

FALL 2005 VOL. 11 NO. 2

# TPIJ

*Texas Paralegal Journal*

## Asset Protection

TECHNOLOGY

ETHICS

EVENTS

EDUCATION



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# PRESIDENT'S *Message*

Ellen Lockwood, CLAS, RP

## WHAT CAN YOU DO TO IMPROVE OUR PROFESSION?

One of the goals of last year's State Bar President, Kelly Frels, was to work to improve the image of attorneys. This year's State Bar President, Eduardo Rodriguez, is continuing to work with the State Bar and other attorney organizations around the country to improve the image of attorneys and judges, and to work to combat judge and lawyer bashing. The image of paralegals with the public is also important. To people who have not had any personal experience with the legal community, you may represent their only impression, other than what they see on television and in the movies.

Most paralegals in Texas want to

raise standards for paralegals and limit who can use the term "paralegal." To be deserving of such status we should strive to conduct ourselves as professionally as possible, both on the job and in our community.

As members of the community, it is important to give back to the profession as well as the community at large. *Pro bono* work allows us to work with the legal community as well as members of the community who need free legal services. If the attorney with whom you work doesn't perform *pro bono* work, contact your District Director. He or she can direct you to *pro*



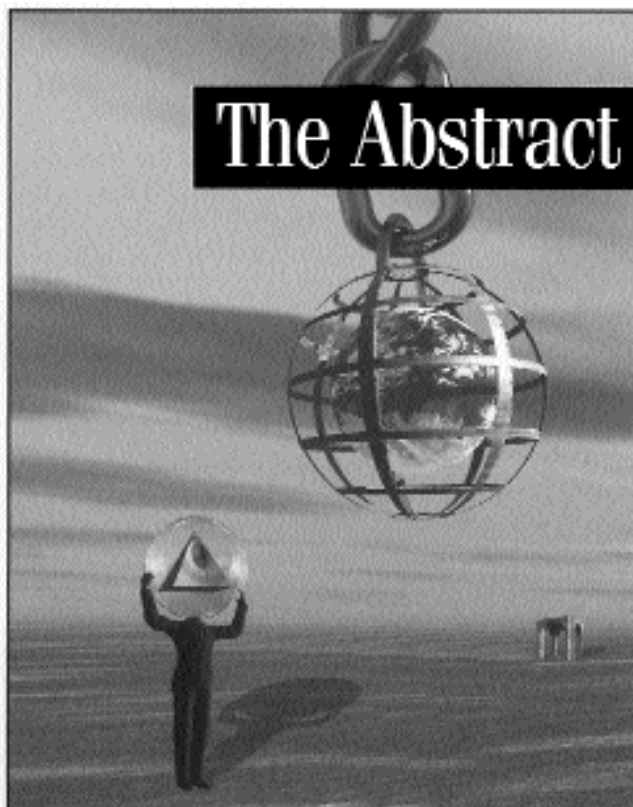
*bono* projects in your area.

Other volunteer opportunities are available in every community to fit every interest. You could volunteer at a soup kitchen or library, donate blood, work with your church, mosque, or synagogue, work with plants or animals, tutor, volunteer with the elderly, the list is endless. Any volunteer work you do, even if it is

only a few times a year, makes your community a better place to live.

Giving back to our profession can be as simple as keeping informed of developments in the profession, staying educated by attending CLE, and volunteering with professional associations. A

(Continued on page 3)



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# TPIJ

## Texas Paralegal Journal



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great way to give back is to assist other paralegals, especially those new to the profession. Each of us was new once and the best way we can repay those who helped teach us is to pass on our knowledge.

Of course, ethics are an important part of professionalism. As a friend of mine is fond of saying, it's not a question of how ethical you are. You are either ethical or you aren't. This year's focus is ethics and we hope to provide more opportunities for ethics CLE as well as resources for ethics information.

As a paralegal, you represent all other paralegals. Your actions determine what others in your town and legal community think of paralegals. Be sure your actions raise the standard for our profession and the legal community in general.

## CELEBRATE TEXAS PARALEGAL DAY ON OCTOBER 23, 2005

(See page 13 for the Texas House of Representatives Resolution)

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### EXCEPTIONAL PRO BONO SERVICE AWARD

**T**he Paralegal Division of the State Bar of Texas is proud to sponsor an Exceptional Pro Bono Service Award. Its purpose is to promote the awareness of pro bono activities and to encourage Division members to volunteer their time and specialty skills to pro bono projects within their community by recognizing a PD member who demonstrates exceptional dedication to pro bono service. Paralegals are invited to foster the development of pro bono projects and to provide assistance to established pro bono programs, work closely with attorneys to provide unmet legal services to poor persons. This award will go to a Division member who has volunteered his or her time and special skills in providing uncompensated services in pro bono assistance to their community. The winner of the award will be announced at the 2006 Annual meeting, his/her expenses to attend the 2006 Annual Meeting will be incurred by the Division, and a profile of the individual will be published in the Summer 2006 *Texas Paralegal Journal*. To complete a nomination form, go to <http://www.txpd.org> > [www.txpd.org](http://www.txpd.org), under Membership and click on Pro Bono Awards. Nomination deadline is March 31, 2006.

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# EDITOR'S *NOTE*

by Rhonda J. Brashears

**G**reetings, Paralegal Division Members. I hope that your summer has been a good one, even if it did vanish a little quicker than you would have liked. I am very excited about this next fiscal year! I have a great committee who has wonderful and fresh ideas. In this issue, you will see one of those fresh new ideas; it is the Opinions to the Editor section. Please take the time to look at this new avenue for professionals to express their views about law related issues in the news. If you have a topic you would like to see discussed, you can email me at TPJ@txpd.org, and we will consider sending it to the members for their comments. One of our goals for this next fiscal year is to print timely articles on changes that will affect our daily work lives. For example, in this issue, you will find a great article on the upcoming changes in the bankruptcy statutes. We need your help to accomplish this. If you know of a good article or a good person to write such an article about upcoming changes in the legal world, we would like to know about it.

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### DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS AUGUST 15, 2005.

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# Asset Protection

## *In the Aftermath of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

R. Glen Ayers, Jr.

### Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," was passed by the Congress this Spring and signed into law by President Bush April 20, 2005. The revisions to the Bankruptcy Code will have a draconian impact upon consumers and consumer bankruptcy practices. Many are now referring to the act at the "BARF" – an acronym composed with much regard to content of the statute but little regard for initials.

While there is much to criticize about the "BARF," the purpose of this paper is to outline changes that will affect asset protection planning. Because those changes are limited and are in some large part justifiable, I will not be able to mount my soapbox and preach against the evil Congress and its masters, those banks and credit card companies who together created this punitive, anti-consumer, unworkable monster of a statute. And, if you really want to know how I feel about the statute, *see* the May 25th issue of THE TEXAS LAWYER.

The changes which will impact asset protection include changes in state law homestead rights when bankruptcy is filed, changes in the exemption scheme for IRA's, and definitional changes which have the affect of removing education trust fund, education IRA accounts, and certain employee benefits from the bankruptcy estate.

However, you should know that all bankruptcy lawyers who represent consumers must now identify themselves as "debt relief agencies." A "debt relief agency" is anyone who provides bankruptcy assistance. 11 U. S. C. 6101(12)(A). At 6101(4), bankruptcy assistance is defined as assistance in a bankruptcy case under title 11. Further, an "assisted person" under 6101(3) is a consumer debtor. Therefore, you do not have to disclose in your firm's promotional materials or on its website that you are a "debt relief agency" unless you fit in these narrow categories. Because one of my partners has a large consumer practice, and because I do pro bono cases, my firm is now a "debt relief agency." This is quite a shock to the two or three of my partners who represent banks.

By way of further introduction to the statute, and as an indication of some of the problems with the Act, new 6101(12) describes "restrictions on debt relief agencies." One of the things that a debt relief agency (*i.e.*, a bankruptcy lawyer) may not do is, at 6101(12)(4):

advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.



A parsing of the sentence reveals that the provisions does not say that a lawyer cannot advise a debtor to borrow money to pay fees but rather that a debt relief agency may not advise a debtor to pay fees.

