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THE IMPORTANCE OF LAWYERS IN JUDGE BARKSDALE'S WRITINGS

*Andrew C.W. Lund**

INTRODUCTION

It is my honor to contribute a piece to this wonderful collection commemorating Judge Barksdale's extraordinary career on the bench. It was truly a privilege to clerk for the Judge and it is no less so to have the opportunity to write a bit about his impact on the law.

My task is to give readers a sense of Judge Barksdale's jurisprudence since his arrival on the bench in 1990. Summarizing the Judge's written opinions is not easy. Judges on the U.S. Courts of Appeals do not get to choose the cases they are assigned or, in large part, the opinions they must write. Moreover, their opinions are significantly constrained by Supreme Court and circuit court precedent. Summaries of circuit court judges' written opinions tend to be a largely ad hoc collection of interesting decisions that may or may not tie together. Having read each of Judge Barksdale's published opinions, including dissents, a number of broad common strands emerge—respect for the law, judicial modesty, integrity and consistency over time and between contexts, honesty, clarity, and a keen analytical approach. Many of these have been aptly described by Chris Green in these pages.[1]

Along this line, I hope in this Article to develop a particular substantive lens through which an otherwise disparate set of his opinions might come into sharper focus. Specifically, I think it is useful to consider the heightened sensitivity to the role of lawyers in Judge Barksdale's jurisprudence. The Judge's writings consistently show that he is particularly invested in the view that attorneys ought to act with civility, integrity and

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[1] *See* Christopher R. Green, *Some Themes from Judge Rhesa H. Barksdale's Published Opinions*, 79 MISS. L.J. 261 (2009).

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competency. These expectations are grounded in the Judge's experience as a judge—his recognition of the "faith, trust and confidence"[2] that he must place in lawyers if he is to fulfill his duties. Judge Barksdale's writings thus (1) advocate for high professional standards, (2) reflect the central assumption that those standards are being met unless there is significant evidence to the contrary, and, (3) if such contrary evidence is shown, take their violation very seriously. The point is not that other judges do not do this, because surely all judges take lawyers—their role, their behavior, etc.—seriously. Rather, it is that Judge Barksdale's commitment to professionalism, broadly defined, plays an important role in his jurisprudence.

This lens, though hopefully useful, is of course not universally applicable across the Judge's opinions. Writing about any aspect of his opinions necessarily causes one to omit consideration of a number of the Judge's most important decisions that did not turn on the role of the attorneys.[3] Nevertheless, this imperfect interpretation is hopefully illuminating in at least one regard. Judge Barksdale's deep respect for the role of lawyers reflects his deep love and respect for the law itself. If law is to retain its "majesty"[4]—if its integrity is to be sustained and its application be honored—those who practice it must behave so as to deserve the majesty, their actions reflecting the same integrity and honor.

The link between lawyers' behavior and the law is clear to Judge Barksdale. To get a sense of its importance to him, one need go no further than "The Role of Civility in Appellate Advocacy," an article he contributed to a *South Carolina Law Review*

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[2] Rhesa H. Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 579 (1999) [hereinafter "The Role of Civility"].

[3] Judge Barksdale's opinions have been frequently cited by other courts and in secondary sources. Among his most "popular" opinions in terms of judicial citations are: Martin v. Cain, 246 F.3d 471 (5th Cir. 2001); Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001); Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999); Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996); Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995); and Macias v. Raul A. (Unknown) Badge No. 153, 23 F.3d 94 (5th Cir. 1994). Academics have most often cited: GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Canutillo Ind. Sch. Dist. v. Leija, 101 F.3d 393, (5th Cir. 1996); Ellison v. Software Spectrum, Inc., 85 F.3d 187, (5th Cir. 1996); and Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, (5th Cir. 1994).

[4] *See* The Role of Civility, *supra* note 2, at 580.

