



# EL PASO BAR JOURNAL

*An Update of Events and Information*

September 2015

## “A Fair Day’s Pay for a Fair Day’s Work”

The Evolving Fair Labor Standards Act. Part I

BY DAVID L. KERN  
PAGE 6

Two Senior  
Lawyers  
Interviews  
in this Issue  
*(LOOK INSIDE AND FIND THEM)*

THE ART OF ETHICAL  
FORGIVENESS  
AMONG LAWYERS  
BY OSCAR G. GABALDÓN, JR.,  
PAGE 13

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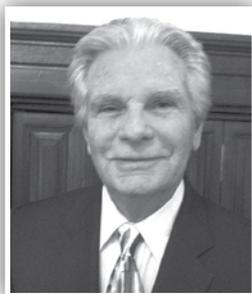
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*The El Paso Bar Journal is a bi-monthly publication of the El Paso Bar Association. Articles, notices, suggestions and/or comments should be sent to the attention of Nancy Gallego. All submissions must be received by the Bar office on or before the 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



I am humbled and honored to be President of the El Paso Bar Association. I am proud to be a lawyer in a most honored profession.

Lawyers are society's professional problem solvers. Lawyers run our social, commercial, and government civilization for us – our government, our business, and our private lives. Most legislators are lawyers, they make our laws.

Many Presidents and Governors, along with their advisors are lawyers. All judges are lawyers; they interpret and enforce our laws. At the most pragmatic level, if a member of society has a problem or gets in trouble, they turn to a lawyer for help. Lawyers are the members of our society that undertake unpopular causes, and seek justice for the downtrodden. Unfortunately, there is a vague popular belief that lawyers are dishonest, disreputable, and unethical.

I grew up in El Paso, and at an early age and through my practice, I have met and worked with and against great, honorable, professional lawyers. These lawyers participated in bar activities, gave back to the community, led the Bar with distinction, and sought justice. Yet lawyers' honesty and ethics are ranked below "used car" salesmen. It is important to note, and many of you may already know, that our legislature has seen fit to change our attorney's oath of office, to encourage attorneys to not demean the practice, by adding the following to our oath:

"That I will conduct myself with integrity and civility in dealing and communicating with the Court and all parties."

By adding this phrase, I believe the legislature and our fellow Texans are sending us a message.

My theme for my Presidency this year will be "Attorneys are Professionals." Professionalism has many meanings, and is necessarily a diverse topic. Professionalism is frequently overlooked in our zealous effort to represent our clients and make a living. Professionals include in their daily lives and practice, concepts such as ethics, integrity, and civility with other lawyers, judges, and clients, honesty in all of their dealings and the ability and desire to serve not only the Bar but our entire community. I invite you to read Oscar Gabaldon's comments on "Integrity and Civility have Come to Town" in this journal.

The many attorneys in our community constantly practice and live their lives utilizing such concepts as ethics, integrity, civility, and honesty in their dealings with fellow attorneys, the courts and clients. This year the El Paso Bar will stress professionalism, and will try to enhance the public image of our great attorneys and profession.

I invite our membership to contribute any ideas or comments which might enhance our El Paso Bar's activities this coming year. We have some new and energizing programs planned. Join with us. I hope at the end of this bar year I have contributed to Professionalism among lawyers.

MYER J. LIPSON  
 President

EL PASO BAR ASSOCIATION  
**September Bar Luncheon**  
 Tuesday, September 8, 2015

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

*Guest Speaker will be*  
 the Office of Domestic Relations  
 who will speak on what the office does

**Door prizes will be given out**

Please make your reservations  
 by Monday, September 7, 2015 at 1:00 p.m.  
 at [nancy@elpasobar.com](mailto:nancy@elpasobar.com) or [ngallego.epba@sbcglobal.net](mailto:ngallego.epba@sbcglobal.net)

**Please make sure you RSVP.**

# CALENDAR OF EVENTS

— SEPTEMBER, 2015 —

**Tuesday, September 1**  
 EPBA Board Meeting

**Wednesday, September 9**  
 EPALP Monthly Luncheon

**Monday, September 7**  
 Labor Day – EPBA Office  
 Closed

**Thursday, September 17**  
 EPPA Monthly Luncheon

**Tuesday, September 8**  
 EPBA Monthly Luncheon

## UPCOMING HOLIDAYS:

Monday, September 7, 2015 – *Labor Day*

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# Advance Sheet, 1346 A.D.

BY CHARLES GAUNCE

Pleas before the King in the time of  
King Edward the Third  
Michaelmas Term 1348  
(82 Seld. Soc. Yrbk. 66)

*Yorkshire*

A jury of the country, on which John of Buckton of Cave, plaintiff, and Nicholas atte Townsend of Hessele, ferryman, put themselves, found that Nicholas on Monday after Martinmas in the twentieth year of the present king's reign [November 13, 1346], accepted a certain mare from the said John at Hessele for the purpose of transporting it safely across the water of the Humber in the said Nicholas's boat, and Nicholas loaded that boat against John's wishes in such a way that he lost the aforesaid mare through Nicholas's lack of care, as John complains by his bill, to the said John's loss of forty shillings, and they found that John lost no goods or chattels there, as he complains by the said bill. Therefore it is awarded that John is to recover his aforesaid damages from Nicholas, and Nicholas is to be arrested etc., and John is to be amerced for a false claim etc. as regards the aforesaid chattels etc.

Afterwards, in this term, John of Buckton came in his own person before the king and acknowledged that Nicholas had given him satisfaction as regards the forty shillings etc. And thereupon Nicholas came and surrendered himself to the person of the king's marshalsea and

prayed to be received to make fine with the king on the aforesaid account. And he is received, as shown by the rolls of fines of this term etc.

Damages 40s., from which 40d. to the clerks, 2s. to Frisby.

In 1985, James Burke produced a television documentary and companion book titled, "The Day the Universe Changed." In it, he explored key moments in Western science that ultimately changed the way science perceived the world around us. One of the striking discoveries of the program was that the key moments were remarkably mundane at the time of their happening, but it was looking back on what happened that later generations were able to identify the dramatic changes that resulted. The twist of the title is that every day has the promise and potential to change the world in remarkably profound ways. Such is the result of our case.

The facts are rather unsurprising: John delivered a horse to Nicholas for transport across the river Humber on Nicholas' ferry. Nicholas loaded the ferry negligently and, upon the crossing, the horse was lost. John sued for the loss of the horse, and recovered. So why is this so remarkable? Of course, the answer to this question is: The Majesty of the Common Law!