#### Effective Dates

The statute generally becomes effective on approximately October 17th or 180 days from the date the President signed the Act. However, some provisions of the Act will not become effective until rules are promulgated. *See generally* 11 U.S.C. 6308. Some of the provisions of the Act dealing with the requirements that all consumer creditors have consumer credit counseling prior to the filing of a bankruptcy do not go into effect until there is a certification by the local United States Trustee that there are local agencies able to provide such consumer credit counseling pursuant to the terms of the Act. *See new* 11 U. S. C. 6109(h).

However, the provisions of the Act dealing with the limitations on the homestead are effective now. The changes to §522 (n), (o) and (p) became effective when the President signed the statute. Also effective immediately are two of the amendments to the Bankruptcy Code Fraudulent Conveyances provisions; the scope of the provision has been extended and transfers made up to two years prior to the date of the filing of the petition are now within the reach of 6548. *See* 6548(a). The prior statute only reached transfers within one year. The second change to 6548 which became effective April 20 is new subsection (e), which permits avoidance of self-settled trusts for up to ten (10) years.

#### EDUCATIONAL ACCOUNTS AND IRA'S

##### Educational Accounts

Rather than exempt education accounts, 11 U.S.C. 6541(a)(5)(b)(5) excludes from property of the estate funds

placed in an "education individual retirement account" qualified under 6530(b)(1) of the Internal Revenue Code and which have been in the account for at least 365 days.

The designated beneficiary must be "a child, step-child, or stepchild of the debtor) for the taxable year for which the funds were placed in the account . . ." Under new 6541(e), "child" includes those children legally adopted or whose adoption is pending and foster children.

There are further limitations. The funds may not be pledged in connection with extensions and credit. Excess contributions do not qualify. Total funds contributed for the period between 720 days from the date of the bankruptcy petition and 365 days before the date of the bankruptcy petition may not exceed \$5,000 per designated beneficiary. In other words, any contribution to a particular child which occurs after 720 days before the date of the petition and before 365 days before the date of the petition in excess of \$5,000 is property of the estate. Further, any funds contributed within 365 days are property of the estate.

This certainly would not end an inquiry into whether the contributions made in excess of the \$5,000 limit or within 365 days were recoverable for the benefit of creditors. The new statute merely provides a safe harbor for a limited amount of money.

Funds contributed in excess of the limits are (apparently) not automatically brought into the estate; rather, the right to recover those funds would be "property of the estate." The unprotected contribution would then be subject to avoidance as fraudulent conveyances under 6548 of the Bankruptcy Code and Chapter 24 of the Texas Business & Commerce Code [incorporated into the Bankruptcy Code at 6544(b)]. This must be correct. For example, IRC 6530 "Coverdell Education Accounts" are trusts with a bank as trustee. Recovery from the trustee would require litigation for reasons too obvious to discuss.

In addition, the same exclusion from the property of the estate with the same exceptions apply to funds used to purchase tuition credits or certificates under Internal Revenue Code 6529(b)(1)(A). The excess contributions would then be reviewed as possible fraudulent conveyances.

##### Employee Benefits

Also excluded from property of the estate are sums withheld by employers from employees under employee benefit plans or received by an employer from employees. *See* 6541(a)(7) There appears to be no limit to the amounts involved as long as the sums withheld or contributed are for deposited into a retirement plan qualified under the Internal Revenue Code or a health plan is regulated by state law.

##### IRA Changes

For Texas residents, and residents of a limited number of other states, the IRA exemption rules have been changed to limit IRA exemptions to a total amount of \$1.0 million but, given the poor wording of the amendments, this limit certainly appears to be "per debtor"—so, in a joint case, the limit would be \$2.0 million. First, the limit is set out at new 11 U.S.C. 6522 (n), which refers to "a case filed by a debtor who is an individual...."

Then, looking up one subsection, at 11 U.S.C. 6522 (m), the statute states: "Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case."

The limitation in 11 U.S.C. 6522 (b) refers to a provision of that subsection which prohibits husbands and wives, in joint cases from selecting the state exemption scheme for one and the Bankruptcy Code alternative exemption scheme, at 11 U.S.C. 6522 (d), for the other spouse.

Given these provisions, almost certainly the cap is \$1.0 million per debtor. Ownership of the IRA funds to title will be important, I think, and the exemption

*(Continued on page 10)*

## SUSTAINING MEMBER PROFILE

### RYDMAN RECORD RETRIEVAL

By: Paco, Chief of Security

It is hard to believe Mom is entering her 10th year in business ... WOW!!! All she wanted to do was make enough money to make her car payment. AND look at her now ... offices statewide. All of those years in law firms taught her the right way to fetch things as quickly as possible, and not to say "no". Those skills, a \$6,000 loan from my grandmother, and a credit card were the humble beginnings of RRR. A table top copier with NO SORTER along with Daddy, a rapid-fire Bates labeler, has turned into a hugely successful business with copiers and fax machines Mom and I cannot even operate. I get lots more love now that Daddy no longer has to Bates label. I would, however, help Bates label ... if only I had thumbs!

RRR and I are grateful for the most wonderful, loyal staff, most of who came from the legal field themselves, some having over 20 years legal experience. Everyone takes pride in their work and

tries very hard to accommodate all of our clients' needs. They strive to develop a special relationship with each client to ensure that we can take care of them, no matter how difficult, convoluted, or last minute those needs may be. You can take my word that RRR employees will take care of you ... I should know because they do a fine job of taking care of me when I need TLC.

Although Mom started out with a specialty in **record retrieval** by deposition on written questions and requests by authorization, I told her she really needed to expand our services and, taking my advice, RRR has included **document retrieval** from court houses, governmental agencies, etc. all over the State of Texas. As Chief of Security I oversee all **Process Service**, another suggestion of mine. To round out these specific services associated with discovery, recently



RRR added **court reporting** and all the bells and whistles that go along. Earlier this past year some folks who really rock in the techno world came on board and have enhanced our awesome database, as well as, our ability to offer all kinds of technology support to our clients (including on-line weblinks for

clients and opposing counsel in multi-litigation cases who need unlimited global access to records and transcripts).

While I cannot take all of the credit for what RRR is today, I am very proud of what it has become. The legal community has been very, very good to Mom over the last 30+ years and to RRR over the past 10 years. For that we are both very thankful because now Mom can afford unlimited doggie cookies! It is folks like you that keep RRR in business. THANK YOU!



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may be affected by whether the funds are community, separate, or owned by an entirety.

Finally, the IRA cap “may be increased if the interests of justice so require,” giving the bankruptcy court wide latitude to examine support needs and the like.

## THE UNLIMITED HOMESTEAD EXEMPTION IS NOW LIMITED

### Limitations in Unlimited Homestead States

New Sections 522(o), (p) and (q), which are now in effect, place limitations upon unlimited homesteads.

First, subsection (o) provides for a ten year look back at any transfers could be described as fraudulent conveyances. The new statute states that the value of the debtor’s interest in the homestead is reduced by any value of the homestead “attributable to” any non-exempt property “disposed of . . . with the intent to hinder, delay or defraud a creditor. . . .” If non-exempt funds are invested in the homestead, and the value of the exemption increases as a result, that volume must somehow be recaptured where there was “intent to hinder, delay or defraud.”

This is a very significant provision because it implicates all long term planning decisions. For example, if a client in Texas is advised to transfer non-exempt cash into the homestead prior to engaging in a new business (increasing the value of the unlimited Texas homestead in a subsequent bankruptcy filed within ten years), the trustee must determine whether there was “intent to hinder, delay or defraud” a creditor.

However, given the structure of the sentence, if there is no creditor at the time of the transfer, the value of the homestead should not be reduced. And, unless the trustee can show “intent,” the transfer would not affect the value of the debtor’s interest in the homestead.

Because of the ten year period, I expect some litigation. How successful the plain-

tiffs will be, given the structure of the statute and the obvious proof problems, I cannot predict.

More importantly, I do not see any enforcement mechanism. Will courts orders sales of homesteads to enforce successful claims? Where will an impecunious debtor get the money without a sale? Will the statute force filing of chapter 11 or 13 cases?

