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BRIGHT
IDEAS

CAPS, PROPOSITION 12 AND A MED-MAL SUIT

by MARY ALICE ROBBINS

A Grapevine woman who alleges in a medical-malpractice suit that doctors removed the wrong kidney during a surgery that never should have been performed would be severely limited in what she could recover if the operation had occurred a few months later, her attorney says.

Randal Mathis says his client, 74-year-old Nelda Jordan Miles, would have substantially less of a claim if her case came under the limits on non-economic damages provided in H.B. 4, a major tort reform measure

passed by the Texas Legislature in its regular session this year. The damage caps under the new law — \$250,000 for all doctors sued, \$250,000 for a hospital and another \$250,000 if a second facility is involved — will be authorized in med-mal suits if voters approve Proposition 12 on the Sept. 13 constitutional amendment ballot.

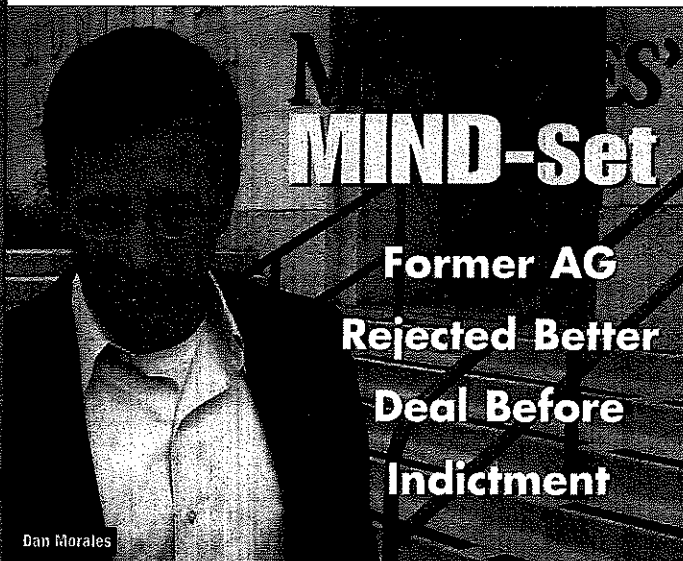
"Mrs. Miles' case is a perfect example of the harshness of H.B. 4," says Mathis, a shareholder in Dallas Mathis & Donheiser.

Mathis says that Miles is unlikely to recover anything but minimal economic damages because she is retired and covered by

Medicare, which must be reimbursed 100 percent for her medical expenses. For all practical purposes, Mathis says, non-economic damages make up the bulk of Miles' claim, although she is seeking an unspecified amount of punitive damages from the lead surgeon and the doctors' group in which he is a partner.

Mike Hull, lobbyist for the Texas Alliance for Patient Access, which supports passage of Proposition 12, says members of the Legislature had to balance the rights of

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Dan Morales

MIND-Set

Former AG
Rejected Better
Deal Before
Indictment

by MIRIAM ROZEN
and MARY ALICE ROBBINS

Former Texas Attorney General Dan Morales was escorted into U.S. District Judge Sam Sparks' Austin courtroom in handcuffs and leg irons on July 17 where he entered guilty pleas to charges of mail fraud and filing a false income tax return.

"Now, is there anything this morning that interrupts in any way your ability to think clearly? Anything at all?

Nervousness? Illness? Drugs? Allergies? The weather? Anything?" Sparks asked the 47-year-old Harvard-educated lawyer who was once the star of the Texas Democratic Party.

"There is not, your honor," a laconic Morales told the judge.

It is not surprising that the judge lingered over the standard inquiry about a defendant's ability to understand and comprehend the consequences of the proceeding. Few court-watchers had expected the persistently combative Morales to plead guilty to charges that could — if the judge

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JENEVEIN SUES JUDICIAL CONDUCT COMMISSION

by MARY ALICE ROBBINS

A former judge publicly censured by the State Commission on Judicial Conduct is taking the commission to court, alleging in a suit that it violated his constitutional rights to free speech and due process.

Unable to appeal his public censure in the state court system, former Dallas County Court-at-Law No. 3 Judge Bob Jenevein sued commission officials on July 21 in the U.S. District Court in Austin.

Jenevein and his attorney, Randal Mathis of Dallas, say that filing a federal suit is the only way the constitutional issues raised by Jenevein in his defense can be addressed.

"It is a sad irony when the constitutional rights of an elected state judge are so besieged by a state agency that he must turn to the federal courts for protection," says Jenevein, now a partner in Brady & Cole in Dallas.

A federal court will see the commission as "excessively activist," Jenevein contends.

Judge Kathleen Olivares, chairwoman of the commission, declines comment on Jenevein's suit. But Olivares, judge of El Paso's 205th District Court, says that before a public censure is issued, a judge has had an opportunity to be represented, take depositions and present evidence to the commission or a special master hearing the case. "At this stage, I feel secure, and I feel the commissioners feel secure, that due process has been rendered," she says.

