

Presented:

2009 Conference on State and Federal Appeals

June 4-5, 2009
Austin, TX

Painstaking Excellence*

More Ethics Than You Require

Kendall M. Gray

*"All labor that uplifts humanity has dignity and importance
and should be undertaken with painstaking excellence."
(Dr. Martin Luther King, Jr.)

Author contact information:
Kendall M. Gray
Andrews Kurth LLP
Houston, TX

kendallgray@andrewskurth.com
713-220-3981

TABLE OF CONTENTS

INDEX OF AUTHORITIES	ii
I. INTRODUCTION.....	1
II. VALUES-BASED ETHICS	3
A. Truth.....	3
B. Justice.....	15
C. The American Way.....	22
III. CONCLUSION	30

INDEX OF AUTHORITIES

<i>Aboushadid v. Ward</i> , No. 07-05-00140-CV, 2007 WL 397117, 2007 Tex. App. LEXIS 885 (Tex. App.—Amarillo Feb. 5, 2007, no pet.)	7
<i>Aland v. Martin</i> 271 S.W.3d 424 (Tex. App.—Dallas 2008, no pet.).....	24, 25
<i>Caperton v. A.T. Massey Coal Co.</i> , No. 08-22 (U.S. Dec. 29, 2008)	16
<i>Cruse v. O’Quinn</i> , 273 S.W.3d 766 (Tex. App.—Hous. [14th Dist.] 2008, pet. denied)	29
<i>Dubai Petroleum Co. v. Kazi</i> , 12 S.W.3d 71 (Tex. 2000).....	9
<i>Kastner v. Jenkins & Gilchrist</i> , 231 S.W.3d 571 (Tex. App.—Dallas 2007, no pet.).....	25, 26, 27
<i>Mingus v. Wadley</i> , 115 Tex. 551, 285 S.W. 1084 (1926).....	9
<i>Gordon v. Gordon</i> , No. 09-05-330 CV, 2006 WL 5961831 (Tex. App.— Beaumont July 31, 2008, pet. denied) (mem. op.) (not designated for publication)	27, 28, 29
<i>Ins. Co. of the State of Pa. v. LeJeune</i> , 261 S.W.3d 852 (Tex. App.—Texarkana 2008, pet. filed)	9, 10
<i>McCamish, Martin, Brown & Loeffler v. F.E. Appling</i> <i>Interests</i> , 991 S.W.2d 787 (Tex. 1999).....	27, 29
<i>Padilla v. LaFrance</i> , 907 S.W.2d 454 (Tex. 1995).....	11
<i>Padrino Mar. v. Rizo</i> , 130 S.W.3d 243 (Tex. App.—Corpus Christi 2004, no pet.)	11

<i>Primate Constr., Inc. v. Silver</i> , 884 S.W.2d 151 (Tex. 1994) (per curiam)	17
<i>Robson v. Gilbreath</i> , 267 S.W.3d 401 (Tex. App.—Austin 2008, pet. filed).....	6, 7, 8
<i>Royden v. Ardoin</i> , 331 S.W.2d 206 (Tex. 1960).....	30
<i>Smith v. Smith</i> , 241 S.W.3d 904 (Tex. App.—Beaumont 2007, no pet.)	17
<i>In re Terminix Int’l Co.</i> , 131 S.W.3d 651 (Tex. App.—Corpus Christi 2004, orig. proceeding)	17, 18
<i>Teter v. Comm’n for Lawyer Discipline</i> , 261 S.W.3d 796 (Tex. App.—Dallas 2008, no pet.).....	5, 6, 18, 19, 20
<i>Twist v. McAllen Nat’l Bank</i> , 248 S.W.3d 351 (Tex. App.—Corpus Christi 2007, pet. denied)	10, 11, 12
<i>United States v. Blagojevich</i> , No. 1:08-CR-01010 (N.D. Ill. Dec. 7, 2008) (Criminal Complaint at Affidavit)	22, 23, 24
<i>United States v. Marc Dreier</i> , No. 1:09-CR-00085-JSR (S.D.N.Y. Jan. 30, 2009) (Indictment)	1, 3, 4

STATUTES

Tex. Civ. Prac. & Rem. Code Ann. § 12.002	25
---	----

RULES

Fed. R. App. P. 29(b)(1)	13
Fed. R. App. P. 29(c)(3)	13

Tex. R. App. P. 52.11	11
Tex. Disciplinary R. Prof'l Conduct 1.01, <i>reprinted in</i> Tex. Gov't Code Ann., tit. 2 subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9)	31
Tex. Disciplinary R. Prof'l Conduct 1.04	29
Tex. Disciplinary R. Prof'l Conduct 1.05	18-19
Tex. Disciplinary R. Prof'l Conduct 1.12	26
Tex. Disciplinary R. Prof'l Conduct 1.14	31
Tex. Disciplinary R. Prof'l Conduct 3.01	31
Tex. Disciplinary R. Prof'l Conduct 3.02	31
Tex. Disciplinary R. Prof'l Conduct 3.03	5, 8-9, 31
Tex. Disciplinary R. Prof'l Conduct 3.04	5, 31
Tex. Disciplinary R. Prof'l Conduct 3.05	31
Tex. Disciplinary R. Prof'l Conduct 4.01	4, 31
Tex. Disciplinary R. Prof'l Conduct 4.04	19, 31
Tex. Disciplinary R. Prof'l Conduct 5.04	30
Tex. Disciplinary R. Prof'l Conduct 8.04	4, 15
Sup. Ct. R. 37(6)	14
5th Cir. R. 28.2.1	12, 13
5th Cir. R. 29.2	13
MISCELLANEOUS	
Abha Bhattarai, <i>Class-Action Lawyer Gets 5 Years in Bribery Case</i> , N.Y. Times, June 28, 2008, available at http://www.nytimes.com/2008/06/28/business/ 28tort.html	15