New subsection (p) caps the value of the homestead at \$125,000 if the homestead was purchased within three and one-half years of the date of the bankruptcy petition. The only exception is a same-state rollover of proceeds of one homestead into a new homestead. The homestead value is capped even if exempt savings, an exempt insurance annuity or some other exempt asset produced cash paid into the homestead. Also, the limitation of \$125,000 applies if a homestead in an unlimited homestead state like Florida is sold, the debtor moves to Texas, and then invests those proceeds in a Texas homestead. Once again, note the lack of an enforcement mechanism.

Here we again have the question of whether the \$125,000 gets doubled if the bankruptcy is a joint bankruptcy for a (married couple). The statute, at 11 U.S.C. 6522(m), specifically says that the section applies “separately with respect to each debtor in a joint case.” Subsection (o) only discusses the singular “debtor,” and does not contain any reference to joint debtor cases or spouses or anything similar which might limit the impact of subsection (o). So, based upon the plain meaning of the statute, and without the need to refer to any legislative history, it would appear that the exemption amount gets doubled in joint cases unless, perhaps, the homestead was not owned jointly – e.g. was the separate property of one spouse.

This same argument can, of course, be made as to subsection (q), discussed below.

Subsection (q) limits the homestead

exemption to \$125,000 where a debtor is convicted of a felony where “circumstances demonstrate that the filing of the case was an abuse” or where the debtor owes debts arising from violation of the security laws, state or federal laws or regulation. There is some discretion with the application of this statute. Subsection (q) does not apply “to the extent the amount is reasonably necessary for the support of the debtor and any dependent of the debtor.”

### Other Caps on State Exemptions

In addition to 11 U.S.C. 6522 (q) discussed above, which limits all state exemptions to \$125,000 in certain securities fraud cases, new 11 U.S.C. 6522 (b)(3)(A) also caps state exemptions.

The debtor cannot elect state exemptions unless his or her domicile has been located in the state whose exemptions are to be used for 730 days immediately preceding the date of the filing of the petition or if the debtor’s domicile has not been located at a single State for such 730 day period, the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place. 11 U.S.C. 6522 (b)(3)(A).

The debtor will be forced to use exemptions of the state of residence before he or she moved to Texas or Florida unless the debtor has been a resident for 730 days or 2 years.

### Domestic Support Obligations and Exemptions

If an individual owes a financial obligation to an ex-spouse or child, that debt will be important in any asset protection plan. To understand this statement, an analysis of several new statutory provisions is necessary.

The revisions create a new category of obligation called “domestic support obligations,” defined at 11 U.S.C. 6 101(14A):

[A] debt that accrues before, on, or



after the date of the order for relief . . . including interest . . .

- (A)  
owed to or recoverable by –
- (i)  
a spouse, former child, or child of the debtor – or such child's parent, . . . guardian, . . . relative, or
- (ii)  
a governmental unit;
- (B)  
in the nature of alimony, maintenance or support . . . without regard to whether such debt is expressly so designated;
- (C)  
established . . . before, on or after the . . . order for relief
- . . . [in a] –

- (i)  
separation agreement, divorce decree, or property settlement;
- (ii)  
in an order of a court of record; or
- (iii)  
a determination . . . in accordance with applicable non-bankruptcy law . . . by a governmental unit; and,
- (D)  
not assigned to a non-governmental entity, unless assigned . . . [for the purpose of collecting the debt].

Domestic support obligations are now a first priority administrative claim under 11 U.S.C. 6507. This means that the assets of the debtor not subject to liens will be distributed first in satisfaction of those unsecured claims (prior to other expenses

of the case, except those related to the collection and liquidation of assets necessary to pay the domestic support obligation).

In addition to being a first priority, domestic support obligations are non-dischargeable under 11 U.S.C. 6523(5).

Because priority claims must be paid in full in chapter 11, 12, and 13, and because those chapters cannot generate a discharge greater than is generated in a chapter 7, a plan in chapter 11, 12, or 13 must provide for the payment of all such obligations.

And, the problems continue. Under the exemptions provisions of 11 U.S.C. 6522(c), by filing bankruptcy, a debtor waives state law exemptions and non-bankruptcy law federal exemptions to the extent necessary to pay all of the "domestic support obligations" governed by 11 U.S.C. 6523(a)(5).

While almost any financial obligation created in a divorce decree or related court

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order may well fall into the categories of “alimony” or “support,” if a financial obligation is not within those categories, the obligation remains non-dischargeable under 11 U.S.C. 6523(a)(15). Section 523(a)(15) also applies in all chapters, including chapter 13. So, even in chapters 11, 12, and 13, any financial obligation created in a divorce decree will either be paid or will pass through bankruptcy.

Obviously, it is the waiver of exemptions provision of 6522(c) that is most relevant to asset planning. Only the “non-bankruptcy law” exceptions are waived. This does leave the bankruptcy exemptions at 6522(d). But, those exemptions are of limited value, particularly if the Debtor owns a homestead. Planning “around” this problem seems all but impossible. I suspect many ex-spouses will now need to avoid bankruptcy. These provisions will not be effective until October, 2005.

#### Self-Settled Trusts

Although there were many comments that the early versions of the statute did not attack the self-settled trust protection schemes available in Alaska and certain other states, new 11 U.S.C. 6548 (e)(1) seems crystal clear. Transfers into self-settled trusts for the ten years prior the date of the petition, where the transfer was by the debtor and the debtor is a beneficiary, may be attacked if the trustee can show “actual intent to hinder, delay or defraud any entity to which the debtor was or became, after the date such transfer was made, indebted.” Note that this provision applies to present and future creditors. Substantial Abuse and Chapter 7: “Means Testing for the Affluent”

Much of the discussion about the new statute has focused upon the “means test” for consumer debtors, with opponents arguing that consumer debtors with little or no ability to pay will be forced into chapter 13 repayment plans for five years. This is all true. The Procrustean bed called a means test is based upon IRS budgets

and requires those individuals whose debts are primarily consumer debts to undergo a stringent analysis of budget, income and ability to repay before being permitted to continue in a chapter 7 liquidation case. See generally 11 U.S.C. 6707(b).

However, the means test applies to all consumer debtors, even those not eligible for chapter 13. Chapter 13 is open to human beings and their spouses who owe less than approximately \$308,000 in unsecured debt and less than approximately \$923,000 in secured debt. The means test clearly supplies to consumer debts eligible for chapter 13, but it can be used to force conversion from chapter 7 to chapter 11 for those consumers.

So, if a person with a great deal of consumer debt (e.g., Dr. Jones, M.D.) wishes to discharge debt, he will be forced to file a chapter 11 case or do without. If Dr. Jones owes a lot for the toys and the good life, and he makes more than the median family income as determined by reference to reports from the Bureau of the Census [see 11 U. S. C. 6101(39A)], and if he can pay \$6,000 to unsecured creditors over five years on a budget taken from the IRS, his only choice is chapter 11.

How future income would factor into this equation is unclear. If Dr. Jones, M.D. is just graduating from medical school, and she does not have much income yet, or if Dr. Jones does not have consumer debt but only has malpractice claims, the trustee or creditors should be limited to 11 U. S. C. 6707(a), which permits dismissal for cause.

#### Significant Changes in the Treatment of Taxes

For those who deal with taxes owed to the federal and state governments, several changes are worth noting. First, the chapter 13 “super discharge” for certain taxes and other claims is gone. 11 U. S. C. 61328(a).

In chapter 11 cases, 11 U. S. C. 61129(a)(9) has been amended to provide for a five year – as opposed to six year –

period for repayment, but the five years begins on the date of the order for relief. The six year period began on the date of assessment. The repayment must be in regular installment payments on terms not less favorable than those of “the most favored non-priority unsecured claim” (with an exception for what are called “convenience class” claims, which are small claims paid in a lump sum for ease of administration).

#### Involuntary Bankruptcies

11 U.S.C. 6303 permits creditors to file involuntary bankruptcies against debtors under chapters 7 and 11. If the debtor has less than 12 secured creditors, only one petitioning creditor is necessary; otherwise, there must be three. The one or three (or more) must hold unsecured, undisputed claims aggregating at least \$12,300.

