



APPELLATE UPDATE

by Richard Salgado¹

Fifth Circuit

The Reviewable Scope of an Interlocutory Appeal Under 28 U.S.C. § 1292(b).

Castellanos-Contreras v. Decatur Hotels, LLC, 622 F.3d 393 (5th Cir. 2010).

For purposes of an interlocutory appeal under 28 U.S.C. § 1292(b), it is the order—not the question certified by the trial court—that is appealable. This means that the Fifth Circuit may review all issues pertinent to a certified order.

A group of 100 foreign workers who came to the United States on H-2B visas to help staff New Orleans hotels in the wake of Hurricane Katrina sued Decatur Hotels LLC under the Fair Labor Standards Act of 1938. The workers had to pay various unreimbursed fees to be able to work—including visa application fees and relocation expenses. The workers claimed that their wages fell below the minimum wage after those fees were deducted. The district court denied Decatur's motion for summary judgment and granted the plaintiffs' motion for summary judgment, holding that the only issue remaining was the calculation of wages paid and the amount of damages due. After the district court certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), a Fifth Circuit panel found in favor of Decatur on the merits. The parties subsequently reargued the case before the *en banc* Court.

Plaintiffs argued that the district court certified only the question of whether the workers were entitled to be paid the minimum wage under the FLSA and that the Court's review was limited to this threshold question. The Fifth Circuit disagreed, explaining that "[u]nder 1292(b), it is the order, not the question, that is appealable." Thus an appellate court may review all issues pertinent to the certified order. In order to grant the plaintiffs' summary judgment motion and deny Decatur's summary judgment motion, the district court was required to evaluate whether the costs of the workers' placement, visas, and relocations were "of the kind for which reimbursement—to the extent necessary to stay at or above minimum wage—is required by law." Whether the expenses are reimbursable is thus "a legal question that can properly be the subject of interlocutory review." The Fifth Circuit held that it had jurisdiction over the merits of the appeal, and, on the merits, the Fifth Circuit agreed with the panel decision and reversed the district court's order.

Texas Supreme Court

"Subsequent-to-Execution" Exclusions in an Insurance Contract.

Mid-Continent Casualty Co. v. Global Enercom Management, Inc., 323 S.W.3d 151 (Tex. 2010).

A "subsequent-to-execution" exclusion in an insurance policy does not bar coverage where one party has yet to sign an agreement if the policy does not expressly define "execution" to require the signature of both parties.

A company ("Global") engaged in constructing and maintaining cell phone towers subcontracted out work to a construction company ("All States") for the repair of a cell tower in Arkansas. The agreement included a provision

- 1 Appellate Update
- 5 Alternative Dispute Resolution Update
- 6 News from the Bar
- 8 Federal Update

- 12 Advice From the Bench:
An Interview with Chief Judge Ricardo Hinojosa
- 13 Mindful of the Method: Why Lawyers
Should Revisit That Old Socratic Madness
- 17 What Makes a Great Trial Lawyer?
An Interview with Mark Lanier

requiring All States to indemnify Global for “all acts and omissions of its employees.” Mid-Continent insured All States through two policies that extended coverage to additional “insured contracts” that All States enters into pertaining to its business, so long as the liability occurred “subsequent to the execution of the contract or agreement.” The day before Global signed the subcontract with All States, All States attempted to hoist workers to the top of a cell tower on a rope that ran through a pulley system attached to a pickup truck. The rope broke during the hoist, and the workers fell to their deaths. Mid-Continent denied coverage on the ground that coverage was barred by the subsequent to execution exclusion in the policy.

The Texas Supreme Court held that, although not signed by Global until after the accident, the subcontract with All States was nevertheless “executed” before the accident. According to the Supreme Court, because neither policy required both parties to sign the underlying contract, and there was no evidence raising a fact issue of such intent by the parties, the “subsequent-to-execution” exclusions in both policies did not bar coverage.

Hurricanes, the Texas Coastline, and Rolling Easements.

Severance v. Patterson, No. 09-0387, 54 Tex. Sup. Ct. J. 172, 2010 WL 4371438 (Tex. Nov. 5, 2010) (rehearing granted).

Easements for public use of private dry beach property change along with gradual and imperceptible changes to the coastal landscape, but storms and hurricanes that drastically alter pre-existing boundaries do not allow a public use easement to migrate onto previously unencumbered property.

For years, Texas has used the never-permanent vegetation line along the shoreline to establish what is known as a “rolling

easement” assuring public access to beaches. Anything on the Gulf side of the vegetation line is public, and, as the vegetation line moves because of beach erosion, the public’s easement “rolls” automatically with it. The plaintiff owned beachfront property that ended up forward of the vegetation line as a result of Hurricane Rita in 2005. The state informed her that her houses were now on the public easement and could be subject to a removal order. The plaintiff challenged the state in federal court, and, on appeal, the Fifth Circuit certified to the Texas Supreme Court the question whether state law and the Texas Open Beaches Act recognize a “rolling” public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line.

Answering the certified question, the Supreme Court held that the Act does not establish a rolling easement, at least to the extent that the state asserted. Justice Wainwright, writing for the six-justice majority, wrote that “[e]asements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But . . . events such as storms and hurricanes that drastically alter pre-existing . . . boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.” In other words, the rolling easement doctrine applies to steady erosion, but not the sudden deep erosion of a hurricane or storm event. The opinion leaves undecided where to draw the line between merely “gradual” changes in the high tide line and more “dramatic” changes attributable to hurricanes and similar events.

The Public’s Right to Information and State Employees’ Right to Privacy.

Texas Comptroller of Public Accounts v. Dallas Morning News, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010).

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According to the Court’s balancing test, the risk of identity theft outweighs the public interest’s in the disclosure of state employee’s birth dates.

In 2005, the *Dallas Morning News* sought an electronic copy of the state employee payroll database from the Texas Comptroller, pursuant to a public records request. The Comptroller agreed to provide various information concerning employees—including full name, age, and pay rate—but refused to provide birth dates. The newspaper argued birth dates should be public record because they help distinguish between workers who have the same name. The paper had previously used birth dates to find criminal records of employees with the Texas Youth Commission, Child Protective Services, and local school districts. The Texas Attorney General subsequently issued an opinion letter concluding that the birth dates are public records and finding no proof that to release them would result in “harmful financial consequences,” i.e., identity theft. The Comptroller disagreed and sued to prevent release of the birthdates. The trial court and court of appeals both ruled in favor of the Attorney General, but the Supreme Court—in a 5-2 decision—reversed, holding that the birth dates should not be disclosed.

Writing for the majority, Chief Justice Jefferson wrote that, “when the privacy rights of a substantial class of innocent parties are affected by one of our decisions, we have a duty to pay them heed.” The Court applied a balancing test to find that the state employees’ right to privacy “substantially outweighs the negligible public interest in disclosure.” While the Court explained that it believed that the *Dallas Morning News* would not misuse the information in any way, the Court expressed concern that, if the information were to be disclosed to the *News*, it would also be required to be disclosed to any other requester. Other requesters, the Court worried, might use the information for “illegitimate purposes.” Writing in dissent (and joined by Justice Johnson), Justice Wainwright expressed concern that the majority’s decision would hinder the ability of newspapers to put the information to good use. Justice Wainwright’s dissent cited studies that show most identity theft results from stolen checks and credit cards, or the use of a fake birth date, not a real one.

Waiver of Sovereign Immunity in a Tort Case—Special Defects.

University of Texas at Austin v. Hayes, 327 S.W.3d 113 (Tex. 2010).

A chain across a barricaded and closed driveway would not pose a threat to an ordinary user in the normal course of travel and is thus not a “special defect” that would waive the University of Texas’ sovereign immunity under the Texas Tort Claims Act.

As a general matter, the State of Texas retains sovereign immunity from suit and can only be sued if the Legislature waives immunity in “clear and unambiguous language.”

However, the Texas Tort Claims Act provides a limited immunity waiver for tort claims arising from either “premises defects or special defects.” On September 12, 2003, the University closed a service driveway to configure parking for the next day’s football game. To prevent vehicle access on the service driveway, the University placed an eight-foot-wide orange-and-white barricade in front of a metal chain that stretched across the entrance. That evening, Robert Hayes rode his bicycle onto the University campus. He pedaled past a University security station and proceeded toward the service driveway. He “saw a barricade placed in the middle of the road . . . [and] without braking, without slowing down significantly, . . . veered to the left-hand side of that barricade and then was stopped short by the chain.” He struck the chain and suffered injuries. Hayes sued the University, alleging the chain was a defect of which the University failed to warn. The University argued that Hayes’s allegations failed to establish a waiver of sovereign immunity under the Texas Tort Claims Act. The trial court granted Hayes’s motion for partial summary judgment, concluding the University’s sovereign immunity had been waived. The University filed an interlocutory appeal, and a divided court of appeals affirmed. The University appealed to the Supreme Court.

In a per curiam opinion, the Supreme Court reversed the Court of Appeals and held that the University did not waive sovereign immunity. The Court noted that “the Legislature does not define special defect but likens it to conditions ‘such as excavations or obstructions on highways, roads, or streets.’” Whether something is a special defect “turns on the objective expectations of an ‘ordinary user’ who follows the ‘normal course of travel.’” Similarly, a premises-defect claim requires that the landowner failed to “either (1) use ordinary care to warn a licensee of a condition that presented an unreasonable risk of harm of which the landowner is actually aware and the licensee is not, or (2) make the condition reasonably safe.” Because “road users in the normal course of travel should turn back or take an alternate route when a barricade is erected to alert them of a closed roadway, . . . a chain across a barricaded and closed driveway would not pose a threat to an ordinary user in the normal course of travel.” The Supreme Court held that the chain was thus not a special defect. Likewise, because there was no evidence showing that the University had actual knowledge of a dangerous condition at the time of the accident, “Hayes failed to establish a premises-defect claim.” Accordingly, the University did not waive sovereign immunity.

The Scope of Employment for Purposes of Workers Compensation Insurance.

Leordeanu v. American Protection Ins. Co., 330 S.W.3d 239 (Tex. 2010).