Paul Braverman, <i>The Year of Living Foolishly</i> , American Lawyer, January 2009	1, 2
Alison Leigh Cowan, <i>et al.</i> , <i>Lawyer Seen as Bold Enough to Cheat The Best</i> , N.Y. Times, Dec. 13, 2008, available at http://www.nytimes.com/2008/12/14/nyregion/14lawyer.html?_r=1&pagewanted=2	3, 5
John Harrington, Note, <i>Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?</i> , 55 Case W. Res. L. Rev. 667, 673 (2004-2005)	14
Wikipedia, <i>Marc Stuart Dreier</i> , http://en.wikipedia.org/wiki/Marc_Dreier	1
Wikipedia, <i>Rod Blagojevich</i> , http://en.wikipedia.org/wiki/Rod_Blagojevich#Early_life	1

I. INTRODUCTION

*Don't worry when you are not recognized, but
strive to be worthy of recognition.*

—Abraham Lincoln

Why did you decide to practice law? Because it's an honorable way to make a living? Or a way to support a family? Or maybe because one of your parents practiced law? Or maybe because it was a way to garner material success, wealth and even fame?

There are indeed many famous lawyers in our culture. Some are famous for what they can do. Some are just famous for being famous—good hair and loud voices that attract attention. You can see both types every night as part of the 24 hour news cycle, some doing things, some talking about those who are doing things. The seeds of notoriety are not always easy to spot.

Meet Marc, for example. Marc, a child of the 50s, grew up on the South Shore of Long Island in an affluent area known as the Five Towns. His father, a Polish immigrant, owned a chain of movie theaters. Marc presided over the Lawrence High School student council and graduated “‘most likely to succeed.’” He graduated from Yale University in 1972 with a Bachelor of Arts, and earned a Juris Doctor from Harvard Law School in 1975.¹ At the end of 2008, however, he allegedly impersonated a man he didn't resemble, defaulted on a \$13 million loan, and tried to defraud hedge funds out of \$100 million.²

Or, meet Milorad. Milorad was raised in Chicago's northwest side, the second of two children. Milorad spent much of his childhood working odd jobs to help the family pay its bills. He was a shoeshiner and pizza delivery boy before working at a meat packing plant and washing dishes for the Trans-Alaska Pipeline System. He obtained his bachelor's degree from Northwestern University in 1979, and his Juris Doctor (J.D.) from Pepperdine University School of Law in 1983.³ But,

¹ *Wikipedia, Marc Stuart Dreier*, http://en.wikipedia.org/wiki/Marc_Dreier.

² Paul Braverman, *The Year of Living Foolishly*, *American Lawyer*, January 2009, at 19; *see also United States v. Marc Dreier*, No. 1:09-CR-00085-JSR (S.D.N.Y. Jan. 30, 2009) (Indictment).

³ *Wikipedia, Rod Blagojevich*, http://en.wikipedia.org/wiki/Rod_Blagojevich#Early_life.

in 2008, he allegedly tried to sell an appointment to the United States Senate.

Or, finally, meet Joe. Joe took his B.A. from St. Francis College in 1969 and his J.D. from St. John's University in 1973. Then, Joe killed AIG, the nation of Iceland and, according to some, Capitalism itself. Okay, that is an exaggeration.

Obviously, each of those mini-biographies are missing some key facts, and that is precisely the point. No one goes directly from being a careful and upstanding member of the profession only to wake up one morning and say, "Hey, I know. I'll sell fake pension fund notes, and better yet, I'll pretend I'm Canadian." Likewise, no one goes directly from honest, pizza delivery boy to realizing that a U.S. Senate Seat is an "F-ing valuable thing." And even more to the point, Joe—Joseph Forte—did nothing wrong at all. As a partner at Thacher Proffitt, Mr. Forte properly performed the legal task requested by his client, First Boston, and created the first mortgage "conduit."⁴ By fits and starts and slips and slides, the conduit in the hands of others became a mortgage bond and then a subprime mortgage bond. Combine that with Americans who choose to live above their means, a housing bubble, mark-to-market accounting rules, and naked short selling by hedge funds, and you have the perfect storm for capitalism's Götterdämmerung, all from what started as perfectly permissible conduct.

So, how to guard against this slippage? The main thesis of this paper and the speech that accompanies it is that one is not best served simply by knowing the rules and their limits. Rather, one can be a more effective advocate by looking behind the rule to the value that it serves, and then serving that value, even if it is more than the rules require. For this standard, I have borrowed the phrase "painstaking excellence," which is more ethics than you require, and admittedly more than I am able to fulfill without fault. While not exhaustive, I hope to illustrate the concept through the exploration of three values from the American Canon: Truth, Justice and the American Way.

⁴ Paul Braverman, *The Year of Living Foolishly*, American Lawyer, January 2009, at 18.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Painstaking Excellence: More Ethics Than You Require

Also available as part of the eCourse

[Lawyers Behaving Badly, Judges and Lawyers Behaving Nicely: Ethics and Practice Issues 2009](#)

First appeared as part of the conference materials for the
19th Annual Conference on State and Federal Appeals session
"Lawyers Behaving Badly: What Not to Do"