At the time, a form of contract action could be prosecuted, but that action was of covenant, and only applied to the failure to perform an agreement under seal. John could have sought compensation in the local courts, but those

courts had limited power to compel attendance and enforce judgments. Fortunately for John, King Edward still liked the occasional road trip and traveled from Westminster to York where he personally held court. The royal courts were developing actions for trespass for wrongfully inflicted physical harm, whether that harm was inflicted upon the person, chattels, or realty. At that stage of development, the trespass had to allege and prove a breach of the king's peace which could not be said of damage done to a bailment. Nevertheless, John sued in King's Bench alleging trespass. To the surprise of nearly everyone, the king was willing to allow his recovery for a poorly performed agreement not under seal. This case represents the first such case and changed the course of the law. Subsequently, this approach was applied to poorly performed obligations, and then to the non-performance of agreements. The action of assumpsit and modern contract law was born.

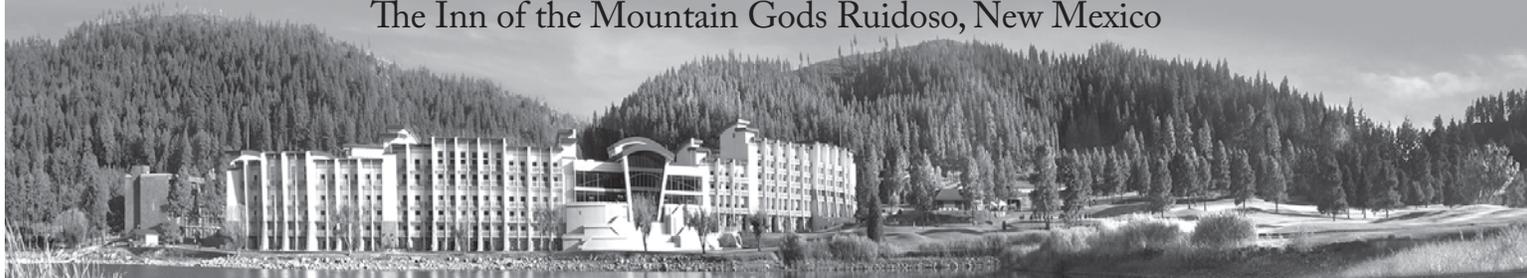
But that's not all. There was a bonus for no additional fee! The harm done by Nicholas was not caused by a force of arms as was then required for a successful action for trespass. His actions were simple negligence, and the court was wholly unconcerned by this failure. By permitting accidental harm to be compensable through trespass, the dispute paved the way for action on the case for negligence, from which most of modern tort law evolved.

A horse fell into a river in 1346, and both contract law and tort law were forever changed.

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

## 23RD ANNUAL EL PASO CRIMINAL LAW SEMINAR November 20 & 21, 2015

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COMPLETE DETAILS AND SEMINAR SCHEDULE IN OCT/NOV ISSUE OF THE JOURNAL

# “A Fair Day’s Pay for a Fair Day’s Work”

## The Evolving Fair Labor Standards Act

### PART I

BY DAVID L. KERN

When I was asked to write an article about the Fair Labor Standards Act (“FLSA”) for the El Paso Bar Journal, I readily agreed. I’ve been litigating FLSA collective actions for groups of employees for more than twenty years and have written many papers on the topic. But almost all of those papers were written for attorneys specializing in employment law whereas this one has an entirely different focus and is designed to educate attorneys who have little, if any, knowledge of FLSA. So why should attorneys who don’t practice in the field care about FLSA litigation? Apart from the altruistic answer that we should educate ourselves broadly to better advise our clients, FLSA collective action litigation is worth knowing about because it is on the rise and can be extremely lucrative. According to a recent report, the average FLSA collective action settlement in 2013 was \$4.5 million. See “Trends in Wage and Hour Settlements: 2013 Update”, NERA Economic Consulting, [www.nera.com/near-files/PUB\\_Wage\\_and\\_Hour\\_Settlements\\_1113.pdf](http://www.nera.com/near-files/PUB_Wage_and_Hour_Settlements_1113.pdf). This number is skewed upwards by several very large FLSA settlements in the tens of millions. However, the statistical mean reveals that over half of 2013’s FLSA collective action settlements were for more than \$2 million. Thus, this is an evolving area of litigation well worth the time to become familiar with.

The FLSA arose from the ashes of the Great Depression. In 1934, President Franklin D. Roosevelt passionately urged Congress to make “a fair day’s pay for a fair day’s work” the law of the land. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). It took four more years, but in 1938 Congress enacted the FLSA which begins: “The Congress hereby finds... the existence... of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers....” 29 USC § 202(a). Because of FLSA’s remedial



origins and purposes, its statutory scheme is far different than other employment laws. And with very few exceptions (e.g., the Portal to Portal Act), each of FLSA’s amendments since 1938 has resulted in further expansion of its remedial scope.

FLSA litigation combines application of a statute, 29 USC §§ 201 et seq., and a comprehensive set of implementing regulations. 29 CFR §§ 510 et seq. FLSA claims can be enforced either by the Department of Labor, 29 USC § 216(c), or by individual employees acting through private attorneys. 29 USC § 216(b). Under the private approach the claims of tens, hundreds, sometimes even thousands of workers are joined together in what are known as “collective actions,” essentially an opt-in

form of class action.

Most FLSA collective actions settle and relatively few proceed to trial. One reason is that FLSA claims are difficult to defend. Unlike discrimination claims, where it must be proven that the employer intended to discriminate, there is no intent requirement under the FLSA. Many well-meaning employers violate the FLSA by making perfectly innocent mistakes in how they pay their employees. No matter, the employer still must pay back pay for the relevant time frame. And damages in FLSA collective actions are far more quantifiable than in other types of employment matters. The significant risks that FLSA cases pose for employers also factor heavily into settlement decisions. Here are some of the FLSA’s employee-friendly features

that often mitigate towards settlement:

Absent an exemption or exception, FLSA requires employers to pay employees “not less than one and one-half times [the employee’s] regular rate” of pay for every hour worked in excess of forty hours in a workweek. 29 U.S.C. §207(a)(1). *Thibodeaux v. Executive Jet Int’l, Inc.*, 328 F.3d 742, 749 (5th Cir. 2003).

An employer with knowledge that a non-exempt employee is working overtime must pay that employee overtime whether a claim is made or not. *See Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995) (“An employer who is armed with [knowledge an employee is working overtime] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.”).

FLSA exemptions are narrowly construed against employers and only apply to those employees who fit “plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

Employers are required by FLSA to maintain records of hours worked and wages paid. 29 CFR § 516. When an employer fails to maintain required records, employees can use good faith estimates of hours worked to compute damages. The burden of proof then falls upon the employer to rebut these estimates. *See Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

Courts continue to hold that employers cannot complain about the speculative nature of employees’ damages estimates when the imprecision arises precisely because of the employer’s failure to maintain the required

records. *See, e.g., Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997).