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symposium on appellate advocacy generally. In it, the Judge makes a compelling case that lawyers who practice civilly—that is, thoughtfully and courteously[5]—are more effective than those who use, for instance, "scorched-earth" tactics.[6]

The Judge's point is not necessarily obvious given pop culture's preference for hard-nosed, antagonistic attorneys and the natural assumption that such tactics are necessary to achieve the best outcome for one's clients. Nevertheless, Judge Barksdale convincingly argues that incivility by appellate advocates (though the point can easily be extended to all forms of advocacy) is truly harmful to their clients' causes. Such incivility "diminishes respect for the law" and erects a roadblock toward the goal of reaching a "fair, prompt, efficient and relatively inexpensive resolution" to the matter at hand.[7] As a strategic matter, the incivility harms the client because "[t]he court cannot place faith, trust, or confidence in the [client's] lawyer."[8] More globally, if judges cannot place faith in lawyers, "there can be no appellate advocacy."[9] The article thus serves as practical advice for individual lawyers as well as a mission statement of sorts for appellate litigation: the entire project depends on certain standards being met by lawyers.

Judge Barksdale's article focused on civility, but civility is certainly not the only characteristic of lawyers key to functioning appellate courts. While there are certainly others, this Article raises two more aspects of lawyering that seem to hold a particularly elevated place in the Judge's jurisprudence: integrity and competency. A presumption of these three (including civility) norms pervades an eclectic subset of Judge Barksdale's opinions. From the obvious cases (attorney sanctions, ineffective assistance of counsel claims) to the less so (standing, the right against self-incrimination), many of the Judge's opinions hearken back to the foundational belief that lawyers are important, that their integrity, competency and civility are to be ex-

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[5] Judge Barksdale summed up the concept as "disagree[ing] without being disagreeable." *Id.* at 577 (citation omitted).

[6] *Id.* at 574.

[7] *Id.* at 577.

[8] *Id.* at 579.

[9] *Id.*

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pected and that incursions on any of those expectations are to be met by a serious response.

Attorney's Fees, Sanctions and Civility

When lawyers fail to act civilly, Judge Barksdale does not stand idly by. Before reviewing some of his opinions on judicial sanctions for attorney misbehavior, it is worth noting that the Judge has expressed his deep concern for civility and professionalism in at least one other context—attorney's fee awards. In *Migis v. Pearle Vision, Inc.*, the Judge concurred in part and dissented in part from a decision that affirmed a $12,000 award for emotional distress in a Title VII employment discrimination case, remanding the case to the district court on the issue of the $81,000 fee award for plaintiff's counsel.[10] The Judge concurred with the decision to remand on these fees but stated that he would have gone further and given more guidance to the district court to significantly reduce the award.[11]

In the case, the plaintiff and her lawyer had entered into a contingency fee arrangement. During the pendency of the litigation, the plaintiff (presumably with advice from counsel) had rejected a settlement offer for an amount only slightly less than the $12,000 that she would ultimately win months later. From the case's inception through its conclusion, the plaintiff's lawyer had spent a significant number of hours on claims that ultimately failed. Finally, as described above, the lawyer's award was over six times the damages won by the plaintiff.

To the Judge, plaintiff's counsel's behavior reeked of incivility—of unreasonableness.[12] Prefacing his treatment of the issue, he noted:

> I fear that this [lodestar] procedure is being applied in keeping with the times, with the idea that nothing deserves something, and, especially in that regard, that lawyers must be handsomely rewarded, notwithstanding that their labors bore little,

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[10] 135 F.3d 1041, 1047-49 (5th Cir. 1998) (Barksdale, J., concurring in part and dissenting in part).

[11] *Id.* at 1050.

[12] *Id.* at 1049-66 (returning to the concepts of "reason" and "reasonableness" in relation to attorney's fees numerous times).

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> if any, fruit . . . . Reason and reasonableness are missing in action. Excess has become an art form.[13]

In the opinion, he suggested that the district court consider the foregone settlement, the allocation of time spent on successful and unsuccessful claims and the relative paucity of plaintiff's recovery for purposes of arriving at a reasonable attorney's fee award.[14] This went further than the majority, which only remanded based on the disparity between the damages and fee.[15]

Judge Barksdale's opinion was not merely a determination that the lawyer in the particular case did not deserve to be rewarded as handsomely as he had been. It also reflected a call for the judiciary to actively raise the level of lawyers' behavior via close inspection of their actions before awarding fees. The system of incentives for attorneys produced inappropriate behavior —in this case the failure to accept a reasonable settlement offer and the waste of resources on unpromising theories. If the law needs lawyers to behave with civility, integrity and honesty, Judge Barksdale believed judges must work to recalibrate the fee incentives to encourage such behavior.[16] Looking solely to the result—the ratio between damages and fees—risked producing a lottery mentality among lawyers and its concomitant diminishment of the characteristics so valued by the Judge. More stringent scrutiny of the process actually undertaken by the lawyer—the settlements rejected and the theories improperly pursued—was necessary to stop the backsliding. While noting the importance of efficient judicial oversight of fee questions, Judge Barksdale concluded that his potentially more time-consuming approach is necessary given the principle at stake.[17]

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[13] *Id.* at 1050.