Traveling home from work does not typically fall in “the scope and course of employment,” but traveling from one workplace to another while on the way home could be considered a work-related activity.

Under the Texas Workers Compensation Act, traveling home from work is generally not in the “course and scope of employment.” But is it in the “course and scope” of employment to travel from one workplace to another while on the way home? Liana Leordeanu, a pharmaceutical sales representative, drove her company car to a business appointment, then to a restaurant for dinner with clients. Afterward, her route home took her past a company-provided self-storage unit, adjacent her apartment complex, in which she kept drug samples and marketing materials. She intended to stop at the unit and empty her car of business supplies. But, midway there, she ran off the highway and was seriously injured. The Texas Department of Insurance Workers Compensation Commission Division concluded that Leordeanu was not in the course and scope of employment at the time of her accident and upheld the insurance company’s denial of her workers compensation claim. The trial court disagreed and ruled in favor of Leordeanu, the court of appeals reversed, and Leordeanu appealed to the Supreme Court.

The Supreme Court, in an 8-1 ruling, held that the company was wrong in denying coverage. Writing for the Court, Justice Hecht noted that traveling home from work does not typically fall in “the scope and course of employment.” Traveling from one workplace to another while on the way home, however, could be considered a work-related activity: “[L]eaving aside the fact that she officed at home and intended to do some paperwork there before retiring for the night, Leordeanu was also on her way from an employer-sponsored dinner to an employer-provided storage facility to empty her company car of business supplies.” Accordingly, the Court found that there was evidence to support the jury’s verdict that Leordeanu was injured in the course and scope of employment.

Expert Witnesses and the Standard to Establish Causation.

Jelinek v. Casas, 328 S.W.3d 526 (Tex. 2010).

When circumstantial evidence is consistent with several possible medical conclusions, only one of which establishes that the defendant’s negligence caused a plaintiff’s injury, an expert witness must explain why, based on the particular facts of the case, that conclusion is medically superior to the others.

On July 10, 2001, Eloisa Casas was admitted to Rio Grande Regional Hospital with abdominal pains, a fever, and a mildly elevated white-blood-cell count, potentially indicating an infection. To treat this possible infection, her surgeon and primary physician consulted with an infectious disease specialist at the Hospital, who prescribed two antibiotics. Two days later, she underwent major abdominal surgery,

which revealed an E Coli infection, and Casas continued on the antibiotics for another five days, but the Hospital allowed the prescriptions to lapse for four-and-a-half days. Even still, Casas did not test positive for E Coli again but did contract two other infections, neither of which would have been treated

by the prescribed antibiotics. Doctors prescribed her different antibiotics for the other infections. Casas left the Hospital on August 23, but returned in early September and died two months later. Several members of Casas’s family, including her husband and son, sued the Hospital and doctors, claiming that the defendants’ negligence caused Eloisa Casas to “suffer grievous embarrassment and humiliation, as well as excruciating pain the remainder of her life which she would not have suffered to such degree or extent if properly diagnosed, treated and cared for.” The plaintiffs’ expert opined that the doctors were negligent in

failing to discover that the antibiotics were not being given to Casas and that, within “reasonable medical probability,” this negligence resulted in a prolonged hospital stay and increased pain and suffering. However, the expert failed to explain any causal connection between the negligence and the purported injury. The court permitted the expert to testify over defendants’ challenge, and he opined that there was likely an infection in Casas’ abdomen. The expert admitted, however, that “there was no objective evidence present to demonstrate that intra-abdominal infection.” The jury found the hospital and doctors to be negligent and awarded \$250,000 damages. The court of appeals affirmed, and the hospital and doctors appealed.

The Supreme Court reversed. Writing for the majority, Justice Guzman stated that “it is not enough for an expert simply to opine that the defendant’s negligence caused the plaintiff’s injury. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury.” The Court held that by conceding that Casas’s symptoms were also consistent with other infections not treatable by the first two prescribed antibiotics, the expert “undermined his conclusion that an undetected infection was also present.” It was possible that Casas had an E Coli infection, but its presence could only be inferred from facts that were equally consistent with the two subsequent infections. According to the Court, “[w]hen circumstantial evidence is consistent with several possible medical conclusions, only one of which establishes that the defendant’s negligence caused the plaintiff’s injury, an expert witness must explain why, based on the particular facts of the case, that conclusion is medically superior to the others. If the expert fails to give any reason beyond an unsupported opinion, the expert’s testimony is legally insufficient evidence of causation.”





ALTERNATIVE DISPUTE RESOLUTION UPDATE

by Susan Nassar

The FAA does not preempt TAA if an arbitration agreement specifies that arbitration will occur pursuant to the TAA.

In re Olshan Foundation Repair Co., LLC, 328 S.W.3d 883 (Tex. 2010).

This case involves petitions for writs of mandamus by Olshan Foundation Repair Company (Olshan) in four different cases in which three separate trial courts denied Olshan's motions to compel arbitration under the Federal Arbitration Act (FAA) of consumer claims filed by homeowners. All four cases involved repair contracts, which contained the following language in the arbitration clauses:

Notwithstanding, any provision in this agreement to the contrary, any dispute, controversy, or lawsuit between any of the parties to this agreement about any matter arising out of this agreement, shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association ("AAA") pursuant to the arbitration laws in your state and in accordance with this arbitration agreement and the commercial arbitration rules of the AAA....

In addition to this language, one of the four contracts also stated that arbitration was to be conducted "pursuant to the Texas General Arbitration Act." In interpreting the arbitration clause containing this additional language, the court adopted the Fifth Circuit's reasoning in *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998). The court noted that while courts rarely construe general choice-of-law provisions to choose state law to the exclusion of federal law, it is proper to do so when an arbitration provision chooses a state's substantive law, specifically the TAA, to govern disputes under an agreement.

The court concluded that the contract containing the additional and specific TAA language clearly indicated the parties' intent to have arbitration governed by the TAA rather than merely "the law of the state" or "Texas law." The court further reasoned that the parties' intention in this regard would be defeated if the FAA preempted the TAA's specific provisions. Thus, while the court has previously recognized that the FAA preempts parts of the TAA, including section 171.002(a)(2) of the Civil Practice and Remedies Code, it held that the FAA does not preempt TAA section 171.002(a)(2) if an agreement specifies arbitration will occur "pursuant to the Texas General

Arbitration Act." Because the parties to this agreement did not choose the FAA, and TAA section 171.002(a)(2) would render their agreement unenforceable, the court determined that the trial court correctly denied Olshan's motion to compel arbitration with regard to this contract.

However, because the remaining three contracts did not specifically state that arbitration would be conducted pursuant to the laws of Texas, which include the FAA, the court concluded that the FAA preempted section 171.002(a)(2) of the TAA and precluded those requirements from barring arbitration under these agreements. In other words, Olshan's motions to compel should have been granted with regard to these three contracts unless the homeowners could demonstrate that the arbitration agreements were unconscionable and unenforceable.

The homeowners contended that the arbitration agreements were unconscionable because "mandatory binding arbitration administered by the American Arbitration Association ... in accordance with this arbitration agreement and the commercial arbitration rules of the AAA" is prohibitively expensive. The court noted that determination of whether arbitration is prohibitively expensive, and thereby unconscionable, turns on consideration of a few factors, including a comparison of the cost of arbitration and litigation:

...a comparison of the total costs of the two forums is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation. Other factors include the actual cost of arbitration compared to the total amount of damages the claimant is seeking and the claimant's overall ability to pay the arbitration fees and costs. These factors may also show arbitration to be an inadequate and inaccessible forum for the particular claimants to vindicate their rights. However, these considerations are less relevant if litigation costs more than arbitration.

The court determined that the homeowners had not met their burden in establishing arbitration would be prohibitively expensive and unconscionable because, although they showed that other claimants in other arbitrations had incurred significant arbitration costs, they provided no evidence that they would incur similar costs. In addition, there was no evidence the homeowners' claims were similar to other claims in amount or difficulty. Thus, while excessive costs imposed by an arbitration agreement may render a contract unconscionable if the costs prevent a litigant

from effectively vindicating his or her rights in the arbitral forum, the homeowners in this case had not made the requisite showing. The court therefore concluded the trial court erred in denying Olshan's motions to compel and pleas in abatement as to these three contracts and conditionally granted mandamus relief.

An employer's retention of the right to change unilaterally personnel policies in an employee manual does not render illusory a separate stand-alone arbitration agreement.

In re 24R, Inc., d/b/a The Boot Jack, 324 S.W.3d 564 (Tex. 2010) (orig. proceeding).

This case involved employment discrimination claims asserted by Frances Cabrera (Cabrera) against her employer 24R, Inc., otherwise known as "The Boot Jack." During the fifteen years that Cabrera worked at The Boot Jack, she was given three separate arbitration agreements in 2003, 2004, and 2005, which she and other Boot Jack employees were required to sign as a condition of their continued employment. Cabrera signed all three agreements. In January 2007, Cabrera developed a medical condition and requested certain accommodations. Four months after requesting the accommodations, she was fired. In 2008, Cabrera sued The Boot Jack for disability discrimination. The Boot Jack filed a motion to abate and compel arbitration pursuant to the 2005 arbitration agreement. The trial court denied the Boot Jack's motion, and the court of appeals denied its request for mandamus relief. The Boot Jack thereafter sought mandamus relief from the Texas Supreme Court.

Cabrera did not dispute that her discrimination claims were covered by the arbitration agreement. Instead, she argued that the arbitration agreement was unenforceable on the grounds that it lacked consideration and was illusory because The Boot Jack retained the right to amend the agreement and was not mutually bound. Cabrera contended that The Boot Jack's employee manual

permitted it to modify or abolish any personnel policy, including the arbitration agreement.

