Dawe.

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Legal Literati

This month the El Paso Bar Journal literary page presents a poem by Donna Snyder

A DAY IN COUNTY COURT

Murmurs in the back benches rise & fall like mumbled prayers

The judge's words blur to a drone in the close air
A man slouches in a t-shirt waiting to hear his name

Drums his fingers
Looks at his shoelaces

Scratches one of his tattoos--a mouth agape
With fangs emerging from black lines & green ink
Some beast indistinguishable at ten feet away
From any other nightmare clad in a black robe

Both bare arms are covered in tangled designs
"Sleeves" the aficionados call them
Pseudo-tribal designs snake between fearsome images

Flesh clad in ink gargoyles & beasts

When the judge calls his name he lopes to the bench
A mullet swings down his back like a coonskin cap
His t-shirt says "pain is weakness leaving the body"
The words snarled by a demon fierce as his tattoos

A cathedral's protectors swell and shrink with each breath he takes

His body his temple

He keeps it holy through ritual submission to pain

The tattoo needle consecrates his flesh

Demonic images protect him from devils

But not from the county judge who sits waiting

Black robes rustling

Like demons whispering secrets to the cold North wind

Donna recently coedited *Mezcla: Art & Writing from the Tumblewords Project*, and is story editor for the forthcoming *Unlikely Stories of the Third Kind* anthology. She has three of her own poetry chapbooks forthcoming in 2010

Judicial Spotlight

Name:

Richard P. Mesa

Court:

U.S. Magistrate
Judge Western District of
Texas El Paso Division

Years on bench:

15 years

Education:

UTEP B.A. 1969
Georgetown Law Center
J.D. 1973

Court Co-ordinator:

Margie Molina



What is your view of the role of a court in society?

Many scholars have written volumes on this topic. At the risk of giving a totally incomplete response, I can only give you a brief statement. I believe civil courts exist to allow peaceful resolution of disputes in a fair and impartial manner. In the criminal arena, courts exist to provide justice to persons accused of conduct deemed excessive (criminal) by society.

What characteristics and qualities do you believe are important for a judge to possess?

To paraphrase an old adage, I believe a Judge should listen patiently, deliberate thoughtfully, and decide impartially.

Describe a day when you, as a lawyer or a judge, felt particularly satisfied or proud.

I recently had the opportunity to participate in a naturalization ceremony. This involved a particularly large group of diverse persons that became United States citizens. Since I normally preside over civil disputes or criminal cases involving serious offenses, it was especially pleasant to participate in a legal proceeding where only happiness was displayed. As a first generation Mexican-American whose father immigrated to America to provide us with a better life, I was extremely proud to swear in all the new citizens.

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HON. ROBERT J. GALVAN COUNTY LAW LIBRARY NEWS

BY LYNN SANCHEZ

The Law Library has acquired the following materials of general interest, which are available for check out:

Kens, Paul

Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age (University Press of Kansas, 1997)

Kens, Paul

Lockner v. New York: Economic Regulation on Trial (University Press of Kansas, 1998)

LEGAL LITERATI CALL FOR SUBMISSIONS:

The practice of law requires the ability to use the written or spoken word to provoke or prompt an intended result. Consequently, throughout history, lawyers have been known for creativity in the arts as well as in formulating arguments. The El Paso Bar Association wants to celebrate this aspect of the legal profession, and to encourage its members to recognize and cultivate their own creative impulses. We ask members or other law related professionals to provide their poems, lyrics, very short stories, or other creative expression.

**Please submit your work for consideration to Poetry Editor
Donna J. Snyder via email to donna.snyder@epcounty.com.**



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Friday, February 19, 2010

- 9:30 – 9:35 a.m. **Introduction** – Carlos Cardenas, President, El Paso Bar Association
- 9:35 – 10:00 a.m. **Developments in Law and Technology** – Roger Miller, Altep, Inc. El Paso, Texas
- 10:00 – 10:45 a.m. **Jury Consulting** – Jonathan Leach, Trial Lab, LLC, Dallas, Texas
- 10:45 – 11:30 a.m. **Developments in Transportation Law** – Carlos Rincon, Rincon Law Group, El Paso, Texas
- 11:30 – 12:15 p.m. **Court's Charge in Construction Cases** – E. Link Beck, Beck & Hall, P.C., El Paso, Texas
- 12:15 – 1:30 p.m. **Lunch on your own**
- 1:30 – 3:00 p.m. **Evidence Jeopardy** – Honorable Linda Yee Chew, District Judge, 327th Judicial District, El Paso, Texas; Honorable Thomas Spieczny, Judge, County Court at Law, #7, El Paso, Texas and Honorable Carlos Villa, Judge, County Court at Law, #5, El Paso, Texas
- 3:00 – 3:45 p.m. **Legal Malpractice** – Steven C. James, Attorney at Law, El Paso, Texas
- 3:45 – 4:00 p.m. **Afternoon Break**
- 4:00 – 4:45 p.m. **Family Law and the Military** – Donald Williams, Attorney at Law, El Paso, Texas
- 4:45 – 5:30 p.m. **Twombly – Iqbal and New Pleading Standards** – Kenneth Krohn, El Paso City Attorney's Office, El Paso, Texas

- at Law #7, El Paso, Texas and Honorable Carlos Villa, Judge, County Court at Law #5, El Paso, Texas
- 10:30 – 10:45 a.m. **Morning Break**
- 10:45 – 11:30 a.m. **Love & Collections in the Time of Recession** – Scott Vogelmeier, Attorney at Law, El Paso, Texas
- 11:30 – 12:30 p.m. **Immigration Issues in Civil Practice** – Hon. Chief Justice David Wellington Chew, 8th Court of Appeals, El Paso, Texas
- 12:30 – 1:15 p.m. **Advertising in the Social Network Era** – Eugene Majors, State Bar of Texas, Austin, Texas

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Door prizes will be given throughout the seminar.

Saturday, February 20, 2010

- 7:30 – 8:30 a.m. **Breakfast**
- 8:30 – 9:15 a.m. **Supreme Court Update** – Honorable Chris Antcliff, District Judge, 168th District Court, El Paso, Texas
- 9:15 – 10:30 a.m. **Ethics Jeopardy** – Honorable Linda Yee Chew, District Judge, 327th Judicial District Court, El Paso, Texas; Honorable Thomas Spieczny, Judge, County Court

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