[14] *Id.* at 1056.

[15] *Id.* at 1048.

[16] *See id.* at 1065 ("We bemoan the too often seen lack of civility and professionalism and ethics, as well as the pursuit by some lawyers of, not excellence, but numbing mediocrity . . . . *Reason* and *reasonableness* can be restored; but, only when we are willing to do so.").

[17] *Id.* at 1056. ("Admittedly, and as noted, a request for attorney's fees should not result in a second major litigation. Nor do we require the district court's . . . analysis to be so excruciatingly explicit that decisions of fee awards consume more paper than did the cases from which they arose.") (internal quotation marks and citation omitted).

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The most well-known example of the Judge responding to a lack of civility by a lawyer is his original dissent[18] and subsequent majority en banc opinion[19] in *Whitehead v. Food Max of Mississippi, Inc.* In *Whitehead*, after winning a verdict for his client against Kmart for the latter's failure to provide security in its parking lot, plaintiff's counsel obtained a writ of execution for the $3.4 million judgment.[20] Before executing the writ, the lawyer notified members of the media as to his plans and proceeded to enter the local Kmart and attempt to seize cash from the store's registers and vault. Despite only a three-day lapse between the denial of Kmart's motion for remittitur or a new trial and his entering the Kmart, the lawyer protested to the reporters present about Kmart's arrogance and failure to pay its debt.[21]

Kmart sought sanctions under Rule 11 of the Federal Rules of Civil Procedure. The district court granted the motion based, in part,[22] on plaintiff's counsel entering the Kmart in order to embarrass the company and self-promote. Counsel later explicitly confirmed these motives.[23] On appeal, a divided panel held that the lawyer's behavior was "patently inappropriate,"[24] but that, absent extraordinary circumstances, no improper purpose should be presumed under Rule 11 when the relevant documents—in this case, the writ—were otherwise legitimately filed.[25] Instead, the majority would leave it to other state authorities to handle the matter of counsel's incivility.[26]

Judge Barksdale dissented from the court's washing its hands of the matter. He noted that the facts at hand repre-

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[18] 277 F.3d 791, 797 (5th Cir. 2002) (Barksdale, J., dissenting).

[19] 332 F.3d 796 (5th Cir. 2002) (en banc).

[20] That judgment was eventually vacated. *See* Whitehead v. Food Max of Miss., Inc., 163 F.3d 265 (5th Cir. 1998).

[21] 277 F.3d at 797-98.

[22] The district court also held counsel had failed to reasonably inquire into the law regarding execution on judgments because an automatic 10-day stay was in effect when he entered the Kmart. The en banc opinion in Whitehead ultimately held that counsel had not made a reasonable inquiry, but held that the "improper purpose" ground for sanctions was sufficient in any event. *See* 332 F.3d at 804-05.

[23] *Id.* at 807.

[24] 277 F.3d at 796-97 (Barksdale, J., dissenting).

[25] *Id.* at 796.

[26] *Id.* at 797.

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sented exactly the kind of "exceptional circumstances" the majority would require. When the purpose of obtaining the writ was as obviously improper as it was in the case, Rule 11 sanctions were appropriate. Consistent with the views he had expressed elsewhere, the Judge considered counsel's actions not merely an affront to Kmart, but also an attack on the judicial process and the rule of law. Because they are so important, the damage that lawyers can cause is all the greater. Courts have an obligation to supervise, through Rule 11 among other mechanisms, the behavior of lawyers who practice before them.[27] To the Judge, hoping for another entity to put a stop to atrocious behavior was not appropriate.