A lenient “similarly situated” standard applies to whether a FLSA collective will be conditionally certified. *See Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995).

Because individualized discovery is impractical and unduly expensive in collective actions containing large groups of employees, representative discovery is either agreed upon by the parties or sought via order from a court. *See, e.g., Oropeza v. AppleIllinois, LLC*, 2010 WL 3034247, at \*6 (N.D. Ill. Aug. 3, 2010) (limiting deposition discovery to 20% of the plaintiff class and ordering the parties to each select 12 deponents to minimize plaintiffs’ concerns regarding unfairness); *Falcon v. Starbucks*, 580 F. Supp. 2d 528, 529-30 (S.D. Tex. 2008) (of the 18 opt-ins deposed, 10 were chosen by defendants and eight by plaintiffs).

Courts have granted plaintiff motions to limit discovery to a representative sample even in cases that involve a relatively “small” collective class. *See, e.g., Hart v. Rick’s Cabaret Int’l Inc.*, No. 09-03043 (S.D.N.Y. Dec. 23, 2010) (denying defendant’s request for individualized discovery in a collective action consisting of 53 opt-in plaintiffs because it would be unduly burdensome and expensive to permit extensive discovery of these plaintiffs). *See infra* for a detailed listing of current cases pertinent to the issue of representative discovery.

The same practical considerations that compel representative discovery also weigh in favor of representative trial testimony. Because courts cannot spend months hearing

testimony from all the plaintiffs in a collective action, FLSA cases are typically tried with the testimony of class representatives. *See, e.g., Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). And the testimony of representative plaintiffs can create necessary inferences that class-wide violations of FLSA have taken place.

Courts either permit plaintiffs to designate trial representatives or allow plaintiffs to pick some of the trial representatives and defendant to choose some. Regardless of the method employed, the goal is to hear testimony from a group representative of the class so trial results can be applied across the class as a matter of just and reasonable inference. *See, e.g., Secretary of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991). *See also Bull v. U.S.*, 68 Fed. Cl. 212 (Fed. Cl. Sept. 27, 2005); *clarified by Bull v. U.S.*, 68 Fed. Cl. 276 (Fed. Cl. Oct. 14, 2005) (tried with representative testimony from six plaintiffs – approximately 10% of the class – three chosen by plaintiffs and three selected by defendant.)

Part 2 of this series will delve deeper into FLSA collective action litigation. Stay tuned.

**DAVID L. KERN** received his law degree from the University of Texas Austin in 1983 and has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 1993. David’s fellow lawyers have recognized him in Texas Super Lawyers for ten consecutive years (2006 - 2015). For more than twenty years he has conducted a nation-wide practice in the representation of classes of current and former employees in wage and hour class actions. He can be reached at [dkern@kernlawfirm.com](mailto:dkern@kernlawfirm.com).

## El Paso Association of Legal Professionals

*September Monthly Meeting*  
Wednesday, September 9, 2015

El Paso Club, 201 E. Main, 18<sup>th</sup> Floor  
12:00 Noon

**Guest Speaker: Ronald Jackson**  
who will speak on Native American Law

## EL PASO PARALEGAL ASSOCIATION

*September Membership Meeting*

Thursday, September 17, 2015

El Paso Club, 201  
E. Main, 18<sup>th</sup> Floor  
12:00 noon

## SENIOR LAWYER INTERVIEW

## DAVID JEANS

BY CLINTON F. CROSS

**CROSS: Please tell me a little bit about your childhood.**

**JEANS:** I was born and raised in Independence, Missouri. My father worked for Ford Motor Company. My mother worked at home, spending a considerable amount of time parenting my older brother and me. Both my parents stressed the importance of integrity and honesty in our daily lives and both had a significant impact on my life.

I got involved in debate and public speaking at an early age. I spent a lot of time debating in high school and college, and participated in Moot Court in law school. Debate emphasized critical analysis of issues. I also had to learn how to argue opposing points of view. I think that experience steered me in the direction of pursuing a legal career.

**CROSS: Where did you go to college and what was your major?**

**JEANS:** I went to the University of Kansas and majored in Political Science, Geography, and Speech.

**CROSS: Then what did you do?**

**JEANS:** Because I went to college on an ROTC scholarship, I graduated with a four-year commitment to service. I became an Air Defense Artillery Officer and was sent to Ft. Bliss. I eventually spent two years with the Second Infantry Division in the Republic of South Korea.

During my time in El Paso, I met my future wife Susan on a blind date. Her father was a retired military officer and a commercial real estate agent. We went through law school together at the University of Kansas. We have now been married forty years.

**CROSS: After you graduated from law school, what did you do?**

**JEANS:** I returned to El Paso and went to work for Kemp, Smith, Duncan and Hammond. I started doing railroad defense work with Jack Duncan. In my first case, I sat second chair to Jack Duncan. I was not yet licensed but the judge let me participate in trying the case. I tried a lot of railroad cases against Joe Morgan



and Taylor Zimmerman. I learned about medical malpractice with Bill Duncan. I have invested much of my career in defending health care providers, both in litigation and before state agencies. I also spend a lot of time on a variety of other kinds of civil litigation cases, usually on the defense side.

The interesting thing about getting into medical malpractice defense is that, after my four years of service in the Army, I had debated whether to go to medical school or law school. Because of my background in debate, I chose law school. But what has happened is that, because of the years spent defending medical professionals, I have learned a great deal about the practice of medicine, including the technical aspects of particular specialties of medicine; in exchange, I have had the opportunity to teach many medical professionals about the legal aspects of practicing medicine. In fact, on more than one occasion, I have taught short classes on the legal aspects of practicing medicine to

young doctors doing their residencies.

I left Kemp Smith in 1995 and joined Ray and McChristian.

**CROSS: Your wife obtained a law degree. Does your wife practice law?**

**JEANS:** Not now, but she did for a number of years. She worked for the El Paso National Bank trust department, and then El Paso Exploration Company. After we had our first child, she opted to stay home, but did occasional *pro bono* work. We ended up having two girls. About the time our younger daughter was finishing high school, Susan worked with me at Ray, McChristian & Jeans for a few years. She now devotes her time to teaching Bible studies at Coronado Baptist Church.

**CROSS: What are the most important issues facing the profession today and why?**

**JEANS:** I am concerned that more and

more lawyers are losing their appreciation for the practice of law as a profession—that it should be a noble profession. As a result, fewer lawyers appear to recognize their role as officers of the court. Part of this is my perception of an increasing lack of civility and co-operation between counsel, even here in El Paso. The legal system is supposed to be about advancing justice. It ought to operate as a pressure release valve, in the sense that it should be a means for people to have their grievances addressed in a civilized manner. We often deal with people whose lives are in crisis and we should never forget our role in their lives at these critical moments. But it seems that the American legal system has become part of the problem; it is a pressure cooker, increasing the tensions and stresses between and among parties, instead of

addressing and easing them.