The court disagreed, reasoning that while an arbitration clause is illusory if one party can avoid its promise to arbitrate by amending the provision or terminating it altogether, this was not the case with Cabrera's agreement. The Boot Jack employee manual stated that "The Boot Jack reserves the right to revoke, change or supplement guidelines at any time without notice," and that "[t]here are a number of The Boot Jack policies an applicant needs to understand and agree to before being employed, such as the Arbitration Policy." Although the manual indicated that The Boot Jack retained the right to unilaterally change personnel policies, the arbitration agreement did not state that The Boot Jack had the right to change the terms of the arbitration agreement. Nor did the agreement mention or incorporate by reference the employee manual. As a result, the court concluded the manual was not part of the contract. This conclusion was further supported by the manual's express disclaimer that "[t]he policies and procedures in this manual are not intended to be contractual commitments by The Boot Jack...."

Because Cabrera's argument rested on language in the employee manual, which was an entirely separate document that did not impose any contractual obligations between The Boot Jack and its employees, and the arbitration agreement was a "stand-alone contract" that did not incorporate the manual, the court concluded that the arbitration agreement was not illusory. Although language in the employee manual recognized the existence of the arbitration agreement, the court determined that this did not diminish the validity of the arbitration agreement as a stand-alone contract and did not require a savings clause similar to the one at issue in *In re Halliburton Co.*, 80 S.W.3d 566, 573 (Tex. 2002) (orig. proceeding)).

The court therefore conditionally granted the requested mandamus relief to The Boot Jack and directed the trial court to vacate its prior order denying The Boot Jack's motion to compel arbitration. ■



NEWS FROM THE BAR

F.R. "Buck" Files, Jr. of Tyler Named President-elect of State Bar of Texas

C.E. Rhodes of Houston Named President-elect of Texas Young Lawyers Association

State Bar of Texas officials announced on May 2, 2011 that **F.R. "Buck" Files, Jr.** of Tyler was elected by the state's lawyers to serve as president-elect of the organization.

C.E. Rhodes of Houston was elected president-elect of the Texas Young Lawyers Association (TYLA).

Buck Files is a shareholder and founding member of Bain, Files, Jarrett, Bain & Harrison, PC in Tyler, where he practices criminal defense law. He is board certified in criminal law by the Texas Board of Legal Specialization (TBLS), and in criminal trial advocacy by the National Board of Trial Advocacy.

Files, who chairs the State Bar of Texas Continuing Legal Education Committee and is a frequent presenter, has served on the State Bar of Texas Board of Directors, Smith County Bar Association Board of Directors, and is a charter member and former director of the Texas Criminal Defense Lawyers Association. He is a member of the National Association of Criminal Defense Lawyers, College of the State Bar of Texas, and a sustaining life fellow of the Texas Bar Foundation. He

serves on the TBLS Board and chaired the TBLS Criminal Law Advisory Commission, served on the State Bar District 2 Grievance Committee, and is a past president of the East Texas Symphony Orchestra Association. Files has been awarded a State Bar Presidential Citation and Outstanding Third Year Director Award, Defense Lawyer of the Year by the State Bar Criminal Justice Section, and Justinian Award by the Smith County Bar Association.

He earned a B.A. from Austin College, where he currently serves on the Board of Trustees, a Masters in Liberal Arts from Southern Methodist University, a J.D. from Southern Methodist University School of Law, and served in the U.S. Marine Corps.

C.E. Rhodes is U.S. Operations and Compliance Counsel to Baker Hughes, Inc. in Houston, where he advises management and employees. He currently serves as the American Bar Association Young Lawyers Division Representative for south and central Texas and as a liaison to the TYLA Board. A TYLA director since 2004, Rhodes served as TYLA chair during 2009-10 and as an executive committee advisor to the Community Education/Consumer Affairs Committee, which created R U Safe: Protecting Yourself in Cyber Space. As co-chair of the TYLA Member Services and Outreach Committee, he co-authored Office in a Flash and co-authored and produced Justice 101: The Client's Guide to Litigation. He also co-authored and produced TYLA's Emmy-award winning video, They Had a Dream Too: Young Leaders of the Civil Rights Movement. In 2007, Rhodes was the recipient of the Joseph M. Pritchard Outstanding TYLA Director of the Year Award. He received his J.D. from Emory University School of Law. Rhodes received his B.A. in History from the University of Virginia, where he played football.

Files and Rhodes will be sworn in as presidents-elect during the State Bar's Annual Meeting June 23-24, 2011 in San Antonio, and will serve as president of the State Bar and TYLA respectively from June 2012 until June 2013.

Also elected to the State Bar of Texas Board of Directors are:

- **Ike Vanden Eykel** of Dallas
- **Steve Fischer** of Rockport
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- **Cindy V. Tisdale** of Granbury and
- **David P. Whittlesey** of Austin.

TYLA Launches “The Little Voice – Recognizing and Reporting Child Abuse”

The Texas Young Lawyers Association (TYLA) has created “The Little Voice – Recognizing and Reporting Child Abuse,” a multi-media project to raise awareness about our statutory obligation to report child abuse. “The Little Voice” includes an English and Spanish PSA and a 35-minute video, featuring actor Victor Rivers, that educates the general public, childcare providers, educators, and parents about child abuse and gives them the tools needed to detect and report it.

The importance cannot be stressed enough: four children die every day from abuse, and 13,700 children are abused every day. “The Little Voice” is available for viewing at www.tyla.org/thelittlevoice or may be requested by calling 512.427.1529.

“The Little Voice has a dual meaning – both the voice of a brave and terrified child, but also that inner voice that tells us something is wrong, said **Jennifer Evans Morris**, TYLA President. “This project encourages everyone to listen to both voices. Children simply cannot protect themselves. But we can.”

TYLA is coordinating with radio and television stations, the State Bar Child Abuse Committee, Child Protective Services, and nonprofits across the state to get this important message out – particularly in April during National Child Abuse Prevention month.

The project is made possible by a generous grant from the Texas Bar Foundation, the largest charitably-funded bar foundation in the country. Since its inception in 1965, the Texas Bar Foundation has distributed more than \$11 million in grants to assist Texas nonprofit organizations with justice-related programs and services.

Electronic Filing in the Texas Supreme Court

Effective March 28, 2011, you may electronically file documents with the Texas Supreme Court, pay your fees, and serve opposing counsel using the Texas.gov electronic-filing system.

To use the electronic-filing system you must first choose an electronic-filing service provider and register. You must send two paper copies of your filing to the Court when you use the electronic-filing system.

If you choose to file using the traditional paper-filing method, you must still e-mail electronic copies of petitions, responses, replies, briefs on the merits, amicus briefs, post-submission briefs, motions for rehearing, and emergency motions to the Clerk of the Court on the same day that the paper copies are filed. The electronic copies must be e-mailed to scebriefs@txcourts.gov. An original and eleven paper copies are still required for most filings when using the paper filing method. ■



FEDERAL UPDATE

by Josh Roseman and Jennifer Turner

Amendments to the Federal Rules of Civil Procedure (Effective December 1, 2010)

Amendments to the Federal Rules of Civil Procedure (the “Rules”) took effect on December 1, 2010. These changes revise the list of affirmative defenses that must be asserted in responsive pleadings (Rule 8), redefine the scope of discovery as it pertains to expert witnesses (Rule 26), and reshape the summary judgment procedure (Rule 56). Attorneys practicing in the federal courts should familiarize themselves with the specifics of these new rules.

Rule 8(c) is amended to remove “discharge in bankruptcy” from the list of affirmative defenses that must be raised in a responsive pleading. As the Civil Rules Advisory Committee (the “Advisory Committee”) explained in its notes, the pleading requirement was effectively negated by provisions in the Bankruptcy Code.

The amendments to Rule 26 alter the discoverability of certain information pertaining to expert witnesses. First, new Rule 26(a)(2)(B)(ii) eliminates the duty to disclose all “other information” forming the basis of an expert’s opinion in favor of a more narrow requirement to disclose only the facts or data the expert relied upon. Second, Rule 26(a)(2)(C) now imposes certain disclosure obligations on non-retained experts, such as treating physicians. In the past, a non-retained expert was subject to few disclosure requirements, save for revealing his or her identity. Now, unless stipulated by the parties or ordered by the court, a non-retained expert witness must disclose the subject matter of expected testimony and provide a summary of the facts and opinions to which the witness is expected to testify. Third, Rules 26(b)(4)(B) and (C) extend work product protection to draft expert reports, disclosures, and attorney-expert communications. However, three types of communication remain unprotected, including those which: (1) relate to compensation for the expert’s study or testimony; (2) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; and those that (3) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.

In revising Rule 56, the Advisory Committee intended to leave the summary judgment standards and burdens intact, while clarifying certain procedural requirements for presenting and resisting a summary judgment motion. Notably, new Rule 56(a) restores the original “shall grant” standard where the movant shows that there is no genuine dispute as to any material fact. Although the change to “should grant” made during the 2007 Style Project was intended to be stylistic only, public concern about the wording caused the Advisory Committee to restore the original language in the most recent amendments.

Insider Trading: Misappropriation Theory, *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010).

In *SEC v. Cuban*, the Fifth Circuit overturned the district court’s order dismissing the SEC’s complaint alleging that Mark Cuban, current owner of the Dallas Mavericks and Landmark theaters, violated Rule 10b5-2(b)(1). The Fifth Circuit found that the SEC had sufficiently pled facts under the misappropriation theory of insider trading to justify the case proceeding to the discovery stage.

According to the SEC’s complaint, as of March 2004, Cuban owned a 6.3% stake in Mamma.com, a Canadian search engine company. Later that year, Mamma.com, following the advice of the investment bank Merriman Curhan Ford & Co. (“Merriman”), decided to raise capital through a private investment of public equity (“PIPE”) offering. Merriman suggested that Mamma.com invite Cuban to participate in the PIPE offering. Thereafter, Mamma.com’s CEO was instructed to contact Cuban regarding the PIPE offering, but ensure that Cuban understood that he was receiving confidential information before any disclosure was made. Cuban did in fact agree to keep the information detailed to him by Mamma.com’s CEO confidential. Cuban was dissatisfied with the idea of a PIPE offering because, among other things, he believed it was dilutive to the existing shareholders. At the close of the phone call, Cuban is quoted as exclaiming to the CEO, “Well now I’m screwed. I can’t sell.”