The Judge's view prevailed when the case was taken en banc. Writing the majority opinion upholding sanctions, Judge Barksdale conceded that civility and ethics rules are to generally be enforced by other bodies,[28] but he concluded that courts do have a clearly prescribed role to play—the one given to them by Rule 11—in enforcing some norms.[29] Against this view, Judge King dissented on the grounds that intent to embarrass and self-promote are too commonly found to constitute exceptional circumstances, given the potentially legitimate purpose in filing the writ.[30] On the one hand, Judge King's dissent stems from the potential chaos generated by allowing widely-observed, if unsavory, characteristics to form the basis of sanctions.

On the other, her disagreement seems to flow from a tolerant view of certain litigation behavior: "We, as appellate judges, operate at a far remove from the business of collecting judgments or effecting settlements. We ought to refrain from excoriating a lawyer based upon our own sensibilities . . . ."[31] Here, Judge King's criticism is not explicitly based on efficiency. Instead, it seems based on a degree of uncertainty about how strictly the norm of civility ought to be set regardless of the cost its enforcement would entail.

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[27] *Id.* at 797 (Barksdale, J., dissenting).
[28] 332 F.3d at 808.
[29] *Id.*
[30] *Id.* at 814 (King, J., dissenting).
[31] *Id.* at 815.

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While sensitive to the inefficiencies created by requiring mini-trials on attorney behavior,[32] Judge Barksdale was much more certain of the need for high standards of behavior for lawyers. The reasons for this—the link he sees between attorney behavior and the legal system—has been discussed above. What the *Whitehead* opinions and Judge Barksdale's refusal to shrug off a lawyer's incivility proves is that he is willing to stand up for that connection. Against the cynicism that many of us feel about the civility, integrity, and competency of lawyers, the Judge refuses to "dumb down" his expectations for the bar.[33]

Crediting Lawyers' Integrity

This refusal to lower expectations has a secondary effect. Because the Judge expects so much from lawyers, he grants them a great deal of respect. This makes all the sense in the world because, after all, imposing high standards on lawyers is based on their importance to the overall project. Thus, the same theme leads to the judge regularly placing a great deal of faith in lawyers' competency and integrity.

In *Guidry v. Dretke*,[34] Judge Barksdale wrote the majority opinion for a divided panel upholding a district court's grant of habeas relief to Howard Guidry who had been convicted of murder for remuneration and sentenced to death by a Texas state court. The habeas claim was based on an alleged violation of Guidry's right against self-incrimination. For present purposes, the Judge's wide-ranging opinion is notable because of the weight it accorded to testimony by lawyers concerning statements made to them by the police officers.

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[32] *See supra* note 28 and accompanying text.

[33] For another example of the Judge taking on intemperate counsel, *see* Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994). In *Travelers*, defendants appealed a district court judge's refusal to recuse himself in their civil case when the judge belonged to social organizations in which colleagues of plaintiff's counsel and directors of the plaintiff were members. In addition to filing a motion filled with "intemperate (if not contemptuous)" allegations, defense counsel actually released a song attacking the integrity of the district court. *Id.* at 1408-09 & 1409 n.6. The Judge denied defendants' appeal on the merits and further held that the appeals were designed to harass and therefore sanctions appropriate. *See id.* at 1413.

[34] 397 F.3d 306 (5th Cir. 2005).

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In March 1995, the officers had questioned Guidry, in jail at the time pending an unrelated bank robbery charge. During this questioning, Guidry confessed to participating in the murder for remuneration. The circumstances surrounding the confession were controversial. Guidry claimed that he had requested his attorney (retained for the robbery charge) prior to the interrogation and had been subsequently told by detectives that the attorney agreed that the questioning could continue outside of his presence. The detectives, on the other hand, claimed that Guidry had never asked for his lawyer and that they had never spoken to his robbery attorney.

Crucially, Guidry's attorneys for the murder trial stated (along with another attorney who had no connection with Guidry) that the same detectives told the attorneys that they (the detectives) *had* been given permission by Guidry's robbery attorney to question Guidry on the murder charge. Confronted with this testimony, the detectives asserted that they said no such thing to the murder-case attorneys. After conducting an evidentiary hearing, the state trial court denied Guidry's motion to suppress the confession, and Guidry was later convicted.