**CROSS: So what can we do about it?**

**JEANS:** We need older lawyers to set high standards for others to follow. We should respect the opposing party and his or her counsel, even in the context of an adversarial relationship. If we were in a tennis match, we should play hard but restrain any desire to throw our racket at our opponent. We should remember to be civil even when opposing counsel is uncivil. When it does not adversely affect our client's interest, we should try to co-operate. When we ourselves err, we should apologize. When dealing with an unnecessarily aggressive opponent whose ways aggravate the existing conflict, perhaps we should confront the issue with opposing counsel. I think collegial interaction with other lawyers

would help address this problem. We ought to set the example of good conduct and manners; even in an adversarial setting, the members of the bar, as officers of the court, should “set the bar” of professional conduct high.

**CROSS: If you had it to do over again, would you still pursue a legal career?**

**JEANS:** Yes. I would do it because the practice of law has afforded me the opportunity to form friendships and work with people that have had a positive impact on my life. This community has been very good to me. I would also do it again because I want to be part of the solution, not part of the problem.

**CLINTON F. CROSS** is a retired Assistant El Paso County Attorney.

# Integrity and Civility Have Come to Town!

BY OSCAR G. GABALDÓN, JR., CWLS

*“You don't have to prove confidence; when you have it, it'll show. Real confidence is quiet, tactful, civil, and humble.”* — ROSALINDA OROPEZA RANDALL

The State Bar of Texas has been called to raise the bar in how its members conduct themselves with the courts and each other. It has been observed that in recent years the standards of integrity, honor, and courtesy have been reduced to hollow ideals in the minds and hearts of some bar members. We are now being summoned to renew our commitment to being healers in the battlefield of the adversarial system and beyond. In this regard, we are to encourage ethical conduct at all times and to model such conduct to those that struggle to fully embrace professional and ethical standards of behavior. The whole bar membership is being called to heal wounds and to consistently work at preventing wounds from occurring.

The “Oath of Attorney,” mandated under §82.037 (a) of the Texas Government Code, and pursuant to Senate Bill 534, has been amended in order to help infuse life to the virtues of integrity and civility. Some will find this to be a difficult challenge, largely due to a human tendency to view and evaluate relationships within a narrow *quid pro quo* self-centered focus, a focus that fails to appreciate the greater



picture of developing and maintaining good and healthy human relations within and outside the legal profession.

Integrity and civility among attorneys have been disintegrating throughout the years, a regrettable reality that affects the public's view and trust of the profession, and that affects the moral fiber and professional well-being of its members. As harsh as it may sound, we must have the courage to see things for what they are. In spite of so many conscientious and truly professional attorneys that are above reproach, there are other attorneys that linger on who misuse, abuse, and even prostitute the law profession.

Motivated by less than ideal considerations, some attorneys will routinely engage in unethical tactics and practices in order to achieve their own ends, often at any cost. Deficient of integrity and civility, they are rude, demeaning, unfriendly and discourteous, and often engage in obstructionist and other inappropriate behaviors. They act in bad faith, and all too often assume the worst about others without giving them the benefit of the doubt. They lack honor, often making hollow promises devoid of any substance. They promote and engage in baseless arguments that they know have no merit in order to further their interests, and they generally do not respect the beauty

and sacredness of the spirit and substance of the law, fair play, and justice itself.

Recognizing this unfortunate reality, which has chipped away at the very foundation of such a noble profession, the Oath of Attorney has recently emerged out of a state of limbo and into a splendid rebirth that calls for greater emphasis on refined and dignified attorney ethical conduct.

Until now, the qualified individuals that had the unique privilege of taking the Oath of Attorney swore to do three things, namely, support the constitutions of the United States and the State, not demean themselves in the practice of law, and discharge their attorney duties to their clients to the best of their ability. Today, however, they must also “swear” to conduct themselves with integrity and civility in dealing and communicating with the court and all parties. This indeed is a high calling that will surely bring back some of the prestige, respect, nobility, and dignity which the bar previously enjoyed and presently lacks.

In line with this infusion of new life to the Oath of Attorney, a heightened expectation calling for all members of the profession to conduct themselves with integrity and civility, attorneys should seize the opportunity to engage in honest self-introspection about their own conduct and about the quality of relationships they maintain with the courts and fellow members of the bar.

It is not incompatible for an attorney to tenaciously advocate for a client, to fervently present a client’s case, and still maintain a consistently courteous disposition towards opposing counsel and opposing parties. The attorney that can do this is not only honorable, but that attorney is also demonstrating superior strength, much more so than the attorney that whines and resorts to dramatic and baseless antics, argues unreasonably and unfairly in the spoken and the written word, and fails to be respectful in dealing with the courts and other attorneys.

The attorney that adheres to integrity and civility is aware of the age old adage that one must treat others as one would want to be treated. Such an attorney also grasps the idea that justice, and not mere winning, is the ultimate Holy Grail to champion in any legal dispute. The attorney with moral fiber and unbreakable steadfast civility has the insight to know and respect the fact that the laws and the rules of courts are there to help maintain efficient structure, and allow for an orderly flow of legal and judicial processes so as to better achieve the legitimate ends of the law.

Often, the attorney that cherishes integrity and civility at heart possesses a metaphysical wisdom about human beings: We are the ultimate mystery...beings that think, that feel, and that sense. In that uniqueness, the mystery of ourselves is there for an exciting unraveling to discover the fullness of who we are and who we can be. Making integrity and civility a staple expectation of the legal profession affords the membership the opportunity to elevate the profession to new and exciting frontiers.

Integrity and civility, as required aspects of the attorneys’ professional lives, are not insurmountable pursuits. In terms of conducting themselves with integrity, it is worthwhile to keep in mind the words of the revered attorney and former American President, Abraham Lincoln, who said, “I am not bound to win, but I am bound to be true. I am not bound to succeed, but I am bound to live up to what light I have”. In terms of mastering civility, albeit it may be a challenge to the unaccustomed, it is within the grasp of any attorney to master it if he or she sincerely desires it as part of his or her everyday character makeup.

Pier Massimo Forni, who co-founded the John Hopkins Civility Project, reminds us that “Civility means a great deal more than just being nice

to one another. It is complex and encompasses learning how to connect successfully and live well with others, developing thoughtfulness, and fostering effective self-expression and communication. Civility includes courtesy, politeness, mutual respect, fairness, good manners, as well as a matter of good health.”