Following this conversation, the executive chairman of Mamma.com, who had received a summary of the phone call from the CEO, emailed the company’s board members explaining that Cuban was not interested in participating in the PIPE offering, but recognized that he could not sell his shares until it was announced. The CEO then sent Cuban a follow-up email directing him to contact Merriman if he wanted more details concerning the PIPE offering. After learning from Merriman that PIPE investors would be receiving certain benefits not available on the market and other confidential information, Cuban immediately sold his entire stock in the company. Once the PIPE offering was announced, Mamma.com’s stock price plummeted 39%. Thus, Cuban avoided over \$750,000 in losses by selling his stake in the company before the PIPE offering announcement.

The central issue before the Fifth Circuit was whether the facts described above sufficiently stated a claim for insider trading. The specific theory of liability the SEC relied on is known as the misappropriation theory. The misappropriation theory was first adopted by the Supreme Court and holds that a person violates section 10(b) “when he misappropriates confidential information

for securities trading purposes, in breach of the duty owed to the source of the information.” Thus, the Fifth Circuit was tasked with deciding whether the SEC had sufficiently alleged a “duty of trust and confidence” between Cuban and Mamma.com that was breached by Cuban’s selling his stake prior to the PIPE offering announcement. In building its case for insider trading, the SEC relied on Rule 10b5-2(b) (1) which states that a person has “a duty of trust and confidence” for purposes of misappropriation liability when that person agrees to “maintain information in confidence.”

The district court found that the above facts allege only an agreement of confidentiality between Cuban and Mamma.com. Although Cuban stated to the CEO that he was “screwed” because he could not sell his shares, this statement did not equate to an agreement to abstain from trading on Cuban’s behalf. In addition, the district court did not attach significance to the CEO’s expectation that Cuban would not sell his shares.

However, the Fifth Circuit, reading the complaint in the light most favorable to the SEC, reached the opposite conclusion. The court pointed out that Cuban was afforded access to the details of the PIPE terms through Merriman only after he expressed to the CEO that he could not sell his shares. Thus, the appeals court concluded that “[t]he allegations, taken in their entirety, provide more than a plausible basis to find that the understanding between the CEO and Cuban was that [Cuban] was not to trade, that it was more than a simple confidentiality agreement.” The Fifth Circuit vacated the district court’s opinion and remanded the case for discovery proceedings.

Although the Fifth Circuit’s opinion did not set forth any new legal principles, it does exemplify that once insider trading cases based on the misappropriation theory are alleged, a detailed fact investigation is difficult to avoid. Significantly, the Fifth Circuit, in arriving at its conclusion, noted that the question of what constitutes a relationship of “trust and confidence” is inherently fact intensive. Thus, courts may be reluctant to dismiss insider trading cases alleging a relationship of “trust and confidence.”

Attorney’s Fees: Lodestar after *Gisbrecht*.

Jeter v. Astrue, 622 F.3d 371 (5th Cir. 2010).

In *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002), the Supreme Court settled a circuit split over the appropriate method of calculating attorneys’ fees under § 406(b) of the Social Security Act by prohibiting exclusive, primary reliance on the lodestar method to determine the reasonableness of a § 406(b) fee award. Eight years later, in *Jeter v. Astrue*, the Fifth Circuit took up the issue of whether “district courts may employ the lodestar method to determine whether an attorney fee constitutes a ‘windfall’ under *Gisbrecht*.” The Fifth Circuit noted that it was necessary to clarify an area of law that “following the Supreme Court’s decision ... has resulted in confusion and conflicting outcomes in the decisions of our lower courts.”

The Fifth Circuit held that district courts may use the lodestar method to determine whether a contingency fee is unreasonable under 42 U.S.C. § 406(b) as long as they consider and articulate other factors that demonstrate that the fee is unearned. In other words, the

district courts may not rely exclusively on the lodestar method when evaluating an attorney’s contingency fees under § 406(b).

In this case, Gary W. Jeter claimed Social Security benefits, including Title II disability insurance benefits and Title XVI supplemental security income due to alleged physical impairments. An administrative law judge declared that he was not disabled under the relevant Act. After exhausting his administrative remedies, he retained John G. Ratcliff as his attorney for the appeal to the district court. He agreed to pay Ratcliff a contingency fee of 25% of his unpaid past benefits if the appeal was successful. The district court remanded the proceedings to a second administrative law judge who found that Jeter was due past benefits totaling \$89,289.00.

Ratcliff, the real party in interest in the appeal, had already received payments for part of his representation. For example, he received the maximum fee of \$5,300.00 for the proceedings at the administrative level. He was paid \$2,827.50 under the Equal Access to Justice Act. Ratcliff’s fee request under § 406(b) totaled \$14,734.74, in addition to fees already collected. The magistrate performed the “reasonableness” analysis under § 406(b) and considered: (1) Ratcliff’s expertise in Social Security cases; (2) adequacy of Ratcliff’s representation in this case; (3) Jeter’s recovery amount; (4) the contingency fee agreement; and (5) risk of loss to Ratcliff. The magistrate found that Ratcliff’s hourly fee under the lodestar method was over \$800.00 an hour and concluded that the fee was unreasonable and constituted a “windfall.” The magistrate recommended, and the district court awarded, fees of \$3,993.75.

On appeal, Ratcliff claimed that the district court erred because *Gisbrecht* forbids the use of the lodestar analysis in § 406(b) reasonableness determinations. The Fifth Circuit did not agree with Ratcliff’s interpretation, and held that the lodestar method may be used in the analysis under § 406(b) as long as other factors are considered and articulated. The Fifth Circuit was careful to note that a high fee calculated by the lodestar method alone “does not render an otherwise reasonable fee unreasonable” but declined to articulate a list of specific factors.

PSLRA: Secondary Actor, Primary Liability,

AFCO Invs. v. Proskauer, 625 F.3d 185 (5th Cir. 2010).

In *AFCO Invs. v. Proskauer*, the Fifth Circuit considered whether the national law firm, Proskauer Rose (“Proskauer”), could be held liable for advising plaintiffs regarding the legality of a purported tax shelter under either the Racketeer Influenced and Corrupt Organizations Act (“RICO”) or the securities laws. The appeals court answered in the negative and upheld the district court’s dismissal of the complaint.

According to the facts set out in the opinion, KPMG targeted and solicited plaintiffs for participation in a tax avoidance strategy in which taxpayers attempted to claim tax losses through a mechanism of offsetting digital options. Plaintiffs allege that KPMG represented that the tax shelter was a legitimate investment vehicle for offsetting their income. In assuring plaintiffs of the legitimacy of the tax shelter, KPMG promised to provide independent opinions from “several major national law firms” confirming the legality of the

venture. Based on these assurances, plaintiffs invested in the tax scheme. Subsequent to this agreement, plaintiffs received an opinion from the law firm Sidley Austin Brown & Wood, LLP (“Sidley”) concluding that the tax shelter would pass muster with the IRS. Before plaintiffs were required to file their tax returns, the IRS issued two separate notices addressing prohibited transactions. Fearing that these notices would extend to the tax shelter scheme, plaintiffs sought advice from Proskauer. The law firm concluded that the tax shelter was not substantially similar to the prohibited transactions described in the IRS notice and therefore was likely permissible. As further assurance, Proskauer counseled that their opinion, in conjunction with the previous opinion from Sidley, would provide a defense shield in the event the tax shelter came under scrutiny by the IRS. Despite these assurances, plaintiffs were later investigated by the IRS and fined millions of dollars in back taxes, interest, and penalties for their involvement in an abusive tax shelter.

Based on the facts outlined above, plaintiffs filed suit alleging that multiple parties, including KPMG, Proskauer and Sidley, formed an enterprise with the common purpose of convincing wealthy taxpayers to participate in an illegal scheme for the purpose of collecting professional fees. Plaintiffs based their claims on RICO and the Securities Act of 1934. Proskauer, the lone defendant in the case after all other parties settled with the plaintiffs, moved to dismiss the complaint. After the district court granted Proskauer’s Motion to Dismiss, the Fifth Circuit considered the following two issues on appeal: (1) whether the RICO claims were barred by the Private Securities Litigation Reform Act of 1995 (“PSLRA”); and (2) whether plaintiffs failed to sufficiently plead the 10(b) element of reliance.

As noted by the Fifth Circuit, the PSLRA bars any civil RICO claims based on conduct that would be actionable under the securities laws. Thus, the allowance of plaintiffs’ RICO claim depended on whether the court considered their investment contracts in the tax shelter to constitute “securities.” To determine if the investment contracts were securities, the court looked to the elements identified by the Supreme Court in *SEC v. W.J. Howey, Co.* 328 U.S. 293 (1946): “(1) an investment of money; (2) in a scheme functioning as a common enterprise; (3) with the expectation that profits will be derived solely from the efforts of individuals other than investors.” Despite plaintiffs’ argument that they largely owned the investment entities used to perpetuate the tax scheme, the appeals court noted that their control was theoretical rather than actual. Since the tax shelter was actually managed by various investment consulting and brokerage entities, the court reasoned that plaintiffs’ “investment” contracts were actually “securities.” Thus, the Fifth Circuit upheld the district court’s dismissal of the plaintiffs’ RICO claim.

The second half of the *Proskauer* opinion draws a bright line between primary and secondary liability. Although the Supreme Court found an implied private cause of action in section 10(b) in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta Inc.*, 552 U.S. 148 (2008), there is no private cause of action for aiding and abetting a section 10(b) fraud. Thus, in order for plaintiffs to prevail against Proskauer they were required to plead sufficiently the following six elements in their complaint: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a

security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

The Fifth Circuit, in agreement with the district court, found that plaintiffs did not sufficiently plead the element of reliance. In coming to this conclusion, the court followed the standard in *Stoneridge* for holding secondary actors, such as lawyers or accountants, liable. This standard, referred to as attribution, holds secondary actors liable only for false statements attributed to them at the time of dissemination. Absent attribution, plaintiffs are incapable of making a claim against a secondary actor for primary liability. Although the court conceded that plaintiffs’ allegations painted a clear picture of Proskauer’s involvement in the tax scheme, the complaint also reveals that plaintiffs agreed to participate in the investment prior to receiving Proskauer’s opinion. Since Proskauer’s opinion was only disseminated to plaintiffs after they had already agreed to the tax scheme, plaintiffs could not prove attribution, and reliance was therefore lacking. In light of this failure, the Fifth Circuit upheld the dismissal of plaintiff’s 10(b) claim.