Guidry pursued state habeas relief and was denied. He filed a federal petition and requested an evidentiary proceeding regarding the involuntary confession issue. The district court agreed to do so, and subsequently granted the habeas petition. The state centered its appeal to the Fifth Circuit on dual claims that the district court (1) abused its discretion in holding an evidentiary hearing when such a hearing could only serve to rehash testimony from state court and (2) improperly substituted its credibility determinations for those of the state court after the evidentiary hearing.

Judge Barksdale wrote the opinion for the panel majority, upholding the district court's decision. On the evidentiary hearing issue, the opinion noted first that the district court had no way of knowing whether the witnesses' testimony would be the same during the second hearing. Moreover, the deference owed to state courts under AEDPA did not prevent the district court from testing the unreasonableness of the state court's factual

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determinations through an evidentiary hearing.[35] Notably, the fact that *lawyers* had testified in state court seemed to matter greatly. The state court's implicit conclusion that the lawyers testified falsely was, to the majority, "too extraordinary to avoid development through an evidentiary hearing in district court."[36] That is, the presumption of lawyers' integrity warranted a closer look.

As to the district court's substantive determination, Judge Barksdale's opinion naturally focused on the four lawyers' testimony. The state court had discussed the conflicting testimony of Guidry and the detectives, but not that of the lawyers and the detectives. The opinion continued:

> The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, *where the witnesses are apparently credible*, brought into question whether [the decision was unreasonable]. After reviewing the demeanor of [the d]etectives ... while observing the credible testimony of the four lawyers and Guidry, the district court . . . was in an even better position not to accept the trial court's findings.[37]

The opinion does not say so, but one is left with the distinct impression that the witnesses' status as lawyers made them particularly credible. Such a determination would be entirely consistent with the Judge's more general commitment to promoting, expecting, and respecting excellence in lawyering.

Crediting Lawyers' Competency – Ineffective Assistance Claims

Along with a rebuttable presumption of lawyers' integrity, a rebuttable presumption of lawyers' competency runs through Judge Barksdale's opinions. The "rebuttable" qualifier is key—although the Judge might presume lawyerly competency as an initial matter, of course the facts of any case lead wherever they

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[35] In fact, Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts specifically contemplates the district court's discretion to hold an evidentiary hearing, subject to § 2254(e)(2)'s bar on evidentiary hearings to develop facts not presented by the petitioner in the state court. *See Guidry*, 397 F.3d at 323.

[36] *Id.* at 324.

[37] *Id.* at 327 (emphasis added).

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do. Nevertheless, the presumption of reasonable and skillful behavior by lawyers is apparent.

Obviously, the question of lawyer competency often arises in the context of Sixth Amendment ineffective-assistance-of-counsel ("IAC") claims. In truth, Sixth Amendment opinions—especially habeas claims based on state convictions—are *not* likely to show very much about a judge's view of lawyerly competency. First, given the deference accorded to state habeas decisions under AEDPA[38] and the high burden required to prove deficient performance in any IAC analysis,[39] it is hard for judges to act in good faith and not have their opinions reflect the presumption of competency described this Article would attribute to Judge Barksdale. Moreover, because courts are able to omit a discussion of deficient performance and simply rely on there being no prejudice to the defendant under the test for IAC,[40] there are relatively few decisions that even tackle the issue of deficient performance *vel non* at all.

Nevertheless, it is unsurprising that Judge Barksdale recognizes the difficult and sensitive nature of defense counsel's work when conducting an IAC analysis. For instance, in *St. Aubin v. Quarterman*,[41] the Judge refused to find that defense counsel performed deficiently by not raising his client's mental-health history during the punishment stage of his murder trial. He concluded that the decision to avoid opening the door to prior bad acts associated with that history was likely the result of a thoughtful litigation strategy.[42]

While recognizing the discretion necessarily granted counsel over strategic matters, the Judge *is* willing to entertain defi-

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[38] 28 U.S.C. § 2254(d)(1)-(2) (2006) (review only to determine if state decisions were unreasonable application of facts or law).

[39] *See, e.g.*, Soffar v. Dretke, 368 F.3d 441, 471 (5th Cir. 2004) ("[J]udicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" under the first-part of *Strickland*'s test for IAC).