The Office of the Attorney General will repre-

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inAustin

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sent the commission officials. Tom Kelley, an OAG spokesman, declines comment because attorneys at the agency have not yet seen the suit.

Cynthia Gray, director of the American Judicature Society's Center for Judicial Ethics based in Des Moines, Iowa, says the Texas procedures are unusual. In most states, the state Supreme Court may publicly censure a judge after receiving a recommendation from the state's judicial conduct commission, says Gray, an attorney. In some states, the commission censures the judge, who can then appeal to the state's Supreme Court, she says.

Jenevein sued Seana Willing, the commission's acting executive director, and the 11 commission members in their official capacity; he is not seeking monetary damages. In *Jenevein v. Willing, et al.*, the former judge is asking the federal court to have the commission expunge the public censure against him from its records. Jenevein also wants to recover the attorneys' fees he has incurred. Willing could not be reached for comment.

"He just wants his name vindicated," says Mathis, a shareholder in Mathis & Donheiser.

Jenevein, a Republican, lost his bid for re-election to Sally Montgomery, a Democrat, in November 2002. Two months later, the commission publicly censured Jenevein for holding a news conference in 2000 and sending e-mails in which he criticized a Dallas attorney involved in a case pending in another Dallas County court. The commission found that Jenevein willfully violated Article V, §1-a(6)(A) of the Texas Constitution and Canon 2B of the Texas Code of Judicial Conduct.

In his July 21 complaint, Jenevein alleges that the commission violated 42 U.S.C. §1983 when it brought proceedings against him and issued a public censure based on his protected speech. Jenevein also alleged in the complaint that he was denied due process by commission rules that prevent an accused judge from asking witnesses what they have told the commission's investigators. He further alleged due-process violations because a legal challenge to the sufficiency of allegations against a judge can't be considered except during a full hearing before the commission.

At a September 2002 hearing before Senior Judge Michael Westergren, Jenevein contended that his public statements were free speech protected by the First Amendment. Westergren, special master in the case, said in his October 2002 findings that, in his role as fact-finder, he could not rule on the constitutional issues raised by Jenevein. A special master makes findings of fact with reference to the allegations in the charging document, says Margaret Reaves, the commission's former executive director.

After being censured, Jenevein asked Texas Supreme Court Chief Justice Tom Phillips to appoint a special court of review to hear his case. The three-justice panel

heard testimony at an April hearing in Fort Worth but held in June that state law and the Procedural Rules for the Removal or Retirement of Judges don't provide for an appeal of a public censure.

Justice Tim Taft of the 1st Court of Appeals wrote the opinion for the panel, which also included 14th Court Justice Leslie Brock Yates and 11th Court Justice Jim Wright.

New System?

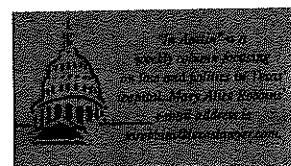
Jenevein is not the first person disciplined by the commission to turn to the federal courts for relief. In 1984, the commission publicly reprimanded James M. Scott Jr., a justice of the peace in Fort Bend County, for criticizing the county's judicial system in a letter to county officials in which he alleged that persons who appealed traffic offense convictions from JP or municipal courts to the county's court-at-law usually had their fines dismissed or reduced. In 1986, Scott filed a §1983 claim in which he argued that his criticism was protected speech. U.S. District Judge Kenneth Hoyt of Houston granted the commission's motion for summary judgment after finding that Scott was not entitled to relief because his letter was not the only reason for the reprimand.

The 5th U.S. Circuit Court of Appeals agreed with Scott in 1990. In a 2-1 decision, the court held in *Scott v. Flowers* that the commission could not constitutionally reprimand the JP for making truthful statements that brought to light unfairness in the judicial system.

The opinion, written by Judge Jerry Smith, said the holding was limited to the narrow question before the court of whether a judge can be reprimanded for publicly commenting on the administration of justice as it relates to cases that pass through his court. Judge Carolyn King, now the 5th Circuit's chief judge, joined Smith in the opinion. Senior Judge Will Garwood said in a dissenting opinion that Scott, who left office in April 1986 but planned future judicial races, had no standing to bring a §1983 action. Scott could not be located for comment.

Mathis says that Texas Government Code Chapter 33, under which the commission operates, and the Rules for the Removal or Retirement of Judges need to be revised. In a July 22 letter to Phillips, Mathis suggested that a "blue ribbon" panel of sitting and retired judges and law school representatives design a system and rules that would ensure the continued competency and integrity of the judiciary but also afford judges due process.

Olivares says she feels comfortable with the way the rules are. Phillips did not return a phone call seeking comment before presstime on July 24.



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