In explaining the significance of its opinion, the court opined that its adoption of the attribution requirement was intended to mark a clear boundary “between primary violators – who are open to liability in private securities actions – and aiders and abettors, to whom the private right of action under section 10(b) does not extend.”

First Amendment: Texas Pledge and the Establishment Clause,

Croft v. Perry, 624 F.3d 157 (5th Cir. 2010).

In this case, David and Shannon Croft along with John and Jane Doe challenged the addition of the phrase “one state under God” to the Texas Pledge of Allegiance. They also challenged the provision of the Texas Education Code requiring students to recite the pledge daily unless parents opt out of the requirement. The district court found that the plaintiffs only brought a facial challenge, and held that the pledge and code provision did not violate the Establishment Clause of the First Amendment under any applicable test. The Fifth Circuit affirmed.

The Texas Pledge of Allegiance was modified in 2007 by the state legislature to read “[h]onor the Texas flag; I pledge allegiance to thee, Texas, one state under God, one and indivisible.” TEX. GOV’T CODE ANN. § 3100.101 (West 2008). The plaintiffs argued that the pledge and code violated the Establishment Clause in four ways: (1) the use of the singular term “God” favors monotheistic over polytheistic beliefs (sect preference); (2) “the amendment does not have a secular purpose or effect, as any stated purpose is pretext for a religious motivation” (*Lemon* test); (3) the pledge affirms that Texas is organized “under God” and impermissibly endorses religious belief (endorsement); and (4) the required recitation by students in schools pursuant to Texas Education Code § 25.082 coerces religious belief (coercion).

On appeal, the plaintiffs claimed that the district court erred by treating their complaint as a facial challenge rather than an as-applied challenge. The Fifth Circuit reviewed the plaintiffs’ four claims and noted that none of them were limited to the

circumstances of the plaintiff. Instead, the plaintiffs sought to have the entire pledge invalidated. Therefore, the Fifth Circuit agreed with the district court that these were facial challenges, and concluded that to prevail the plaintiffs must show that there is no set of circumstances in which either the recitation requirement or the language of the pledge is constitutional.

In evaluating the sect preference claim, the Fifth Circuit adopted Justice O'Connor's reasoning that the reference to God is to a generic God rather than any specific deity. The Court found that the term God was generic enough to acknowledge both monotheistic and polytheistic beliefs.

Under the *Lemon* test, a statute violates the Establishment Clause if (1) there is no secular purpose; (2) its primary or principal effects either advance or inhibit religion; or (3) it "creates excessive government entanglement with religion." The Fifth Circuit examined the legislative history of the provision and determined that the stated purpose to mirror the national pledge is a permissible secular purpose, and that the purpose is not defeated because there is a religious element. Under the second prong, the Fifth Circuit rejected the plaintiffs' argument that the court must only consider the effect of the inserted phrase rather than the pledge as a whole, citing to Supreme Court cases for the proposition that the context and the "whole of the thing" matters. The Fifth Circuit found that there was no compelling reason to believe that the inserted phrase endorses religious belief, and held that the pledge satisfied the second prong of the *Lemon* test.

The court dismissed plaintiff's third argument of endorsement, noting that the analysis was essentially the same as the second prong of the *Lemon* test. The Court briefly reviewed the claim under *Lynch v. Donnelly*, 465 U.S. 668 (1984), and reaffirmed its finding that given the context, the pledge does not endorse religion.

Finally, the Fifth Circuit addressed the coercion challenge to § 25.082 of the Texas Education Code. The plaintiffs argued that a teacher-led recitation of the pledge places psychological coercion on the dissenting students to participate. The Fifth Circuit explained that there must be a "formal religious exercise" in order to constitute an unconstitutional coercive act. Here, the Fifth Circuit determined that the recitation of the words "under God" in the context of a pledge is not a formal religious exercise. For these reasons, the Fifth Circuit held that neither the pledge nor the challenged code provision violates the Establishment Clause of the First Amendment.

**Class Action:
Mandatory Limited Fund Class Certification,**
In re Katrina Canal Breaches Litig., 628 F.3d 185 (5th Cir. 2010).

In the wake of Hurricanes Katrina and Rita, a plethora of lawsuits were filed by residents of the greater New Orleans area who were harmed by flooding. The complaints were consolidated in the District Court for the Eastern District of Louisiana and divided for case management purposes into several categories. The "Levee" and "MRGO" plaintiffs obtained certification and approval from the district court for a limited fund mandatory settlement class under Federal Rule of Civil Procedure 23(b)(1)

(B). Under the relevant terms of the proposed settlement, the class would receive roughly \$21 million, representing the limits of available insurance proceeds in exchange for releasing all claims against the settling defendants. Two groups of dissenting class members objected to the settlement and appealed to the Fifth Circuit, arguing that (1) the proposed class did not qualify as a Rule 23(b)(1)(B) class, (2) the settlement did not benefit the class and (3) the content of the notice was deficient and misleading in violation of due process.

In reversing the lower court, the Fifth Circuit noted that a "limited fund" action, "which aggregates numerous claims against a fund insufficient to satisfy them all," is one type of class action traditionally encompassed by Rule 23(b)(1)(B), but found that the *Katrina* plaintiffs failed to meet the stringent requirements for such actions set forth by the Supreme Court in *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). In *Ortiz*, the Supreme Court counseled against the "adventurous application" of Rule 23(b)(1)(B) but declined to rule on the constitutionality of a mandatory mass tort class certification. Instead, the Supreme Court outlined three "presumptively necessary" characteristics of a traditional limited fund: (1) the maximum liquidated claims and maximum available funds demonstrate inadequacy to pay all claims, (2) the whole of the fund is devoted to the overwhelming claims, and (3) plaintiffs "identified by a common theory of recovery are treated equitably among themselves." With respect to the third element, the Supreme Court indicated a preference for straightforward, pro-rata distribution, but acknowledged that the unattainability of pro-rata damages would not necessarily disqualify a case from Rule 23(b)(1)(B) certification so long as the settlement provided for fair distribution amongst the claimants in the class. In this case, the Fifth Circuit found that this third element could not be satisfied because "class members suffered a wide variety of injuries, ranging from property damage to personal injury and death, and no method is specified for how these different claimants will be treated vis-à-vis each other." The appointment of a special master to establish a protocol for the settlement fund "simply punts the difficult question of equitable distribution ... without providing any more clarity as to how fairness will be achieved."

The Fifth Circuit also agreed with appellants that the record did not demonstrate that the settlement would benefit the class in any way, as required by Rule 23(e). Specifically, although class counsel waived attorneys' fees, they retained the right to seek reimbursement of "enhanced" costs and expenses. Because the record contained no indication as to what these attorneys' costs would be, it was error to approve the settlement "without any assurance that attorneys' costs and administrative costs will not cannibalize the entire \$21 million settlement." Furthermore, the Fifth Circuit ruled that "enhanced" costs were the functional equivalent of attorneys' fees, and noted that it was abuse of discretion to approve a class action settlement without determining that any attorneys' fees claimed are reasonable.

Finally, the Fifth Circuit, assuming that a *cy pres* distribution was likely, permissible and feasible, found that the lower court did not direct reasonable notice to the class because "the notice did not inform class members of the possibility that they would not receive any direct benefit from the settlement." ■



ADVICE FROM THE BENCH: An Interview with Chief Judge Ricardo Hinojosa

by Marcos Rosales

IN 1983 RICARDO HINOJOSA WAS SWORN IN as the youngest-serving Article III judge in the country. After 27 years of presiding over thousands of civil and criminal proceedings, Judge Ricardo Hinojosa was presented with a new set of challenges. A year before sitting down with me at the Federal Courthouse in McAllen, Judge Hinojosa took over as Chief Judge of the United States District Court for the Southern District of Texas. In addition to his regular docket of civil and criminal cases, his obligations as a Commissioner and previously as Chair of the United States Sentencing Commission, Judge Hinojosa assumed the administrative responsibilities for managing one of the largest and most diverse district courts in the nation. Judge Hinojosa was kind enough to discuss his first year as Chief Judge as well as offer some advice for how civil litigators can better serve their clients while practicing in federal courts.

Judge Hinojosa, where are you from?

I am originally from Rio Grande City, Texas and I lived there until I graduated from high school. I attended the Immaculate Conception School for 8 years and then Rio Grande City High School. After graduating from high school I received my bachelor's degree at the University of Texas at Austin and went to law school at Harvard.

What was your first job out of law school?

I clerked for Justice Tom Reavley on the Texas Supreme Court and then joined the firm of Ewers & Toothaker in McAllen, Texas. I had five job offers, and Ewers & Toothaker was the lowest paying of the five, but I wanted to come home. Like many others, I had student loans to pay off. However, it was one of the best decisions I have ever made.

What kind of work did you do at Ewers & Toothaker?

I spent about 7 years at the firm. I had a number of business clients and a regular office practice. I did some litigation, and I did municipal work for the City of Hidalgo. I had done some federal court criminal appointments, as everyone licensed in the Brownsville Division of the Southern District of Texas received criminal appointments. That was the extent of the criminal work I did in my practice, but it served me well with regards to presiding over criminal cases when I became a judge.

Tell me about how you ended up on the bench.

Becoming a federal judge was never a goal of mine. At the time the vacancy came up, I was very involved in Republican politics. While engaged in my undergraduate studies at UT, I was employed at the Republican Party's state headquarters. Following my return to the Rio Grande Valley, I became the Hidalgo County Chairman of the Republican Party. I even ran in

a special election for the state senate. When the federal vacancy came up, I decided that I wanted to be considered.

The vacancy was created in the Brownsville Division when Judge James DeAnda decided to move from the Valley to fill an opening in Houston. Senator John Tower recommended me to President Reagan who nominated me in 1983. I was confirmed by the Senate that same year. I came to McAllen in 1988 after the creation of the McAllen Division.

Judge, as we conduct this interview, you have just completed your first year as Chief Judge of the Southern District of Texas. What has this year been like?