[40] *See, e.g.*, United States v. Fuller, 769 F.2d 1095, 1097 (5th Cir. 1985).

[41] 470 F.3d 1096, 1102-03 (5th Cir. 2006)

[42] *Id.* at 1103. See also United States v. Pierce, 959 F.2d 1297, 1301-04 (5th Cir. 1992), in which Judge Barksdale observed the competence of defense counsel where (1) the complained-of failure consisted only of the failure to raise Fourth Amendment issues for which his client had no standing and (2) counsel aggressively cross-examined prosecution witnesses.

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cient performance claims in cases of simple negligence. In *Ladd v. Cockrell*, the defendant was convicted of capital murder and sentenced to death after a sentencing phase in which defense counsel put forth no mitigating evidence regarding the defendant's difficult childhood.[43] Judge Barksdale's opinion noted that defense counsel's failure to investigate further when the fact of a juvenile arrest was raised and no juvenile records had been provided to him *could* be deficient performance (when coupled with the failure to provide any mitigating evidence).[44]

St. Aubin and *Ladd* become easily reconcilable when one places them in the context of Judge Barksdale's commitment to lawyers. To the Judge, thoughtfully considering litigation options is the heart of a lawyer's job. Thus, he will not countenance second-guessing of those good faith decisions. However, negligence like the kind alleged in *Ladd* is to be rejected at all times. Avoiding using hindsight to evaluate strategic decisions while chiding attorneys for a failure of appropriate effort reflects the balance in the Judge's opinions between expectations of, and respect for, lawyers.

Crediting Lawyers' Competency – Standing

The view of lawyers as essentially competent unless demonstrated otherwise shows up elsewhere. For instance, in *Doe v. Tangipahoa Parish School Board*,[45] a father brought a claim against the local school district on the grounds that the school board's practice of praying before meetings violated the Establishment Clause. Judge Barksdale authored the majority opinion for the three-judge panel, concluding that the prayers fell outside any legislative prayer exception because they were uniformly Christian.[46]

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[43] 311 F.3d 349, 357 (5th Cir. 2002).

[44] *Id.* at 359. The opinion concluded that, in any event, the defendant was not prejudiced by the arguably deficient performance. *Id.* at 359-60. *See also* Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000) (prejudice not required to be presumed under law at time of conviction when defense counsel slept for unidentified segments of trial), *reh'g granted en banc, vacated by* 234 F.3d 1339 (5th Cir. 2000).

[45] 473 F.3d 188 (5th Cir. 2006), *reh'g granted en banc, vacated by* 478 F.3d 679 (5th Cir. 2006).

[46] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (establishing exception). Judge Barksdale's opinion assumed arguendo that *Marsh* could be applied to school board

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In the father's original amended complaint, he asserted that he had attended school board meetings that began with prayer. In response, the board denied that assertion, but only for lack of information. Eventually, the sides agreed to a consent judgment leaving the Establishment Clause question as the only open issue. At that point, they also agreed to a set of stipulated facts, none of which specifically addressed the father's attendance at meetings or standing generally. The order regarding the stipulations, however, did note that the father and his sons would, if necessary, testify as to the facts alleged in the amended complaint.[47] At no point in the proceedings before the district court or the court of appeals did the board contest the father's standing or suggest that the father had not attended the board meetings.

In his panel opinion, the Judge dealt with the issue of standing *sua sponte*. He held that the board's failure to (1) challenge the father's assertion from the amended complaint or (2) contest standing more generally was an implied admission that the father had, in fact, attended a meeting: "[T]he [b]oard's decision to proceed on the merits of [the father's] claim, without challenging either that he attended [b]oard meetings or was offended by them, permits an inference that the [b]oard conceded these allegations in [the] complaint."[48]

Judge Barksdale's implied admission analysis in his panel opinion rested on a fundamental view of lawyerly competence. Standing cannot be waived,[49] but the facts supporting its existence can be conceded. The question is whether to take the board's silence in the face of the allegations in the amended complaint as a concession regarding the factual allegation of the father's attendance. This, in turn, depends largely on one's view of the board's lawyers. If the board's lawyers were competent,

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meetings. *But see* 473 F.3d at 205 (Stewart, J., dissenting) (contending that the *Marsh* exception did not apply to such meetings).