Integrity and civility, even if they were not mandated as part of the Oath of Attorney, are unquestionably worthwhile and practical professional investments. Integrity brings value to one’s life, or as the celebrated scientist Albert Einstein puts it: Try not to become a man of success but rather try to become a man of value. As for civility, the pragmatist will recognize, as writer Lady Mary Wortley Montagu so succinctly said it, that “Civility costs nothing and buys everything”. It is all a win-win situation. What more can anyone want?

**OSCAR GABALDÓN** is an assistant City Attorney and former 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).

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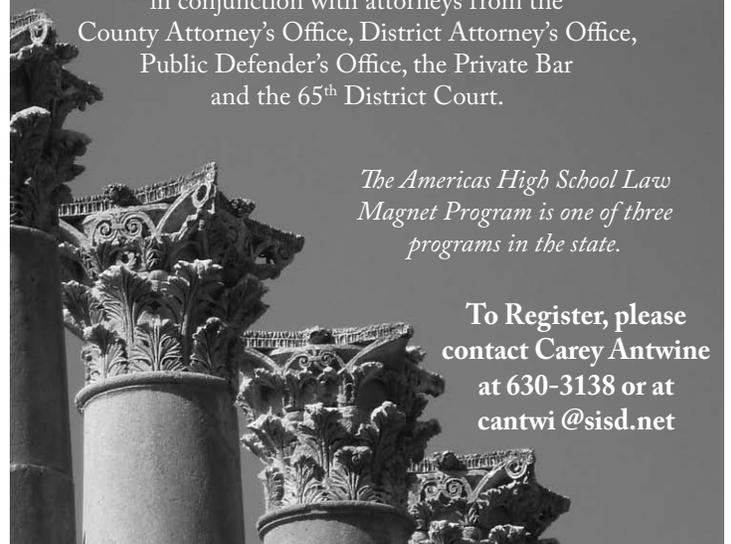
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## SENIOR LAWYER INTERVIEW

## BILL MAYNARD

BY CLINTON F. CROSS

**CROSS: Tell me about your childhood.**

**MAYNARD:** I was born in North Carolina and grew up in a small community named Guilford College, after a small liberal arts college affiliated with the Society of Friends (Quakers) on the outskirts of Greensboro. My parents were teachers. Both had graduated from Guilford. My mother taught biology in high school. She also raised five children. I am amazed that she was able to work and raise five children. My father was a gifted athlete. He coached a high school football team to a state championship. Then he returned to Guilford to teach physical education and coach football and baseball. I have four brothers and sisters, all back in North Carolina.

**CROSS: Where did you get your schooling?**

**MAYNARD:** As an undergrad I majored in French and political science at the University of North Carolina at Chapel Hill. I studied one year in France. I enjoyed two summers working in France as a counselor and softball/baseball instructor at a summer camp for boys. The French kids weren't very good at throwing, catching and hitting baseballs, but they could dribble soccer balls all around me. Learning to speak, think and live in a second language was for me a mind-opening, enriching experience. It's beautiful to appreciate both Spanish and English, and the beauties and contrasts of each. After I graduated from the University of North Carolina, I worked as a reporter for daily newspapers in North Carolina. As a journalist, I frequently noticed lawyers "lurking" in hallways and rooms where important local government decisions were being discussed. On a hunch, I decided to go to law school. I wanted to be part of the conversation, instead of reporting it in the press. While in law school, I earned a master degree in Public Administration from Duke University. I



*Bill Maynard*

graduated from UNC Law School in 1977.

I may have had some good luck when I took the LSAT. An entire segment of my particular exam was based on a hypothetical foreign language. I had to quickly memorize the vocabulary and then decode its grammatical structure in order to answer the questions. Well, this "hypothetical" language happened to look a lot like Latin, which I also happened to have studied, along with French, Spanish, and Romanian.

In the summer of 1975 the Southern Poverty Law Center (SPLC) offered me an internship investigating local implementation of Nixon's "New Federalism" policies.

The SPLC placed me in Odessa. When first I heard I was assigned to Odessa I thought, "Hey, that's in the USSR!?" Warren Burnett, a personal injury, civil rights and criminal defense

lawyer in Odessa, provided SPLC with office space, a desk and a phone for me. I enjoyed the privilege of seeing Warren Burnett at work that summer. His energy and genius were incredible. He inspired everyone in the law office.

**CROSS: How did you end up in El Paso?**

**MAYNARD:** The summer I worked out of Burnett's office in Odessa, I visited El Paso and Juarez for a few days. Burnett's secretary gave me a letter of introduction to a cousin of hers who lived in Juarez. El Paso-Juarez fascinated me. Back in 1975 our community was not only a bilingual and bicultural community, but it was very interconnected. Customs inspections were cursory. The Rio Grande near Monument One opposite where Asarco was a bi-national swimming hole free of interference by Border Patrol agents.

I returned the following summer as a Duke University intern working for El Paso Legal Assistance Society (EPLAS). By then I knew my other language was going to be Spanish and my bar exam would be in Texas. Out of law school in 1977, I accepted a position as a staff attorney with EPLAS. I worked at EPLAS for six years.

**CROSS: How do you feel about that experience?**

**MAYNARD:** My fondest memory was helping to establish a community nonprofit called Centro Medico Del Valle in Ysleta. At that time the Lower Valley was not only "medically underserved," it was very underserved. The modest clinic facility we built and opened is now occupied by a pharmacy next to the University Medical Center complex in Ysleta.

**CROSS: Then what?**

**MAYNARD:** Around 1983 I left EPLAS and went into solo private practice. I practiced a mix of family, probate, real estate and some bankruptcy and criminal defense for about three years. I have tremendous respect for private practitioners. In addition to gaining and representing clients and keeping up with the increasingly complex law, they must run a business – rent, payroll, personnel and budget management, equipment, and so on. In this day and age, over 30 years later, I cannot imagine what it must be like to run a “general practice.”

**CROSS: Obviously, you decided to try something else.**

**MAYNARD:** In 1986 I joined the Federal Public Defender office. I wanted more experience with juries, federal court and criminal defense. I soon realized that I loved criminal defense and the Federal Public Defender’s office was the place for me. I’ve been with the FPD for 29 years. Lucian Campbell, the district Defender from San Antonio, hired me and became my mentor. I have been privileged to work with Lucian Campbell and a wonderful staff.