There are 94 district courts in the United States. The Southern District of Texas is one of the largest in terms of our geographic area, number of judges and the caseload. This makes for challenges, but I have had some great examples in my predecessors. Since I joined the bench, I have observed the examples of John Singleton, James DeAnda, Norman Black, George Kazen, and Hayden Head serving in the role of Chief Judge. One of the interesting administrative challenges is the docket diversity of the divisions encompassing the Southern District of Texas. We have some Divisions with very heavy criminal dockets and others with challenging civil dockets. Here in McAllen, we have a heavy criminal docket, but we also have a good amount of civil work. The balance I see here is helpful in understanding the administrative needs across the district. I do believe the Southern District of Texas Chief Judgeship is easier because we have a collegial court. I applaud the efforts of our judges and have no doubt we will continue to ensure our dockets are managed efficiently.

What are some of the issues we can expect to deal with in the years to come?

We have been experiencing an increase in criminal cases along the southwest border for a few years now, impacting our

courts in Laredo, McAllen, Corpus Christi, and Brownsville. We also have an increasing population in South Texas and in Houston. With the increase in criminal cases and the increase in population, we are continually working harder to keep up to date with our dockets. In the Southern District, we are very fortunate with the bar practicing before us. There are good civil attorneys who represent their clients well and efficiently. On the criminal side of the docket, the U.S. Attorney's Office, public defenders, and the private sector criminal defense lawyers also handle their cases well and efficiently. On the whole, we are very pleased with the quality of the bar. The quality of our bar will help us address the administrative issues we will have in the years to come.

Judge, the publication in which this interview will appear is targeted at civil litigators. So let me ask, what do we get wrong?

In short, very little. That being said, civil practice sometimes gets mired in discovery disputes. We have tried to develop discovery plans. I understand the desire to have access to *everything*. But initial conferences may help to narrow certain aspects of a case. It is beneficial and important to involve the judge early on – before discovery has gotten too expensive. Additionally, it is important to understand the heavy criminal docket and how it interacts with scheduling. Another challenge today is that with more and more

federal legislation, more litigation comes into federal courts. It leads to specialization in federal laws, procedure, and local rules. I cannot overemphasize the importance of becoming familiar with local rules and a specific judge's rules. One thing that may not be clear to litigators is that judges and their staffs need to spend time to prepare for hearings. Therefore, late filings should be curtailed so that the judges will have adequate time to review all filings.

How can we represent our clients better?

Lawyers are attorneys and counselors at law. It is acceptable to counsel clients that the way they view a certain issue may not necessarily be the way the law comes out on that issue. It is okay to suggest compromise when appropriate. Attorneys have to spend time with their clients explaining legal possibilities and exploring all the facts. Attorneys have to discuss with their clients whether negotiation may be more beneficial to their interests.

What advice would you give to a young lawyer?

Just remember that the most important quality you have is your integrity. You cannot put a price on it. Everyone should strive to maintain a good reputation. It is in your own best interest as well as your client's best interest to not let your integrity be challenged. ■



MINDFUL OF THE METHOD: Why Lawyers Should Revisit That Old Socratic Madness

by Gretchen Sween

*I am so far like the midwife that I cannot myself give birth to wisdom,
and the common reproach is true, that, though I question others,
I can myself bring nothing to light because there is no wisdom in me.*

— Socrates, in Plato's *Theaetetus*

LET ME TAKE YOU BACK TO THOSE ROLICKING GOOD TIMES you had in law school thanks to the “Socratic method.” Remember that game? Did it do anything for you? Is there some way those happy memories can be mined to enrich your present life as a practicing lawyer?

I say, “Yes!” The specter of a bald, bearded, pot-bellied Athenian in a dusty chiton really can help you as you labor over that responsive brief late into the night and wonder about the meaning of it all. That is, the goal of this essay is to prompt some gratuitous thinking about the limits created by The Law.

Your skepticism is palpable. You're a busy litigator! You have more than enough demands on your time. I can practically feel your fingers reaching to flip the page in search of far more practical articles about the latest developments in the Fifth Circuit or tips on managing e-discovery. But skepticism is an entirely appropriate response. After all, skeptical thinking is the fundamental force underlying the entire history of Western civilization.

So, if musings be the food of thought, read on. . . .

Before I went to law school, I thought I knew a thing or two about Socrates. Before law school, I had spent seven years teaching introductory philosophy, among other things, to undergrads. I was, therefore, familiar with Plato's *Dialogues*, those mini-plays, sorely lacking in drama because Socrates almost always plays the lead role—and almost always has the last word. I knew that those *Dialogues* are credible evidence that a person can be a failed playwright and still be a rather provocative philosopher. But when I decided to go to law

school, I had no clue how much had gotten lost in translation when some joker at Harvard back in the Dark Ages got the bright idea that the best way to teach The Law was through a shadowy approximation of the “Socratic method.”

Indeed, as a bemused 1L, I was appalled that this thing that went on in law school classrooms was blamed on Socrates.

“They should call what they are doing by another name. Something like the ‘I-Know-But-I-Ain’t-Telling’ method!” I recall railing to my husband. “After all, isn’t law school supposed to encourage precise language?”

Admittedly, the dynamic of many law school classes resembles a Socratic dialogue in that those who get caught up in a conversation with Socrates generally end up looking like an ass. And in some instances, the other speaker in a dialogue, whose name is usually “Glaucou,” is only engaged in a “dialogue” in the lamest sense of the word. In *The Crito*, for instance, Glaucou says little more than “Yes, Socrates,” “Very astute, Socrates,” “I never thought of it that way before, Socrates.” But there ends the parallel between Socratic dialogues and most law school inquisitions. Or so I thought.

Back then, I thought it was unfair and inaccurate to call something “Socratic” that amounted to wasting a big chunk of time forcing some poor schmoe to “recite the facts” of a “case” that all of us had supposedly read (among the twenty or so assigned for the day). This ritual had nothing to do with Socrates as far as I could tell. It was just boring—and needlessly mean-spirited. Socrates’s skill at deflating arrogant windbags may have earned him the nickname “the gadfly of Athens,” but he was no sadist. When Socrates decided to make someone look like an imbecile, it was because that person had sauntered up to him in some public place and mouthed off about how he’d figured out the essence of morality—or some similar topic. Socrates would then follow through, to see if Mr. Profundity’s theory really hung together. Socrates didn’t go out of his way to set people up. He didn’t randomly call on some quivering, sleep-deprived soul and force him to perform parlor tricks in front of an auditorium of over 100 peers, many of whom were eager to see him fail. Aside from a personal dislike of blowhards, Socrates engaged in question-laden dialogues in response to a specific social concern: the rise of the sophists.

The sophists were super-smart guys who were paid to dissect and develop clever arguments. They were master

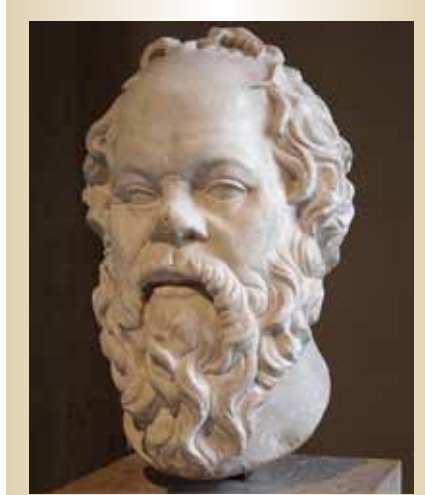
rhetoricians. They gleefully straddled both sides of the fence. They were, come to think of it, a lot like lawyers. Socrates hated these guys for several reasons. First, he believed that pretty speeches had no inherent value. He preferred bantering, the meandering, tentative, and continuous quest for some morsel of truth. Second, he believed in subjugating the ego to those higher truths by accepting the inevitable limits of a person’s ability to truly **know** something. Third,

he did not like the way sophists saw their skills as commodities that could be bought and sold in a market place. He preferred sitting around with a bunch of guys drinking wine and discussing the true nature of love, for instance. For him, dialogue was an end in itself.

But mostly, Socrates hated the sophists because they were relativists. Socrates believed in absolutes—the Good, the True, the Beautiful—as phenomena much bigger than mere individuals. And he believed we had an innate longing for true knowledge, but it got crudded over with the barnacles of petty existence, preventing us from **remembering** what was there from the start. Socrates (at least as portrayed by Plato) was a mystic. The sophists, by contrast, believed that studying a series of systems is a good idea and that the road to success was paved by learning an insider’s language that simultaneously dazzles and daunts the uninitiated.

Of course, obsessing about how Socrates’s name was being taken in vain did not help my mood any during those first few weeks of law school. As my spirit careened straight downward from heights induced by utterly unrealistic expectations, I concluded that the law seemed inherently sophisticated. I saw this as sad proof that the sophists had gotten their revenge on the gadfly of Athens in a way far more potent than hemlock. Thanks to law professors, approximately 40,000 people each year come to associate Socrates with electroshock therapy. That, I concluded, is all you could say about the relationship between The Law and Socrates.

But a bit later in my 1L year, a faint, energy-efficient light began to glow. I started to feel as if I understood what law schools meant when they promise to teach a person how to “think like a lawyer.” It didn’t just mean “thinking like a sophist.” Thinking like a lawyer required adopting a certain skepticism about one’s own knowledge base; it required an objective approach to probing the reasoning that led a court to reach a particular holding; and it required recognizing the



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SEE HIM FAIL.**

essential challenge of The Law: the problem of line-drawing.

Okay, The Law is really two things. First, The Law is a process whereby a community decides where and how to draw a clear line between “okay” and “not okay.” Second, The Law is a body of information: a compendium of lines (rules, tests, standards) that have already been explicitly codified or that can be gleaned from precedent. Making the law means deciding on the rules that get codified. Enforcing the law means applying the rules to actual behavior in the real world. Adjudicating the law means testing the fit between those rules and the actual facts of a given

case in light of previous attempts to assess the fit between the same or similar rules and different sets of facts. Through the Socratic method, law professors awaken their students to the truth about this law business—and the fact that it is a hopelessly paradoxical enterprise. That is, their variation on the Socratic method teaches that the goal of The Law—line-drawing—is both essential and impossible. And because it is essential, lawyers and judges pretend that it is not impossible.