What if petitioning creditors file an involuntary petition at a time when a debtor cannot take advantage of state law exemptions in the state of residence – e.g., an involuntary is filed against someone who has just moved to Texas and purchased, for cash, a \$1.0 million house? At state law, the house is “safe.” In bankruptcy, the exemption is limited to \$125,000 (or \$250,000 if doubled). Is it constitutional to force a waiver of the exemption in this fashion? I think not. I think it constitutional to force the debtor to elect between a limited homestead exemption and bankruptcy protection. If the debtor wants to file bankruptcy, and take advantage of the discharge, he or she may have to pay a price. I do not think it constitutional to allow creditors to force the debtor into bankruptcy in order to take away a state law given right, such as a homestead.

#### Soapbox

Earlier, I stated that much of what Congress did in the context of asset protection was justified. Even though confusing and poorly thought out, most of the



changes and limitations are responses to real problems. All of the homestead and exemption limitations seem to reflect notorious Florida bankruptcies, where debtors fled to Florida one step ahead of creditors or the SEC, bought or built mansions, and pulled up the drawbridge.

Many of the other changes are generally beneficial, including the education trust/IRA and benefits exclusion. The cap on IRA's, except in a few states like Texas, is actually neutral or beneficial.

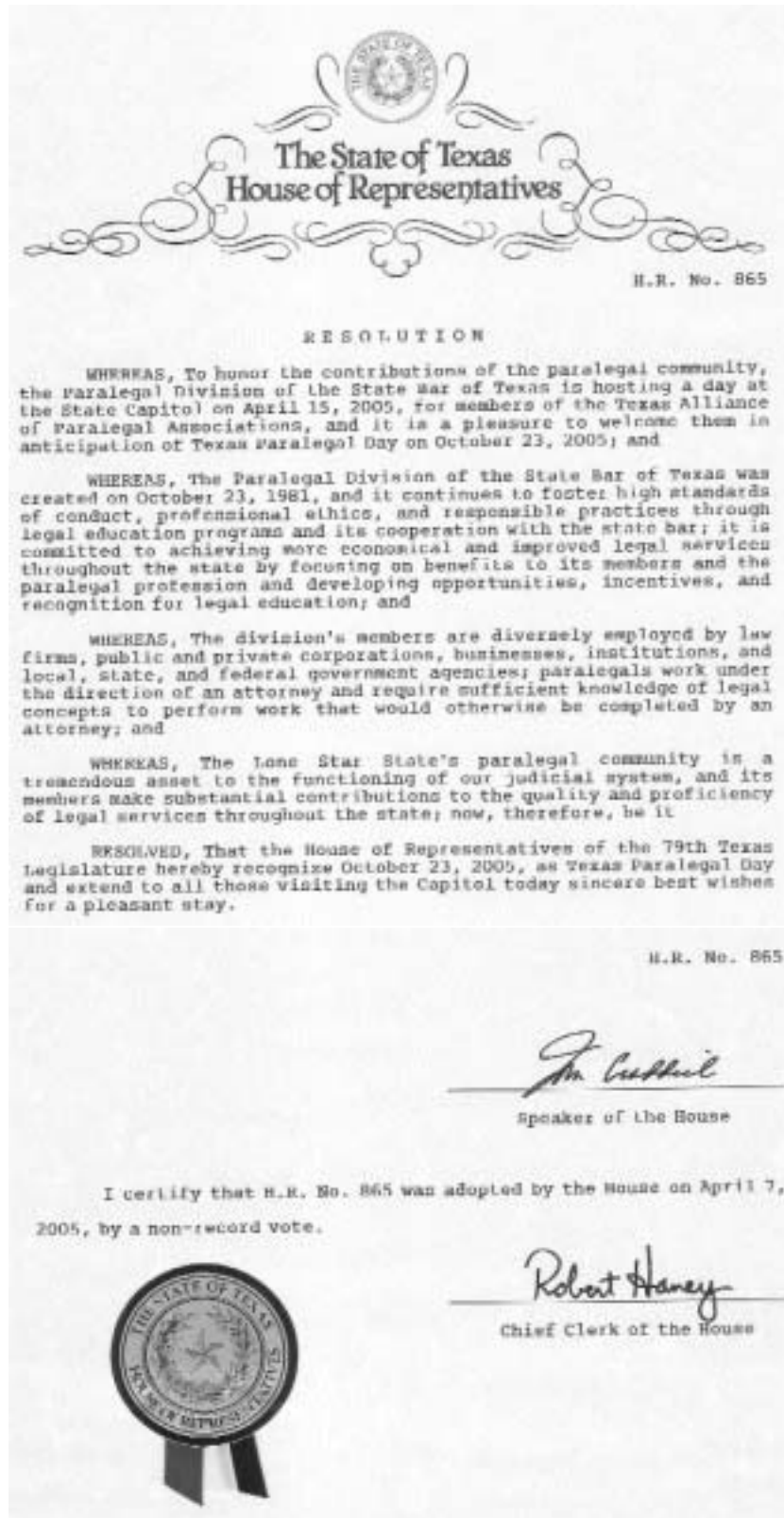
The truly punitive portions of the statute, which are not explored, impact poor consumers. Those are people who barely know the meaning of the word "asset" and who think that "asset protection planning" involves purchasing burglar bars.

#### Conclusion

With the new restrictions on exemptions, including the homestead, asset protection plans must now adopt a very long range approach, assuming that the full protections of careful planning may not be fully realized until from two to ten years have passed.

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# Spoliation & Electronic Discovery

*A New Wrinkle in an Old Concept*

Sharon Small & Jerald Harper

The evidentiary concept of spoliation—which permits a fact finder to infer that evidence which has been suppressed, altered, or destroyed was unfavorable to the responsible party—is not new. But recent developments in electronic discovery have given the concept a new wrinkle. The obligation of federal court litigants to preserve and timely produce e-mails in discovery has been drawn into much sharper focus as a result of two recent cases—*Zubulake v. UBS Warburg, L.L.C., et al*, 2004 WL 1620866 (S.D.N.Y.) (July 20, 2004) and *Coleman Holdings v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. Cir. Ct.) (March 1, 2005). In the weeks and months following *Zubulake*, this district-court opinion received wide publicity from the legal community, with the American Bar Association, the Metropolitan Corporate Counsel, and Law Technology News weighing in on this issue. *Morgan Stanley*, a more recent decision, will no doubt garner attention as well.

## *Zubulake*

In *Zubulake*, a routine employment discrimination case, Judge Scheindlin imposed sanctions that included an adverse-inference jury instruction because certain of the employees “willfully” deleted e-mails after being notified of a “litigation hold.” From the outset of her opinion, Judge Scheindlin stressed the importance of effective communication between corporate clients and their attorneys. Citing the famous words from the movie *Cool Hand Luke*, “what we have here is a failure to communicate,” the court stressed that the failure of UBS and its counsel to communicate had prejudiced *Zubulake*.

*Zubulake* had filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”). Immediately after *Zubulake* filed the EEOC charge, UBS’s in-house counsel instructed employees not to delete or destroy potentially relevant material (both electronic files and hard copies) and to cull such material for counsel’s review. UBS’s outside counsel subsequently met with a number of key UBS employees and reiterated the instruction to preserve relevant materials—including emails. After *Zubulake* requested the production of emails stored on backup tapes, UBS’s outside counsel instructed the information technology staff to stop recycling backup tapes. In spite of these instructions, UBS employees deleted relevant emails. (Some of the emails were ultimately recovered from the backup tapes and belatedly produced, and some were never recovered.) *Zubulake* also presented evidence that UBS employees had had emails on their computers relevant to the lawsuit but never provided them to counsel and, therefore, they were not produced to *Zubulake* until her attorney learned of their existence during depositions. Upon discovery of this, *Zubulake* then moved for sanctions. With this background, the court was ready to rule.



The court explained the standard for imposing sanctions, stating that a party seeking sanctions for spoliation of evidence must establish (i) that the party with control over the evidence was obligated to preserve it at the time that it was destroyed; (ii) that the evidence was destroyed with a “culpable state of mind;” and (iii) that the evidence was relevant such that a reasonable trier-of-fact could find that it would have supported the moving party’s claim or defense.

Importantly, the court explained both that “culpable state of mind” includes negligence and that when evidence is destroyed in bad faith the relevance requirement is presumed to be satisfied. After finding that Zubulake had met the first prong, the court concluded that UBS and its counsel had not taken all necessary steps to guarantee that relevant evidence was preserved. While the court acknowledged that *counsel* could have been “more diligent” in the preservation process, the focus of the court’s ire was the “UBS employees [who] deleted emails in defiance of counsel’s explicit instructions not to.”