**CROSS: Any Interesting cases?**

**MAYNARD:** The most interesting and challenging case involved the prosecution of District Judge Henry Pena, Jail Magistrate Scott Segal, and attorney Gary Hill on RICO conspiracy and bribery charges. This became the most stressful and ultimately most gratifying case of my career. I had the privilege and honor of working second chair helping Mike McDonald defend Scott, with Sib Abraham defending Judge Peña, and David Botsford, from Austin, defending Gary. The trial lasted a month. We all lost weight. The government’s case seemed to include a lot of irrelevant innuendo. And the judge, a visiting judge from Louisiana, felt it was all relevant, despite our objections. But when the defense began putting on its cases, testimony seemed to get less relevant with every government objection. Still, by closing, the government’s case had unraveled. It was a relief to hear the clerk read the words “not guilty,” I believe about 27 times, on all counts for all defendants.

**CROSS: How has the office and the practice evolved over the years?**

**MAYNARD:** In 1986 we had three lawyers in El Paso -- Kevin Shannon, Liz Rogers and myself, and we also covered federal court in

Pecos. Now the El Paso FPD office has 20 lawyers. In 1986 the El Paso office handled just a few hundred cases a year. Now there are about 3,000 cases a year just in El Paso, not counting misdemeanors. A separate branch office with three lawyers defends cases in the Pecos/Alpine Division.

In 1986 we had one federal district judge in El Paso, Harry Lee Hudspeth. Judge Lucius Bunton in Midland rode circuit a few days each month in El Paso and Pecos. Now five federal district judges manage the docket with four magistrate judges.

In 1986 the U.S. Attorney’s office had three prosecuting attorneys in El Paso, Tom McHugh, Mike McDonald, and Joe Galenski. Today about 35 Assistant United States Attorneys prosecute in the El Paso courts. In 1986 there were maybe seven or eight U.S. probation officers. Now there are about 75 to 80.

The criminal code has become more complicated. The annual paperback code on my desk is twice as thick as in 1986.

Federal criminal defense has changed in other ways. We used to have frequent jury trials. It reached a peak at the turn of the century. The office had over 40 jury trials and over 30 acquittals that year! Working together as co-counsel, Anne Burton and Robert Castaneda, won ten consecutive acquittals. They are now happily married and U.S. magistrate judges. Today there are few trials.

**CROSS: Why?**

**MAYNARD:** Frankly, and in hindsight, that year of 30-plus acquittals was an anomaly. You’ve heard the saying that when the prosecution does the job as it’s supposed to, the defense is not supposed to win. Well, there’s some truth to that. The “feds” usually investigate, screen and prepare their cases very carefully and thoroughly, certainly much more than they did 15 years ago. Today the litigation is usually over sentencing, with federal Sentencing Guidelines always influencing the debate, too often, in my view, arbitrarily. And, as you know in federal court juries are not involved in sentencing decisions. I don’t have the time to explain the guidelines’ complexities, but they create incentives that discourage going to trial and encourage plea bargaining.

**CROSS: How do you feel about the administration of justice in the federal criminal system?**

**MAYNARD:** In recent years the crime *du jour* in federal court is illegal immigration,

even more than drugs. The sentences can be horrendous and the effects on families can be heartbreaking. A man enters the U.S. illegally to work. Years go by. He eventually marries and starts a family. One day his illegal presence is discovered. He is deported. His wife and U.S. citizen children need him and beg him to return. He tries to sneak back into the U.S. to rejoin his loved ones. He’s arrested and criminally prosecuted. A family has been devastated and torn apart.

To me at least, the federal laws just do not distinguish very well between those who should be punished and those who should be allowed to stay. In immigration cases, we have become sentence mitigation advocates within the confines of virtually inflexible federal guidelines. I live with heartbreak every day!

**CROSS: What can be done?**

**MAYNARD:** Frankly, I am not sure what we can do locally to improve the “system.” El Paso and Ciudad Juarez are not the same open cities they were 38 years ago. People no longer use the Rio Grande near Monument One as a swimming hole. Nor do people shop and travel as casually between the two cities as they did then..

To a great extent, our cities’ circumstances are decided, or at least heavily influenced, by decisions made in Washington, D.C. and Mexico City, D.F. Locally, we lawyers, judges, agents, probation officers, businessmen, laborers, and others do the best we can at ground level within the parameters of politically driven national policies.

While some may disagree, I think a system that mechanistically punishes with little regard to individual circumstances disrespects jurists and citizens alike. The law is not just about rules. It is also about people. Perhaps we should give judges the right to use some judgment again.

**CROSS: Family?**

**MAYNARD:** I have a wonderful son, Stuart, who lives in Austin. He works, primarily in marketing and sales, for a business that hosts websites. He makes me feel proud, but I have only a vague understanding of what his job entails, although he has explained the details of his responsibilities to me several times. He’s of the Internet generation. I am definitely not. E-filing still seems strange to me.

**CLINTON F. CROSS** is a retired Assistant El Paso County Attorney.

# The Art of Ethical Forgiveness Among Lawyers

BY OSCAR G. GABALDÓN, JR., CWLS

*“The weak can never forgive. Forgiveness is the attribute of the strong.”<sup>(1)</sup>*

The virtue of forgiveness is an essential and laudatory dimension of ethical frameworks and systems. One of the most altruistic forms of goodwill among peoples of all nations is to forgive and to be forgiven. All too often, we encounter circumstances calling for interventions and acts of forgiveness in our everyday lives. Regardless of whether it is extending or receiving forgiveness among family members, friends, colleagues, co-workers, groups, or even entire nations, forgiveness is an all encompassing selfless act of embracing the ideals of justice and peace. Forgiveness is a charity-based form of healing that creates and re-creates human bridges of reconciliation, and which gives birth to new beginnings, as well as invigorates strained, damaged, and severed relationships.

The legal profession has traditionally advocated in favor of an antagonistic approach to problem-solving and conflict resolution commonly referred to in the law as the adversarial system. It is a philosophy that often encourages and nurtures an inclination towards a rigid, often tenacious and determined adversarial manner of relating between opposing sides in legal disputes. While the adversarial system does have merit at some level as an effective methodical legal process that assists in the discovery and unveiling of the elusive truth often hidden within the intricate web of prosecutorial and litigious processes and systems of law, it also has ethical pitfalls for the unsuspecting lawyer.

In ethical realms, unrestrained adversarial routine approaches may seep into other regions in the practice of law that sometimes kindles petty and uncalled for behaviors among lawyers. Irresponsible and unethical use of the adversarial system will occasionally spark a tendency for some lawyers to engage in acts of bad faith, unethical practices, a misplaced passion to win at all costs and otherwise demeaning and undesirable behaviors. Lawyers may become upset with other lawyers, and this may lead to revengeful overtures, resentment, placing colleagues in a negative light, nurturing



*In the legal profession, as with other professions, acts of forgiveness are especially momentous opportunities to help the profession achieve and maintain equilibrium, a sense of fraternity, and a genuine respect among the membership.*

rancor due to injured pride, and avoiding the most basic norms and principles of common courtesy, just to name some.