[47] *See* Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 510-11 (5th Cir. 2007) (en banc) (Benavides, J., dissenting).

[48] 473 F.3d at 195. Additionally, the opinion analogized to Rule 15(b) of the Federal Rules of Civil Procedure, which allows that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fed. R. Civ. P. 15(b); *see also* 473 F.3d at 195.

[49] 494 F.3d at 501 (Barksdale, J., dissenting).

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their failure to challenge the complaint's allegations or the standing issue generally can be attributed meaning. Given an obviously important issue in their client's interest (the father's possible lack of standing) and an obviously adverse allegation in the complaint (that the father attended a meeting), a competent lawyer would raise his or her hand if there was something amiss. If, on the other hand, one is more skeptical of the lawyers' competence, their failure to fight on standing is of little probative value.

The issue was not discussed by either the concurrence or dissent in the original opinion. However, after a majority of the circuit's judges voted to rehear the decision en banc,[50] the standing question became the crux of the case. Chief Judge Jones, writing the majority opinion, refused to infer anything regarding the father's attendance from the board's failure to dispute the allegation in the amendment or the standing issue.[51] Where the stipulated facts omitted anything on that score the majority held that there was no reliable information to be gleaned from the board's lawyers' failure to contest standing or the factual allegations in the amended complaint.

In his dissent to the en banc opinion, Judge Barksdale recapitulated much of his analysis in the panel opinion. In particular, he highlighted the view of lawyer competency underpinning the implied-admission analysis: "Surely, had the [board] felt the [father] lacked standing, it would not have stipulated as it did, including . . . the four prayers that had been presented at [board] meetings . . . . Simply put, the [board] more than recognized its requisite adversarial position with the [plaintiffs]."[52] This conclusion was further supported, again assuming a certain level of lawyer competence, by the failure of the board to dispute the father's attendance on appeal before the en banc court.[53]

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[50] *See id.* at 496 (noting that the standing issue was raised by the en banc court *sua sponte* and subjected to supplemental briefing).

[51] *Id.* at 497. Chief Judge Jones also wrote that implying admissions regarding standing was impermissible in any event. *See id.* (citing Spencer v. Kemna, 523 U.S. 1, 10-11 (1998)).

[52] *Id.* at 508-09 (Barksdale J., dissenting).

[53] *Id.* at 507 (noting that the board did not address the standing issue until prompted by the court).

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It would be folly to expect the themes discussed above to provide an interpretive key for the whole of Judge Barksdale's writings. But hopefully the recurring role that his view of lawyers plays in his opinions sheds a bit of light on his jurisprudence. Along this line, it demonstrates a bit more about what the Judge's opinions have meant for the law—they have served as a call to pay greater respect to, and expect more from, lawyers.

CONCLUSION

For those of us fortunate enough to have been able to have one, a clerkship offers not just an inside view of the justice system but also an introduction to being a lawyer. Those of us who have had the privilege of clerking for Judge Barksdale received the most wonderful of such introductions imaginable. The Judge as a boss is brilliant, warm and funny. But so are others whom we have met and will meet during our careers after leaving his chambers. To me, what separates Judge Barksdale is the way he forced me to take my profession—and, by extension, myself—seriously.

The importance of this norm-setting cannot be overstated. At the beginning of my clerkship I would work diligently primarily because I did not want to let the Judge down. At some point during the year, I had internalized his ethic of professionalism so that I did those things because I understood that extreme diligence was the price of *being a lawyer*. This view is largely due to the standards the judge set, both implicitly and explicitly, for lawyers—himself, those of us who worked for him and the members of the bar that practiced before him. Those lessons are not always easily applied—they require us to maintain integrity when it may be advantageous to cut corners, to act competently when it would be easier to let things slide, to behave civilly when the alternative is appealing to say the least. But they are the necessary conclusions for anyone considering the role of lawyers in our society. Lawyers' integrity, competency, and civility are critical because lawyers are critical. Judge Barksdale's writings demonstrate his view that to believe otherwise is to make a serious error. His opinions offer those

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who read them a chance to learn a few of the lessons that his clerks are lucky enough to have learned first-hand.

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