Accordingly, the court declared that:

the jury would receive an adverse inference charge with respect to emails that UBS deleted after August 2001;

UBS was required to pay for any additional depositions or re-depositions required by the late production of evidence; and

UBS was required to pay the reasonable costs and attorneys’ fees of the motion.



While *Zubulake* was an employment discrimination dispute, the issues highlighted therein are not unique to such cases. With electronic communications becoming increasingly prevalent, one should expect the issues raised in *Zubulake* to draw enormous attention. Moreover, the case is also significant because the court imposed sanctions despite the apparently genuine attempts by counsel to comply with discovery obligations—both inside and outside counsel gave repeated instructions to employees not to destroy emails. Thus, *Zubulake* teaches that even well-meaning efforts by counsel to preserve and collect electronic discovery may not be adequate. And merely going through the motions is never enough.

#### *Morgan Stanley*

Most recently, the investment banking

firm of Morgan Stanley was dealt a severe legal blow (to the tune of \$604 million) after a circuit court judge granted the plaintiff’s motion for an adverse inference instruction to the jury. See *Coleman Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. Cir. Ct.) (March 1, 2005). Morgan Stanley was sued for fraud in connection with a stock sale transaction. Because Morgan Stanley’s knowledge of the fraudulent scheme was key, the plaintiff sought access to Morgan Stanley’s documents, including email. Morgan Stanley implemented a “litigation hold” with regard to paper documents, but

its employees overwrote emails after 12 months, despite an SEC regulation requiring that they be preserved for two years. See 17 C.F.R. 6 240.17a-4. Morgan Stanley also violated an Agreed Order by failing to search all backup tapes for relevant emails and providing a false certification of compliance with the court order.

The court had entered an Agreed Order requiring Morgan Stanley to: (i) search the oldest complete backup tape for employees involved in the transaction; (ii) review emails from a specified period and those containing certain search terms regardless of their date; (iii) produce all non-privileged responsive emails by May 14, 2004; (iv) provide a privilege log; and (v) certify complete compliance with the Agreed Order. What followed the entry of the Agreed Order was a series of blunders and mis-statements that set Morgan Stanley on a collision course with the court. While



Morgan Stanley produced 1300 emails on time, it did not certify compliance until June 23, 2004—more than a month after the production. Sometime prior to the issuance of the certification, however, the manager in charge of the project learned of 1,423 additional backup tapes in Brooklyn, New York that had never been processed in accordance with the Agreed Order, making his certification false. Despite the realization that these tapes covered the relevant time period, the manager never withdrew the false certification or informed CPH. In addition, other tapes that were later found in Manhattan were also handled in violation of the Agreed Order.

Morgan Stanley then changed project managers. But the new manager made no immediate effort at email production. In fact, five months passed before she was even informed about the litigation. Moreover, the court was not informed until November 17, 2004 that the certificate of compliance was incorrect due to the discovery of new material. The next day, Morgan Stanley produced 8,000 pages of additional emails, stating that they had come from “newly discovered” tapes. But this assertion turned out to be false because the new manager, Ms. Gorman, testified that her team did not figure out how to upload and make searchable the materials until January 2005.

The court admonished Morgan Stanley and its counsel for a lack of candor which had “frustrated the court’s and opposing counsel’s ability to be fully and timely informed.” According to the court, Morgan Stanley’s failure to process material in the designated area and to search the material as required by the Agreed Order was a “willful and a gross abuse of its discovery obligations.” The court concluded that Morgan Stanley had acted “knowingly, deliberately, and in bad faith.” This, coupled with their failure to maintain email in readily accessible form as required by SEC regulations, warranted the imposition of sanctions. The sanctions were as follows: (i) a statement of facts

that was read to the jury detailing Morgan Stanley’s behavior in whatever evidentiary phase requested by CPH; (ii) CPH may argue that Morgan Stanley’s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages; (iii) Morgan Stanley would bear the burden of proving to the jury that it lacked knowledge of the Sunbeam fraud; and (iv) Morgan Stanley would pay the attorneys’ fees and costs of the motion. Most significantly, the burden of proof was *flipped from plaintiff to Morgan Stanley*, and that essentially sounded the death knell for Morgan Stanley.

#### ***Lessons from Zubulake and Morgan Stanley***

Cases like *Zubulake* and *Morgan Stanley* highlight the significance of email discovery, and in-house counsel need to be aware of the related pitfalls. Companies and their attorneys must carefully evaluate the use of electronic information and create effective programs to ensure that such information is properly preserved. There may be no single “right” way to comply with these obligations, but here are some suggestions for avoiding the pitfalls highlighted by *Zubulake* and *Morgan Stanley*: *Compliance Program*. In-house counsel should make document preservation a part of its compliance program, continually stressing to employees the importance of the company’s preservation obligations and imposing sanctions on non-compliant employees.

*Outside Counsel*. Outside counsel must be directly involved in the implementation of the company’s preservation program and be prepared to correct the deficiencies or inadequacies therein.

*Litigation Hold*. At the first indication of a dispute, a “litigation hold” should be implemented. Backup tapes containing communications by “key actors” should be quickly identified and sequestered. Employees should be regularly reminded of the hold and sanctions should be

imposed upon non-compliant employees. *Outside Vendors*. Consider using third-party or outside vendors to assist in-house technical staff with the preservation effort.

#### ***Conclusion***

Compliance with electronic preservation obligations continues to spark debate among rule-makers, and changes in discovery practices are occurring as a result. For instance, the American Bar Association has recently amended its standards on document retention and preservation issues, and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has invited comment on a proposal for revising the Federal Rules of Civil Procedure to specifically address the issues raised by electronic discovery. In addition, many courts have adopted or are considering local rules addressing this subject. With proper protocols in place for electronic preservation, corporate litigants may use the standards set forth in *Zubulake* as a shield rather than have those same standards used as a sword against them.

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*Jerald Harper is the principal of Harper Law Firm in Shreveport Louisiana. He has over 25 years experience in general commercial litigation, including intellectual property, unfair competition, and securities litigation. Mr. Harper has appeared in State and federal courts all over Louisiana and as pro hac vice counsel in numerous other States, including Texas, Arkansas, Missouri, California, New York, Wisconsin, Illinois.*

# The Last Great Shelter

Craig Hackler, Financial Advisor, Raymond James Financial Services

Your home is probably the last great widely available tax shelter. With the economy running strong, more and more people are wondering about the tax benefits of owning a home. So, it pays to review some of the tax implications of home ownership. For now, let's just look at some of the rules for home mortgage interest, home equity debt interest and "points."

The rule used to be pretty simple; home mortgage interest was deductible. Then Congress "simplified" the tax code. Nothing's simple anymore. Under current law, home mortgage interest incurred to purchase, construct or substantially improve your first or second home is deductible to the extent of \$1 million of debt secured by either home. That's right, the \$1 million limit applies to the total debt on both homes. This so-called "acquisition" debt will only go down over time. It generally cannot be increased by a subsequent refinancing. Mortgage loans obtained on or before October 13, 1987 are not subject to the \$1 million limit, but will count against the over-all \$1 million limit.

"Home" for the purpose of these rules includes just about any place you call home that has sleeping quarters, cooking facilities and a bathroom. So, a condominium, co-operative apartment, mobile home and houseboat all qualify. The rules permit you to include both a first and a second residence. Your first or primary residence, generally, can be thought of as the place you call "home." The second residence may be a vacation home, but be careful - special rules apply if you rent out your vacation home.

The interest on a total of \$100,000 of "home equity" debt secured by your first or second home is also deductible, almost regardless of the use of the loan proceeds. The \$100,000 limit is further limited by the value of the home reduced by any acquisition indebtedness. For example,



suppose you own a \$150,000 house on which you still owe \$90,000 on the original mortgage. In this situation, deductible interest would be limited to \$60,000 of home equity indebtedness.

As we all know by now, the interest on a consumer car loan or ordinary credit card purchases are no longer deductible. However, if the car loan or other consumer debt is incurred via a home equity loan, the interest is deductible. But I said above, "almost." The interest on debt incurred to purchase or maintain a position in municipal bonds is not deductible, even if incurred through a home equity loan.