The recognition and acceptance of human imperfection is often a necessary precursor to a person's ability, desire, and willingness to seek to forgive or to be forgiven. While the transgression is not necessarily forgotten, it is disempowered and is no longer of meaningful consequence. Forgiveness, therefore, is a virtue of significant nobility for the person that wants to pursue an ethical existence. It instills in a person's heart and mind a desire of reconciling and maintaining amicable solidarity with his fellowmen. This virtue truly belongs in the hearts and minds of all men and women who value and have a reverence for the beauty of mankind's constant yearning for restoring broken relationships to a harmonious state of existence.

In the legal profession, as with other professions, acts of forgiveness are especially

momentous opportunities to help the profession achieve and maintain equilibrium, a sense of fraternity, and a genuine respect among the membership. This, in turn, helps to propel positive energy and develop constructive relationships within the profession. Additionally, not only is the lawyers' professional and personal development, as men and women of alpine ethical stature, consequentially augmented, the lawyers' influence on their clients' willingness to pursue conflict resolution initiatives is also intensified. Consequently, such lawyers are in a unique position to mentor other lawyers in the art of forgiveness, and to influence their own clients' attitudes in such a way as to foster hope and reconciliatory approaches within an otherwise adversarial system--- a system that should always have room for the art of ethical forgiveness to still thrive.

It is commonly known that some negative alternatives to forgiveness often will include revenge and the holding of grudges and other

negative impulses. This state of being can overwhelm an individual with a blinding darkness, an emptiness of serenity, and a state of restlessness. An absence of tranquility will frequently cloud the life of both the unforgiving and the unrepentant soul, for it is in the nature of men and women to both desire and seek lives of harmony. Such desire helps to focus attention on the premise that forgiveness is unquestionably at the core of an ethical life. It is the power of forgiveness that often enables men and women to jump the hurdle and stumbling blocks that tenuous and endangered personal and professional relationships in need of healing often crave.

We are called to take the initiative to create the momentum and culture of forgiveness needed in our ethical lives. Marvin J. Ashton puts it this way: Be the one who nurtures and builds. Be the one who has an understanding and a forgiving heart, one who looks for the

best in people. Leave people better than you found them.<sup>[2]</sup>

The lawyer that manages to incorporate a culture and ambience of forgiveness among his or her fellow lawyers and beyond, will have found a gem unlike any other; for it is in the forgiveness of others and ourselves that our lives can be genuinely shield with a cloak of unparalleled fortitude that will allow us to better withstand the tribulations and follies that sometimes endanger the well-being of human relations. A person that recognizes the power of forgiveness will know that forgiveness liberates. Such a person will grasp the enlightening truth in Lewis B. Smedes' insightful words, "To forgive is to set a prisoner free and discover that the prisoner was you."<sup>[3]</sup>

[1] Quote found in *All Men are Brothers: Autobiographical Reflections*, which is a collection of Gandhi's writings on non-violence, particularly as it relates to a post-

nuclear world. It was first published by UNESCO and The Columbia University Press in 1958. It was also first published in 1980 by The Continuum. The Library of Congress Catalog Number is 79-56674; ISBN 0-8264-1739-6.

[2] Marvin Jeremy Ashton (May 6, 1915 – February 25, 1994) was an author and a member of the Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints. He also served in the Utah State Senate (1957 – 1961).

[3] This quote is from author Lewis B. Smedes (August 20, 1921 – December 19, 2002), whose works include the book entitled *The Art of Forgiving*. Smedes was also a renowned ethicist and theologian in the Reformed tradition.

**OSCAR GABALDÓN** is an assistant City Attorney and former 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).

# Why Our Legal System is Respected Most of The Time

BY CLINTON F. CROSS

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## A. Introduction

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

There is an ongoing political debate about how far appellate courts should go in reconciling demands for change with established rules. When appellate courts appear to "make law" rather than "interpret" the law for any reason, such as "civil rights" or "law and order," their opinions are sometimes met with disrespect. "John Marshall has pronounced its decision;"

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

President Andrew Jackson once said, "let him enforce it." After *Brown v. Board*, "Impeach Earl Warren" was a popular political slogan in many parts of the country. *Roe v. Wade* remains controversial.

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

Finally, there are now television commentators like Nancy Grace and her clones who, for the purpose of entertaining millions of viewers, preside in the name of "court tv" over popular legal "reality shows." These commentators assume both the role of judge and jury and "try" defendants in the court of public opinion without any respect for the presumption of innocence, rules of evidence, or the burden of proof required in criminal cases. When the "bad

person” seems to win, respect for due process of law and our time honored rules designed to protect the innocent are put in jeopardy.

### B. Why the system is Respected

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

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

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

### 1. The Influence of Religion

The notion that the “good guy” should prevail for doing the right thing and the “bad guy” should lose for doing the wrong thing reflects our religious past. The legal system tries to get people to do the right thing, and discourages people from doing the wrong thing. Although we humans have often failed in our effort to “do good,” we cannot afford to quit trying. Most people continue to respect the effort.

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

Reflecting the past, courthouses today continue to resemble churches, at least courtrooms do. The judge’s bench is similar



to the preacher’s pulpit. The benches behind the “bar” resemble pews in a church. The well of the courtroom is a special if not a sacred space, so perhaps for that reason not available for sanctuary. The judge wears a priestly robe, a symbol of moral authority.

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

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

### 2. The Parent-Child Relationship

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

We remember our childhood and how our parents controlled our desire to explore. Most of us could not wander around the house at will,

or go outside, without regard to our parent’s wishes. When we explored life inappropriately our parents restricted our use of the phone, the television, the car, or even our movements, giving us “time out” or sending us to our room.

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

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

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

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

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and play now, judge?"

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

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

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

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

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

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

Courtroom culture reflects of the larger community that it represents, in effect a

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

Although committed to traditional values, our legal system permits critics to constructively "question authority." We honor, for example, the civil rights movement that in many ways dramatically changed our American culture. In 2004 the American Bar Association celebrated Law Day by focusing on the U.S. Supreme Court decision in *Brown v. Board of Education*. In Texas, courthouses are named after cultural heroes like Heman Sweatt and Albert Armendariz, Sr.

### D. Conclusion

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

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

of the law.”

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

of our secular priesthood, may resort to more effective remedies designed to address the problem.

How can we best confront some of the other problems facing the justice system? How do we provide better justice for more people at an affordable price? How should we most responsibly respond to widespread usage of drugs in our society, in blatant disregard of existing law? How should we respond to commentators like Nancy Grace, who try

defendants in the media without the benefit of the protections afforded by the law?