Much of modern philosophy is about exposing the hopelessly fuzzy nature of borders and the limits of the truly knowable. That is, Socrates’s essential mission—the quest for absolutes like the Good, the True, and the Beautiful—has been abandoned by most philosophers. Even science, an offshoot of philosophy, has spent much of the past century or so deconstructing the very notions of essentialism and clearly discernible boundaries. Indeed, the Greatest Hits of Twentieth Century Scientific Innovation could be aptly dubbed “The Triumph of Fuzzy Borders.” Consider quantum physics, which at the most basic level of physicality, blurs the distinction between waves and particles and relies on retroactive causation. And cosmology teaches that the universe itself has no outer boundary, but continues to move away from a singularity in all directions. Then there is chaos theory, which provides insights into the dynamics of non-linear systems, such as weather, the formation of coastlines, and the stock market, which produce patterns—but patterns that can **never** be predicted with any certainty from one moment to the next because their “initial conditions” are highly sensitive to even the most subtle kind of feedback. And of course there is the development of modern psychology-neurobiology, which has successfully dismantled the long-cherished belief in mind-body dualism. Moreover, anyone who has spent any time studying genetics (or raising a kid, a pet, or a plant) will tell you that trying to separate the precise boundary between DNA and environmental influences is impossible—not just because of **current** epistemological limitations but because, from the outset of life (another fuzzy boundary), the feedback between genes and environment is so pronounced that the contributions of each set of variables cannot be ascertained with apodictic certainty. Ever.

THANKS TO LAW PROFESSORS,
approximately 40,000 people
each year come to
associate Socrates with
ELECTROSHOCK THERAPY.



So, scientists have pretty much embraced the perspective of existentialist philosophers—at least in their professional capacity. That is, contemporary science and philosophy both accept that many natural phenomena are most accurately described as having ambiguous boundaries, best expressed in terms of probabilities and trends rather than rigid, singular determinations. Therefore, “right answers” to certain kinds of questions will often be expressed in terms of a **continuum** instead of a hard number.

And well before scientists found their way to wave-particle duality, evolution, psychoanalysis, the double helix, and the general realization that boundaries are porous things, and even

before philosophers rejected the mission of its founding members, exploring the jagged nature of human experience has been canvassed by plenty of poets. (If you don’t believe me, go read some Euripides or Shakespeare or Wallace Stevens.)

What seems peculiar about The Law is that, while law school itself teaches future lawyers to recognize the somewhat tortured, arbitrary nature of the line-drawing process, this teaching is accomplished implicitly, through experience. And when exam time comes, law professors still expect students to articulate precise rules and tests and standards as if they were Newtonian laws of nature although, thanks to the law school version of the Socratic method, everyone recognizes that these “bright-line rules” are largely a function of short-term, practical necessity. These rules are just rough approximations of Justice that are always subject to adjustment or even a complete overhaul if they prove to be unworkable in real life.

The Law is replete with attempts to draw lines that people then pretend are crystal clear: statutes of limitation, the rule against perpetuities, the test for assessing the constitutionality of a restriction on commercial speech, the standard for deciding whether a patent is invalid as a matter of law. But isn’t most litigation about accusing some entity of crossing over some line or another—and then fighting tooth and nail to shape the way a supposedly disinterested fact-finder will apply The Law (as presented) to the facts (as presented) to reach a conclusion, if not necessarily The Truth?

Don’t get me wrong. An affection for bright-line distinctions is not necessarily a bad thing. This predilection reflects the quintessential human fantasy: the desire to wrest order out of chaos. And those who make and interpret the law like bright-line rules because they seem more orderly, more predictable. But no matter how deftly judges and legislators try, they cannot parse language finely enough so as to create stable, let alone absolute, answers about what a given community has decided is okay. Language, the medium of lawmakers, is perpetually fluid. And the legislators and judges who try to draw these keeping-chaos-at-bay lines can never predict all the ways they have come up short until **after**



THAT MOTTO, “KNOW THYSELF,” IS REALLY A **WARNING.**

their efforts have been put to the test.

If you remained moderately conscious during your first year of law school, you must remember noting how Sisyphean the whole project seemed—or worse, how irredeemably arbitrary. Remember that infernal fox case? It wasn't the guy who'd prepared for days and schlepped over hill and dale chasing the fox that The Law rewarded with ownership rights. It was the guy who'd appeared out of nowhere, at the very last second, and merely laid hands on the little critter first. That case came out the way it did because the arbiters of The Law had decided, quite reasonably, that trying to sort out the true meaning of Ownership would be hopelessly complicated and that a clear boundary between ownership and non-ownership was better (read “more manageable”) for civil society. Therefore, the person in possession prevailed, not necessarily True Ownership or Cosmic Justice.

We all got it. At least eventually. A decision had to be made—and not just because the fox carcass was rapidly decomposing. People have to move on with their lives. And those who come along later need some guidance about how to resolve similar kinds of disputes without killing each other. The Law must provide a little structure to define the contours of the next, slightly different fight—next time over who owns a living rabbit, for instance. And so on, *ad nauseam*.

But outside of the law school context, perhaps the tremendous compromise that the fox case represents is not so apparent. Perhaps we do not discuss often enough the fact that this compromise was *consciously* embraced to serve pragmatic interests. Perhaps practitioners do not remind the world often enough that hard edges in The Law are largely *constructs*. Constructs with some practical value, to be sure, but nevertheless constructs, not the *ding an sich*. Clarity, certainty—these are all terrific values. I'm a big fan. But perhaps the art of crafting and interpreting The Law would be enhanced somewhat by occasional reminders that few boundaries are truly rigid and that a great deal of fuzziness characterizes the transitions between many states—matter/energy, liquid/gas, guilt/innocence, human/non-human, living/non-living. Indeed, some of the ugliest episodes in legal history involve attempts to cling to hard distinctions—based on race, gender, mental capacity—where one side of a fuzzy boundary was defined as good/entitled/capable and the other was not.

Perhaps, in seeing bright-line rules as a tool to *curb* arbitrary adjudications, The Law has been unduly optimistic or cynical; it is hard to say which. At least in some circumstances, clinging to bright-line rules may be more likely to *engender* arbitrary results. This should come as no surprise to students of The Law, who know that all manner of tests once considered to be based on “bright lines” have been expressly abrogated or faded away. In truth, most lawyers' bread-and-butter involves

cognizance that there are very few bright lines or certainties of any kind in the quagmire known as litigation. Even facts are never as wonderfully solid as we like to imagine. Facts, like the law, are subject to interpretation—a process that takes place in a context that is forever shifting, thereby continuously affecting the variables that impinge upon the interpretation.

In short, some nuance is frequently missing from certain legal debates—about how best to define the border between Texas and Mexico, about what kinds of marriage contracts states may sanction, about how to determine who is mentally retarded and thus exempt from execution, about the difference between “strict construction” and “judicial activism,” and about the need for balanced budgets. No matter how *personally* attached we may be to bright-lines, lawyers know *professionally* that borders—whether they are made out of matter, facts, or law—are rarely digital. Working to inject this insight into more high-profile legal debates might ultimately help more lawmakers and judges resist the urge to seek refuge in bright-line cutoffs that do not always (or even often?) allow us to best approximate Justice.

And when we talk to clients about what they might expect from the judicial process, when we struggle to manage their expectations, perhaps we should occasionally share with them the truth about The Law. Perhaps, for instance, we should explain how it is a hopelessly compromised operation. Lines must be drawn; yet those lines will not always be fair. Sometimes challenging where the line has been drawn is really important; sometimes resignation is the better course. But despite all this, one should not despair. The Law is a noble enterprise precisely because it demands that we see how essential *and* impossible it is—and yet refuse to drink the hemlock.

This commitment to an impossible, but essential, quest is what Our Man Socrates, with his pesky questions, was all about. To the uninitiated, what lawyers do in the service of clients can look a lot like sophistry (and sometimes is). But if we drill down deep enough and think hard about this work that we do, we can see that we are actually engaged in a living Socratic dialogue. And we can avoid settling for sophistry if we are mindful of Socrates's motto, adopted from the Oracle of Delphi. That motto, “Know Thyself,” is really a warning—about the limits of the knowable and the importance of starting every inquiry with a presumption regarding our own ignorance. By approaching every legal inquiry methodically, one probing question after another, we can see that the Rule of Law, the very engine of any robust society, is inevitably about drawing lines in the sand, an essentially indeterminate medium. But thanks to Socrates, perhaps some days the method itself is reward enough.





WHAT MAKES A GREAT TRIAL LAWYER?

An Interview with Mark Lanier

by Lisa Blue

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IHAVE BEEN A PSYCHOLOGIST FOR 32 YEARS and a trial lawyer for 30 years, and for the last two decades I have been focused on the question “What makes a great trial lawyer?” When I say to a colleague, “You are a great trial lawyer, but do you know what you do that makes you great in trial?,” I have never gotten a satisfactory answer.

Is part of what makes a trial lawyer great genetic, or do environmental factors play a role? Are there elements of being a great trial lawyer that are “teachable”? As a jury psychologist and trial lawyer, my goal is to find these qualities and teach other lawyers how to improve what they do in trial to get the best results for their clients.

Mark Lanier—who is perhaps best known for winning the first Vioxx trial in 2005 but who has achieved tremendous success for injured people throughout his 27-year career—seemed like the perfect “subject” to start with. Mark founded the Lanier Law Firm in 1990; it now has offices in Houston, Los Angeles, New York City, and Palo Alto, California, and employs 150 attorneys and staff. In our conversation, he generously shared his thoughts about his practice, his faith, his family—his wife, Becky, and their five children—and how he keeps working at becoming the best trial lawyer he can be.

Is there any particular experience or event in your life that you think made you who you are today?

Yes, a number of them, but a few stand out in my mind. I moved around a lot as a child, and I learned how to make new friends every year because my old friends were gone. This was pre-Internet, pre-Facebook, pre-ability to keep up with people electronically, so I just made a brand-new set of friends every time my family moved.