"Points" are another very confusing area. A "point" is 1% of the amount of the mortgage and the term is used to describe a variety of charges imposed by a mortgage lender. To be deductible, the "points" must be: 1) incurred to buy or build your principal residence only, 2) represent additional interest and not pay for some other

service, 3) the loan must be secured by your principal residence, 4) the charging of points must be an established business practice in your area, 5) the points must be within the amount normally charged, 6) they must be clearly designated as points on the Uniform Settlement Statement, 7) they must be computed as a percentage of the loan amount and 8) may be paid by the borrower or seller. Refinancing points are generally not currently deductible and must be deducted evenly over the term of the mortgage loan.

*Craig Hackler holds the Series 7 and Series 63 Securities licenses, as well as the Group I Insurance license (life, health, annuities). Through Raymond James Financial Services, he offers complete financial planning and investment products tailored to the individual needs of his clients. He will gladly answer your questions. Call him at 512.894.0574 or 800.650.9517*

# Medical Records 101, Lesson 3

## Building Your Medical Library

Janabeth F. Taylor, R.N., R.N.C.

Whether your practice involves a client injury in the workplace, injury due to medical negligence, product defect, or toxic chemicals you will have a need to obtain and review medical records.

At times the terms used in the medical records can be confusing and the rationale for diagnosis and treatment is not clear. In other instances you wish to review a standard of care as it relates to your client's diagnosis and treatment.

Below is a general listing of resources, both in text print as well as online which might be of benefit to your office.

We are all sensitive to the issue of overhead for the law office. Therefore, you may want to consider obtaining some of these books as library materials for a shared legal medical library established through your local bar association or in co-operation with other law firms in your immediate area.

### Medical Abbreviations: 24,000 Conveniences at the Expense of Communications and Safety, by Neil M. Davis

Temple Univ., Philadelphia, PA.  
Annual pocket quickreference guide to 24,000 meanings of medical abbreviations and 3,400 crossreferenced generic and brand drug names. Thumbtabbed pages. Includes singleuser access code to the Internet version of the book which is updated with 80120 new entries per month. Softcover.

Paperback: 430 pages

Publisher: Neil M. Davis Assoc; 11th edition (December 2002)

ISBN: 0931431115

### Laboratory and Diagnostic Tests with Nursing Implications (6th Edition)

by Joyce Lefever Kee, RN, MSN,  
Each test is discussed in seven subsections in the following sequence: (1) reference

values/normal findings, (2) description, (3) purpose, (4) clinical problems, (5) procedure, (6) factors affecting laboratory or diagnostic results, and (7) nursing implications with rationale. Following the name and initials for each test, there may be names of other closely associated tests. Reference values/normal findings are given for children and adults, including the elderly. The description focuses on background data and pertinent information related to the test. The general purpose for each test is listed. Clinical problems include disease entities, drugs, and foods that cause or are associated with abnormal test results. The procedure is explained with a rationale for the test and with appropriate steps that the nurse and other health professionals can follow. Factors affecting laboratory or diagnostic results alert the nurse to factors that could cause an abnormal test result. The last subsection and most valuable information for each test concerns the nursing implications with rationale. For most diagnostic tests, nursing implications are given as "pretest" and "posttest."

Paperback: 805 pages ; Dimensions (in inches): 1.25 x 9.50 x 7.25

Publisher: Prentice Hall; ; 6th edition (September 12, 2001)

ISBN: 0130305197

### Alexander's Care of the Patient in Surgery by Jane C. Rothrock, RN, DNSC, DNoR, FAAN (Editor), Dale A. Smith, RN, CNOR, RNFA (Editor), Donna R. McEwen, RN, BSN, CNOR, CRST (Editor)

ALEXANDER'S CARE OF THE PATIENT IN SURGERY, considered the standard in perioperative care for over 50 years, is a comprehensive reference for students and practitioners alike. Unit I covers basic principles and patient care requisites. Unit II details stepbystep procedures for over 400 general and specialty surgical inter-

ventions. The unique needs of ambulatory, pediatric, geriatric, and trauma surgery patients are discussed in Unit III. New features include highlighted patient education and discharge planning, sample critical pathways, expanded coverage of endoscopic/minimally invasive procedures, and internet resources. A new chapter, Surgical Modalities, addresses today's technologically advanced perioperative environment.

Hardcover: 1409 pages

Publisher: MosbyYear Book; ; 12th edition

(January 15, 2003)

ISBN: 0323016227

### Merck Manual Diagnosis & Therapy (Includes Facsimile of 1st ed. of the Merck Manual)

by Mark H. Beers (Editor), Robert Berkow (Editor), Mark Burs (Editor)

The most widely used medical text in the world and the hypochondriac's bible, the Merck has the lowdown on the vast expanse of human diseases, disorders and injuries, as well as their symptoms and recommended therapy. It's intended for physicians and medical students, but though the type is tiny and the language technical, the Merck's a valuable volume for anyone with more than a passing interest in bodily ills.

Leather Bound: 2833 pages

Publisher: Merck & Co; 17th edition (March 5, 1999)

ISBN: 091910107

### Rosen's Emergency Medicine: Concepts and Clinical Practice (3Volume Set)

by John, Md. Marx, Robert, Md.

Hockberger (Editor), Ron, Md. Walls (Editor), Robert S. Hockberger

ROSEN'S EMERGENCY MEDICINE continues to be the premier source that defines the field of emergency medicine. It describes the science of emergency medicine and its application, focusing on the diagnosis and management of problems encountered in the emergency department. This stellar new team of editors has introduced many new features including a "Cardinal Presentations" section, chapter consistency, and more diagnostic imaging throughout. All existing chapters have

been extensively revised, and reference lists have been edited to include more significant, up-to-date references.

Hardcover: 2766 pages  
 Publisher: Mosby/Year Book; 5th edition  
 (January 15, 2002)  
 ISBN: 0323011853

**Joint Commission on Accreditation of Healthcare Organizations. (CAMH) Comprehensive Accreditation Manual for Hospitals: The Official Handbook: Accreditation Policies, Standards, Scoring, Aggregations Rules, Decision Rules.**  
 Oakbrook Terrace, IL, Joint Commission on Accreditation of Healthcare Organizations, 2001. CAMH, \$350.00; CAMH and 1year update, \$565.00; CAMH annual subscription update, \$245.00.

**Cecil Textbook of Medicine (Single Volume)**  
 by Russell L. Cecil (Editor), J. Claude Bennett (Editor), Lee Goldman (Editor)  
 Cecil Textbook of Medicine, 21 Edition  
 CDROM provides rapid access to the complete text, illustrations, tables and references. Review questions with answers are linked to the relevant sections of the textbook and complete drug monographs from Mosby's GenRx are included. Plus, this CDROM gives you FREE access to Cecil Online! This text refers to the CDROM edition.

Hardcover: 2308 pages  
 Publisher: W B Saunders; (January 15, 2000)  
 ISBN: 072167996X

**Current Pediatric Diagnosis & Treatment**  
 by William W. Hay, Jr, MD (Editor), Anthony R. Hayward, MD (Editor), Myron J. Levin, MD (Editor), Judith M. Sondheimer, MD (Editor)  
 Provides clinical information on ambulatory and inpatient medical care of children from birth through adolescence, focusing on clinical aspects of pediatric care and their underlying principles. Emphasis is on ambulatory care, acute critical care, and a practical approach to pediatric disorders.

This edition contains new chapters on developmental disorders and behavioral problems, substance abuse, allergic disorders, and fluid, electrolyte, and acid-base disorders and therapy, plus expanded illustrations.

Paperback: 1320 pages  
 Publisher: Appleton & Lange; 16th edition (October 25, 2002)  
 ISBN: 0071383840

**Clinical Nursing Skills & Techniques**  
 by Anne Griffin Perry, Patricia Ann Potter, Anne G. Perry, Patricia A. Potter  
 The 5th edition of Clinical Nursing Skills and Techniques offers new up-to-date content and improved features, in addition to complete coverage of more than 200 nursing skills, a nursing process framework for a logical and consistent presentation, and a convenient 2-column format with rationales for each skill step.