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

**CLINTON F. CROSS** is a retired Assistant El Paso County Attorney.

## Criminal Justice Reform is Here to Stay

BY JAY L. NYE

**T**his was the buzz word on capital hill, Washington D. C. In July 2015 at the national association of drug court professionals yearly training conference.

Drug treatment specialty courts are way ahead of the curve on this issue and have been saving lives and money for years.

Drug treatment specialty courts are very intense rehabilitation programs supervised by the judge, defense counsel, prosecution, probation, treatment counselors, trauma counselors and law enforcement. Participants are monitored very closely on a daily basis. Treatment consists of court appearances, meetings with probation, individual and group counseling and if needed trauma counseling. Surveillance officers from the sheriff's department, police department and the Court are working 24/7 checking on the participants' welfare as well and their compliance with the program. Participants may be checked several times day and night. As they progress through the phases, the program's requirements lessen, especially if the participants are doing well. Participants are expected to maintain steady employment or be enrolled as full-time students. They remain in the community with their families, working and giving back to the community rather than being locked up in jail or prison.

Although relapse is not officially tolerated, it is an unfortunate but normal part of recovery for a participant to relapse before attaining consistent and prolonged sobriety. When a participant relapses, the court may, as an example, send the participant to jail or order additional community service hours. Participants who do not relapse are rewarded – for instance, a court may permit a curfew extension to see a movie or have dinner outside

the home with his or her family. They may be granted travel privileges.

Is the taxpayer/government investment in drug courts worth the money?

Drug Courts save lives: 75% who graduate never return to the system.

Drug Courts save money: for every dollar invested in drug court programs the state and federal governments save an estimated \$27.00.

Drug Courts reduce crime, perhaps by as much as 45%.

Our El Paso drug court judges are doing a great job. Judge Patrick Garcia established the SAFPF Re-entry Court in 2003. When Judge Guaderrama was appointed to the federal bench, he graciously assumed responsibility for managing the Adult Drug Court in addition to his regular and mental health docket. Judge Robert Anchondo started the DWI Court in 2004, the first of its kind in Texas. Judge Angie Barill established a Veterans' Treatment Court in 2012 and is due to receive the Patriotism Award from the Texas Veterans' Commission. Judge William Moody presides over that court 50% of the time and maintains a rehabilitation docket as well. Judge Maria Salas-Mendoza is on call for that court. Judge Sam Medrano has presided over the Juvenile Drug Court for eleven years which court is recognized as a model gender-specific program by the National Council of Juvenile and Family Court Judges. Judge Yahara Lisa Gutierrez runs the Family Drug Court out of the 65 District Court. Under the auspices of the 65th is Judge Linda Chew—Family Intervention Court and Judge Michelle Locke—Family Preservation Court. Judge Ricardo Herrera maintains a mental health docket in addition to his regular docket. All these judges have undertaken these programs

in addition to their regular dockets.

El Paso is a leader in the drug court movement. I am privileged this year to serve as President of the Texas Association of Drug Court Professionals (TADCP). Omar Sanchez, with the Adult Drug Court, and Belinda Acuna, with the Family Drug Court, serve on the Association's board of directors.

At the recent meeting in Washington D.C. of the National Association of Drug Court Professionals (NADCP), Judge Robert Anchondo received the National DWI Court Leadership Award, recognizing his hard work and successful implementation of his drug court program and is one of four DWI Academy Courts nationwide.

Texas is on the leading edge of this movement. Mary Covington, Harris County, received the Hank Pirowski award for exemplary work in Veterans Courts. Judge Ruben Reyes, Lubbock, was elected as Chairman of the Board of NADCP. Charles Robinson, Travis County, was elected as Secretary of NADCP.

At the NADCP Conference in Washington, D.C., this year many attendees at the conference had an opportunity to meet with their respective Senators and Congressmen, where they were universally well received. Locally, Chief Public Defender Jaime Gandara, District Attorney Jaime Esparza, adult probation director Maggie Morales, Sheriff Richard Wiles and Police Chief Greg Allen have all embraced these programs.

My heartfelt thanks go out to my boss, Jaime Gandara, and all those who make this system work.

Drug Courts are Criminal Justice Reform at its best. Drug courts are here to stay.

**JAY L. NYE** is a Public Defender and President, Texas Association of Drug Court Professionals.



# Views on Marriage and Matrimony

Excerpts from *Las Siete Partidas*, Spanish Code, 1256  
and commentaries by William Blackstone, 1775

*Las Siete Partidas* was a Spanish code promulgated during the reign of King Alfonso X of Spain. For those readers more familiar with English history than Spanish history it might serve as a point of reference that Alfonso X's half sister married Edward I of England. For an interesting case decided during the reign of Edward I, see *Advance Sheet* on page five. Ed.

## Excerpts from *Las Sietes Partidas*, 1256

### LAW 1.

What Marriage is.

Marriage is the union of husband and wife, made with the intention of always living together and of never separating: each observing mutual fidelity towards the other; the husband having no commerce with any other woman, nor the wife with any other man, but both living as one (*ambosados*)....

### LAW 2

Whence the word matrimony is derived; and why it is called *matrimonio* and not *patrimonio*.

*Matris* and *munium* are Latin words from which the term matrimony is derived, a term, which, in common speech, means the office of mother. And the reason why marriage is called *matrimonio* and not *patrimonio* is, because the mother suffers greater travail, on account of her children, than the father. For though

the father begets them, the mother undergoes much suffering, while she bears them in her womb, and very great pain when she brings them forth, and great labour after they are born, in nourishing them herself. And moreover because children, when they are small, have greater need of their mother's aid, than their father's. It is for all these reasons appertaining to the mother, and not the father, marriage is called *matrimonio* and not *patrimonio*.

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*More than 500 hundred years later, during the Age of Enlightenment, English legal scholar William Blackstone commented on the marriage relationship. It is not likely that today we would consider his views more enlightened than those expressed in *Las Sietes Partidas*. Ed.*

## Excerpts from *Commentaries on the Laws of England*, by Sir William Blackstone, 1775

### Of Husband and Wife

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least in incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and

disabilities that either of them acquire by the marriage. . . . A man cannot grant any thing to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence. . . . A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of her long. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is obliged to pay them; but for any thing besides necessaries, he is not chargeable. . . . If the wife be indebted before marriage, the husband is bound afterward to pay the debt; for he has adopted her and circumstances together. . . .

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with the power of restraining her, by domestic chastisement. . . . But, with us, in the politer reign of Charles II, this power began to be doubted: and a wife may now have security of the peace against her husband; or in return, a husband against his wife. . . .

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.

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Brothers David A. Hall and Teo D. Hall, ages 22 and 24



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