You know, you figure out how to get along with different people, you figure out how to start all over again. You figure out different ways of talking, different ways of thinking, different ways of listening.

Another thing is I worked in a neighborhood grocery store from about ninth grade through law school. I learned how to greet people and get to know people. The owner of the store taught me that the reason the store existed was because people liked to come in. So my goal, as much as checking them out or stocking the shelves or sweeping the floor, was to make sure everybody that came in was glad they came in.

I know your religious faith is a central part of your life. Tell me a little bit about how you use it to make you a better trial lawyer, a better person, a better father.

Well, some people are stunned to learn this, and I try not to wear it on my sleeve because I think everybody’s decision about religious faith is highly personal. I’m not in the business of trying to shove what I believe down someone else’s throat, but I really believe that there is a personal God. I believe He cares about what goes on in this world. He cares about us and what we do. His greatest desire is that we walk in a relationship with Him.

And so my goal is to try to understand God to the best of my ability and to be in a relationship with Him. If my goal is to walk with God in humility and love, that changes the way I treat people and the reason I do my work.

When you are in trial, how do you use your relationship with God to give you strength to go into court every day and do battle for your client?

Because of my faith, I believe that I’m out there doing what I’m supposed to be doing. From the way I perceive things, my responsibility—what God would have of me—is to be honest, to be forthright, and to try my hardest. I’m not responsible for the consequences; I’m responsible for my behavior. And if I’m not responsible for the consequences, and I think there’s a higher and better good, it really frees me up from a lot of stress and pressure.

Give me an example.

Well, we tried the first Vioxx case, and it was a really difficult case for me physically. I was undergoing some heart issues at the time that I didn’t let people know about. (Since then, they’re fully resolved. I had good surgery, and I’m a spring chicken.)

But I can remember walking into the courthouse before closing argument, wondering, “How am I going to do this? How is this trial going to turn out?” The case was very important. Lives were at stake, the drug business was on trial, and the legal system was on display. The media were everywhere—every television station had a camera there, every independent written press outlet sent a reporter.

And the passage from the Bible that was reverberating in my brain as I walked into the courthouse—and I remember it like

it was yesterday—was the passage where God says, “My grace is sufficient for you.” I remember thinking, “You know, I’m giving this my best shot. I’m not perfect, I mess up, I make mistakes, but God knows all of that, and His grace is sufficient for me—win, lose, or draw. My goal is just to go in there and give the best possible closing argument I can.”

In the couple of hours before you walk in the courtroom, what do you do to prepare yourself to present your client’s case to the jury?

I would say there’s a combination of three things.

Number one is preparation. There is no substitute for it. You can have the most talent in the world and be beaten by a lack of preparation. So regardless of your talent level, whether you are a 1 or a 10, make your preparation a 10. That takes away a lot of stress.

Number two, I find time for prayer. I typically will read a Scripture passage that gives me something to meditate on. One of the Psalms, for example, that has meant a lot to me through a lot of trials, talks about David getting ready for battle. It says, “Some trust in the chariot and some trust in the horse, but we’ll trust in the name of the Lord our God.”

I love stuff like that because it reminds me of my place—my role and my responsibility. I’ve got a responsibility to prepare and to be honest and to be the good advocate that I can be.

The third element that helps me is just making sure I’m in the right frame of mind. I’m careful who I’m around in the morning before I go to court. I always try to talk to my wife and kids. They’re my anchors. They keep my feet in the real world and help me remember that there is a life outside the courtroom.

You mentioned the importance of preparation. What are some techniques you use to prepare a case?

I’ve learned some great tools from the masters at this, one of them from you. When I was talking to you about a case, you looked at me and said, “OK, tell me the case’s three biggest strengths and its three biggest weaknesses.” This is the way you approached learning about the case to see whether or not it was a winner. And I thought, what a wonderful way to start getting your feet wet with a case.

And, so, one of the first things I do is think about strengths and weaknesses. I am a firm believer in telling the truth. I haven’t always been there as a trial lawyer, in this sense: I used to think our responsibility was to tell our side of the truth. But I’ve decided now that my goal as a lawyer is to tell the whole truth. I will take the truth that doesn’t support my side, and I will incorporate it into my story.

A case that really brought this home to me was one where I represented the widow of a man who walked into an oncoming train and was killed. At trial, we stood up and told the jury that the man was at fault, that I could think of at least two things—maybe three—that he did wrong. But the train company was at fault as well, and I told the jurors that I could list nine reasons why that was true.

The train company would admit none of this and said it was

all the man’s fault. They told their version of the truth only.

Well, the jury sees through that and says, “You know, the plaintiff’s story has got credibility. The lawyer put down on the board two things his client’s husband did wrong and nine things the railroad did wrong.” So the jury gives the widow about \$4 million and assigns 80 percent responsibility to the railroad and 20 percent to the plaintiff.

It’s an incredibly liberating aspect of trying a case to stand up and honestly say to the jury, “Here are the strengths and here are the weaknesses of my case, and I will always tell you the whole truth. The story has good, bad, and ugly, and I’m going to lay it all out there.”

That only comes from strong preparation. That only comes from embracing the truth. I think it becomes readily transparent to the jury, and I think it works.

Let’s talk a little about how you manage your firm. I noticed that your staff is extremely loyal to you. How do you get your staff to that point?

I try hard to treat them the way I’d like to be treated if I were in their shoes, to let them know what they’re doing is important and valuable, to treat them with respect regardless of their position or their place on the salary list, and to give them a nice place to work.

And how do you criticize them or get them to change their behavior when needed?

It all depends on the person and the nature of the crime. Let me give you a couple of examples.

I have had “trusted others” within the firm address the matter for me. They might say something like, “You don’t want Mark to speak to you on this, but here is the problem and here is what you better do.”

I have had sit-down sessions where I bluntly, but with compassion (I hope), tell the person, “You are doing X. It must stop. This is your measure of grace, and by that I mean your warning. If this does not stop, you will leave me no choice but to let you go. It is not what I want to do, because I value you as a person. But I am responsible for this law firm, and what you are doing is hurting the firm and has potential to hurt the people who work here or the clients represented here. Either way, I have a responsibility to prevent that. So I need you to get after it now.”

I have given that speech five times over the last 20 years. Two of those times the person failed to respond, and I politely but firmly let them go. The other three flipped a switch, did a 180-degree turn, and have been as solid as a rock.

With your busy trial schedule, how do you find time for a life outside the courtroom? How do you divide your time between trial work, running a huge law firm, and being with family?

I don’t like to sleep, so I try to get in 18 to 20 waking hours a day. I travel a lot, but that gives me a lot of time to read.

When I’m home, I try to be home as much as I can. And I try hard to plug into my kids’ activities. I coached our son’s

basketball team for eight or nine years in a row.

I love to cook—we'll do cooking as a family activity.

I don't watch a lot of TV, but when I do, I try to watch with family. I think I've seen every episode of *Hannah Montana* and *iCarly*.

Do you really watch those shows, or are you working or doing something else while your kids are watching?

No, I watch them. The kids know it, too. I can quote the lines. "What has two thumbs and has seen every episode of *Hannah Montana*? This guy." It's a *Hannah Montana* joke.

I don't try cases without first sitting down with my children and saying, "Here's this case. If I try it, it's going to take me away from home, except the weekends, for six or eight weeks. That's a huge chunk of your life and a huge chunk of mine, and I don't want to do that unless you agree with me that this is something that it's worth us doing."

Have they ever said "no"?

No. And if they ever did, then I wouldn't do it, because if my kids don't think a case is that good, that important, it's probably not.

You know, it's also a wonderful chance to tell your case in pretty simple terms, where even your fifth- or sixth-grader can understand it. You can see what is important in the case and what's not.

When someone—for example, your opponent—is demeaning to you, how do you handle that person in front of other people?

I tend to laugh about it in front of other people, but it does irritate me. In fact, I can think of one case, in particular, that I tried simply because the other lawyer had tweaked me.

I had not planned on trying it. I had been convinced by a friend to do *voir dire* for him, and then he was going to try the case, or have someone in his firm try it. But he kept asking me, "Would you go ahead and just try the case?" And I kept saying, "No." But the defense lawyer had tweaked me and that irritated me, so I thought, "Fine, I'll try this case."

I have a tendency to, yeah, stand up against people like that.

Is there ever a need to be ugly to people, to the other side?

Probably not. I'm not saying it doesn't ever happen, but there's probably really no need for it.

For a time, coming out of law school, I looked at the practice of law as a competition. I'm fiercely competitive, and I like to win. And so my view of the world was "I've got to beat everybody else."

It took a little time and some maturing for me to realize that what's a lot more important than winning—in terms of being better than every other lawyer, or getting more credit than every other lawyer—are the relationships you build along the way. And so some of my best friends are lawyers on the other side, lawyers on my side, lawyers I work around, staff I work with.

It's about more than winning. It's about more than the competition. Life will be happier and your practice will be better if you're someone who values friends. ■

• • • QUICK-TAKE Q&A • • •

Lisa Blue subjected her interviewee to a version of the so-called Proust questionnaire, in which the subject reveals personal preferences, quirks, and aspirations.

Mark Lanier was game to play along.

If you could change anything about yourself, what would it be?

I'd be more self-disciplined. I like to eat, and I'd love to lose 10 or 15 pounds.

What self-improvement are you working on?

I'm trying to relearn some of the Hebrew I forgot.

If someone were to make a movie about you, who would you want to play you?

There's an actor in *Glee* who plays the glee club director—Matthew James Morrison.

What person, living or dead, do you admire most?

Straight up, the apostle Paul.

Do you have a favorite movie?

There are five great movies: *The Godfather*; *The Good, the Bad, and the Ugly*; *The Princess Bride*; *Lonesome Dove*; and *Fiddler on the Roof*.

What quality do you most admire in a person?

Faithfulness.

What quality do you most despise?

Disloyalty.

If you had six months to live, how would you live it?

The same way I'm living right now.

What talent would you most like to have?

I'd love to be more artistic.

What motto do you try to live by?

Treat other people the way I'd like to be treated.

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