Paperback: 1320 pages  
 Publisher: Mosby, Inc.; 5th edition  
 (June 15, 2001)  
 ISBN: 0323014062

**ACEP - Critical Decisions**  
 Critical Decisions in Emergency Medicine, reliable, relevant clinical updates/risk management. two lessons each month. Subscription for non member \$244 a year. Index of past issues found at:  
<http://www.acep.org/1,5012,0.html>  
 Order by calling ACEP or going to [www.acep.org](http://www.acep.org) and order online

**ACEP - Foresight CEU Risk Management**  
 Example:  
<http://www.acep.org/library/pdf/Foresight56.pdf>  
 Print monthly from online resource.

**AMA - Medicolegal Forms with Analysis - Documenting Issues in the Patient/Physician Relationship.**  
 Covers issues such as consent, informed refusal, AMA, and others. Contains current forms and references to legal citations related to each issue discussed.

Binding: Hardcover  
 Publisher: American Medical Association

Published Date: 06/01/1990  
 List: USD \$32.00  
 ISBN: 0899704026

### *Other Suggested Book Lists/Links*

Brandon/Hill selected list of print books and journals for the small medical library  
<http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pubmed&pubmedid=11337945>

"Selected List of Books and Journals for the Small Medical Library" was published almost forty years ago, this series of selection guides has been heavily used and highly valued by librarians, nurses, health care practitioners and publishers. The Small Medical Library list was followed in 1979 by the "Selected List of Nursing Books and Journals" and by the "Selected List of Books and Journals in Allied Health Sciences" in 1984. In 2001, the publications were made available on the internet, promoting unrestricted access.

It was always the instruction of Alfred Brandon and Dorothy Hill, the original authors, that the selected lists would not be published under their names without their direct involvement which is why they retained copyright of the lists. With the recent retirement of Dorothy Hill, this longstanding project has drawn to a close.

**Brandon Hill Journal Links -**  
<http://nnlm.gov/libinfo/ejournals/branhill.html>

This list of Journals available in full text online was updated on a regular basis by the National Library of Medicine through May 12, 2003. This page is valuable in terms of information to online resources, but this page, "MLA Brandon/Hill Journal Links", is no longer updated.

### *General Reference Internet Links*

**Medscape**  
<http://www.medscape.com>  
 Medscape is a multispecialty Web service for clinician and consumers that combines information from journals, medical news providers, medical education programs,

and materials created for Medscape. Here you will find a combination of peerreviewed publications, a free version of drug information via the "First Data Bank File" and free Medline.

#### MD Consult

[www.mdconsult.com](http://www.mdconsult.com)

Founded by leading medical publishers that include Mosby and W.B. Saunders, MD Consult integrates peerreviewed resources from over 50 publishers, medical societies, and government agencies. From this site you can obtain full text from respected medical reference books from a variety of specialties, medical journals, and MEDLINE. In addition you can obtain comprehensive USP drug information (beyond the scope of a PDR), as well as more than 600 clinical practice guidelines. This is not a free service, but for a small fee you can have access by the day, month or year. Also there is a free seven day trial membership.

#### Guidelines Clearing House

[www.guidelines.gov](http://www.guidelines.gov)

This site is a public resource for evidencebased clinical practice guidelines. NGC is sponsored by the Agency for Healthcare Research and Quality (formerly the Agency for Health Care Policy and Research) in partnership with the American Medical Association and the American Association of Health Plans. A medical term search will retrieve objective, detailed information on clinical practice guidelines. Results in a search will obtain: structured abstracts (summaries) about the guideline and its development, a utility for comparing attributes of two or more guidelines in a sidebyside comparison, syntheses of guide-lines covering similar topics, highlighting areas of similarity and difference, links to fulltext guidelines, where available, and/or ordering information for print copies and, annotated bibliographies on guideline development methodology, implementation, and use.

#### CPT Codes - [www.ama.org](http://www.ama.org)

This website gives users of CPT the opportunity to perform CPT code searches and obtain information about Medicare's rela-

tive value payment amount associated with the codes. Searches can be performed using 5 digit CPT code numbers or key word(s) in the code description. Also you can order the CPT coding handbooks in paperback format. The codes are updated annually.

#### *Additional Internet Resources*

##### Anatomy

[www.anatomy.org/i4a/pages/index.cfm?pageid=1](http://www.anatomy.org/i4a/pages/index.cfm?pageid=1)

##### Anesthesiology

[www.abanes.org](http://www.abanes.org)

[www.asahq.org](http://www.asahq.org)

##### Cardiology

[www.acc.org](http://www.acc.org)

[www.augusta.net/atlantic/ascp.ascpscm.html](http://www.augusta.net/atlantic/ascp.ascpscm.html)

[www.asecho.org](http://www.asecho.org)

[org.umc.edu/iash/homepage.htm](http://org.umc.edu/iash/homepage.htm)

[www.americanheart.org](http://www.americanheart.org)

##### Chiropractic

[www.amerchiro.org](http://www.amerchiro.org)

[www.accoweb.com](http://www.accoweb.com)

[www.chiromed.org](http://www.chiromed.org)

[www.nysca.com](http://www.nysca.com)

##### Emergency Services

[www.aaem.org](http://www.aaem.org)

[www.abem.org](http://www.abem.org)

[www.acep.org](http://www.acep.org)

##### Endocrinology

[www.aace.com](http://www.aace.com)

[www.womeninendo.org](http://www.womeninendo.org)

[www.diabetes.org](http://www.diabetes.org)

##### Gastroenterology/Liver

[www.acg.gi.org](http://www.acg.gi.org)

[www.gastro.org](http://www.gastro.org)

[www.asge.org](http://www.asge.org)

[www.sgna.org](http://www.sgna.org)

[www.liverfoundation.org](http://www.liverfoundation.org)

##### General Medicine

[www.aafp.org](http://www.aafp.org)

[www.abms.org](http://www.abms.org)

[www.amaassn.org](http://www.amaassn.org)

[www.aamc.org](http://www.aamc.org)

[www.msweb.net/aaps/](http://www.msweb.net/aaps/)

##### Hematology

[www.hematology.org](http://www.hematology.org)

##### Iatrogenic Injuries

[www.iatrogenic.org](http://www.iatrogenic.org)

##### Immunology

<http://www.ashihla.org/>

<http://www.aaaai.org>

##### Infectious Disease

<http://www.idac.org/idlinks.html>

<http://pages.prodigy.net/pdeziel/>

[http://www.cdc.gov/ncidod/id\\_links.htm](http://www.cdc.gov/ncidod/id_links.htm)

<http://www.amm.co.uk/>

##### Internal Medicine

[www.acponline.org](http://www.acponline.org)

[www.abim.org](http://www.abim.org)

[www.sgim.org](http://www.sgim.org)

##### Obstetrics/Gynecology

[www.acog.org](http://www.acog.org)

[www.abog.org](http://www.abog.org)

<http://www.accesspub.com/tempobg/soc/socm.htm>

##### Midwifery

[www.acnm.org](http://www.acnm.org)

##### Neurology

[www.stroke.org/](http://www.stroke.org/)

<http://http://www.aan.com/>

<http://http://www.neuroguide.com/>

##### Oncology

[www.asco.org](http://www.asco.org)

[www.cancernet.nci.nih.gov](http://www.cancernet.nci.nih.gov)

[www.oncolink.upenn.edu](http://www.oncolink.upenn.edu)

[www.cancer.org](http://www.cancer.org)

##### Ophthalmology

[www.eyenet.org](http://www.eyenet.org)

[www.ascrs.org](http://www.ascrs.org)

[www.asoprs.org](http://www.asoprs.org)

[www.glaucomafoundation.org/info/](http://www.glaucomafoundation.org/info/)

##### Optometry

[www.aaopt.org](http://www.aaopt.org)

[www.aonet.org](http://www.aonet.org)

##### Orthopedics

[www.aaos.org](http://www.aaos.org)

[www.sportsmed.org](http://www.sportsmed.org)

##### Pediatrics

[www.aap.org](http://www.aap.org)

##### Pharmacy

[www.aphanet.org](http://www.aphanet.org)

##### Physical Therapy

[www.aaptnet.org](http://www.aaptnet.org)

[www.apta.org](http://www.apta.org)

[www.nationalrehab.org](http://www.nationalrehab.org)

##### Physiology

[www.faseb.org/aps/](http://www.faseb.org/aps/)

##### Plastic Surgery

[www.facialplasticsurgery.org](http://www.facialplasticsurgery.org)

[www.plasticsurgery.org](http://www.plasticsurgery.org)

##### Podiatry

[www.apma.org](http://www.apma.org)

<http://http://www.footandankle.com/podmed/>

**Preventative Medicine**[www.acpm.org](http://www.acpm.org)**Psychiatry**[www.abpn.com](http://www.abpn.com)[www.psych.org](http://www.psych.org)**Pulmonology**[www.lungusa.org](http://www.lungusa.org)<http://www.aarc.org/><http://www.chestnet.org/><http://www.thoracic.org/>**Radiology**[www.asrt.org](http://www.asrt.org)[www.rsna.org](http://www.rsna.org)[www.acr.org](http://www.acr.org)**Rheumatology**[www.rheumatology.org](http://www.rheumatology.org)[www.arthritis.org](http://www.arthritis.org)**Surgery**[www.facs.org](http://www.facs.org)[www.acfas.org](http://www.acfas.org) (foot and ankle)[www.fascrs.org](http://www.fascrs.org) (colon and rectal surgeries)[www.womensurgeons.org](http://www.womensurgeons.org)**Urology**[www.auanet.org](http://www.auanet.org)[www.kidney.org](http://www.kidney.org)**Vascular Medicine**[www.svmb.org](http://www.svmb.org)**Veterinary Medicine**[www.abvp.com](http://www.abvp.com)[www.avma.org](http://www.avma.org)**Medical Terminology**<http://mywebmd.com/encyclopedia><http://www.nlm.nih.gov/medlineplus/plusdictionary.html><http://medmatrix.org><http://www.edae.gr/dictionaries.html>[www.medicinenet.com](http://www.medicinenet.com) (then click on dictionary)[www.4woman.org/nwhic/references/dictionary.htm](http://www.4woman.org/nwhic/references/dictionary.htm) (on line medical dictionaries and journals)**Large Listing of Medical Related Sites**<http://www.sciencekomm.at/links/medicine.html>

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## Rebutting Your Client—How Much Involvement Is Too Much?

*From An Expert's Point of View*

*By Joseph Leauanae, CPA, CITP, ABV, ASA, CFE and Bryant Petersen*

**I**n a situation that may be all too familiar, your client asks you how much your professional services will cost them. Assuming that you are feeling ethical that day, your response will likely be that it depends upon how much work you will have to perform. When your client follows up by asking how much of that work can be performed by them, how should you respond?

Clients will often seek to involve themselves in the litigation process in one form or another. Sometimes this attempted involvement is an effort to minimize fees and in other cases it may reflect a desire to exert control over an unfamiliar situation. If this article were about the relationship between attorneys and their clients we would likely be summarizing and concluding

our narrative at this point. However, as non-attorney expert witnesses<sup>1</sup> who are frequently faced with this dilemma, we believe this topic to be an important one. Not putting it lightly, cases have been destroyed because an expert relied too much upon the assistance and work product of a client.

As experts in financial matters, our interactions with clients are generally along the lines of reconstructing and evaluating financial statements, investigating allegations of fraud, and valuing businesses and business interests. Although our experiences are specifically relevant to these types of analyses, our observations and conclusions are universally applicable to experts in other fields. These observations also provide insight to those in the legal

profession as to the amount of reliance an expert can and cannot be expected to have upon work product and assistance provided by a client.

In putting together this article, the authors have relied upon a fundamental difference between attorneys and expert witnesses. Other than the fact that we experts typically look like nerds and are easy to pick out of lineups, there really is an important distinction between the way that an attorney and an expert view their relationships with clients: although attorneys are advocates for their clients, expert witnesses are expected to remain objective and neutral to the party that retains them. How, then, can an expert witness interact with a client and use client work product without compromising that objectivity?

### Objectivity

What is objectivity? Where can I buy it? Can I get a used one on eBay?

To experts, objectivity is something that, once lost, is difficult if not impossible to find again during an engagement. The American Institute of Certified Public Accountants states that in the performance of any professional service, a [CPA] shall

**A client can typically do quite a bit to obtain and organize the data necessary to prepare the expert reports and schedules, although the expert must oversee the process to ensure that the compiled information is true to the source documents.**

maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others<sup>2</sup>. While this guidance applies to CPAs, it provides an excellent barometer by which to gauge objectivity. Furthermore, the authors contend that an expert must also maintain objectivity in appearance and avoid even the impression of impropriety. With these concepts of objectivity in mind, how does objectivity become endangered when a client seeks to assist with or perform a portion of the work deemed necessary by an expert?

Experts will typically begin an engagement by assessing the amount of work necessary to reach a conclusion. Once this preliminary assessment has been made, the expert will then segment the anticipated work into chronological blocks that incorporate deadlines such as discovery cut-offs, report due dates, depositions, and trial. Common sense would seem to indicate that the client should not typically write any portion of the expert report or put together any part of the expert's exhibits, but to what extent can an expert rely upon work provided by the client prior to the preparation of the expert report? We use Mel's story to shed some light on this dilemma.

### **Conspiracy Theory**

Mel was a client in a marital dissolution matter. She suspected that throughout 20 years of marriage her husband had used marital funds to purchase certain assets that were then purposely hidden from her. Mel claimed that her husband, his brothers, and certain close friends had conspired together to hide these assets. Mel engaged us to trace the ultimate disposition of marital funds to determine whether she could attach to any previously undisclosed assets.

The first time that Mel came into our

office she thought that she recognized our office manager. She thought that the office manager was one of her husband's cousins and that therefore she couldn't be trusted. In fact, Mel refused to believe that our office manager was not related to her husband until we demonstrated it to her by tracing the office manager's family tree to show that there really was no relationship. Even after this exercise, the first few months of our engagement with Mel continued to be strained when she was unwilling to leave messages for us with the office manager.

Soon after our engagement, Mel brought in a large plastic garbage bag and a banker box, both of which contained documents that she claimed would support allegations that her husband had been living a secret life involving an illegal pornography ring, polygamist wives, a secret identity, and hidden assets. Upon a cursory examination of the garbage bag and banker box we soon discovered that the documents were in total disarray.

As our fees for Mel's case began to mount, she asked us if it would be possible to let her organize the documents so that she could reduce her costs of litigation and thereby save our expertise for use on the actual financial analysis. At that point we were relieved that she wanted to organize the documents; in our initial review of the documents we had found baby pictures intermingled with bank statements, which was only trumped by the discovery that one of her teenage son's baby teeth had been stashed by the tooth fairy amongst promissory note documentation. We readily agreed to accept her assistance.

To facilitate our oversight of Mel's work we provided her with free use of part of our office space and gave her daily parking validations. Initially Mel did as we requested, organizing the documents chronologically by entity; however, as Mel went through the documents and found items

that she thought would link her husband's activities to her conspiracy theories, she would track us down and attempt to explain why each particular document was crucial to our expert analysis. Thereafter, each time she located a similar document we would have to revisit the same issues. If Mel felt that a staff member in our office did not buy into her conspiracy theory, she would make her way through each consecutive office until she found someone who would believe her when she made claims such as the assertion that her husband owned a major credit card company because one of its call centers shared administration costs with one of her husband's entities.

After continuing in this fashion for some time, we reached a point where we were dedicating large portions of the workday to hearing and addressing numerous conspiracy theories. With each passing day we conveyed our concerns regarding our rising professional fees, reiterating that instead of interrupting us with every little document she should instead make notes and continue organizing the documents, as we had asked her to do, so that we would be able to review all of the documents at once, prior to discussing addressing her individual concerns. Our fees were adding up and we had only just scratched the surface of our analysis.

The problem that arose in this instance is that we initially set out with the best intentions: to save our client a certain amount of fees by having her perform some of the more basic tasks that would otherwise have been completed by our firm. What actually happened, however, was that the client's determination to perform the analysis she wanted rather than the organization and analysis we had instructed her to do, resulted in a situation where the client was requiring daily attention but could not understand that our escalating fees were due to our daily involvement with her in the performance of her tasks. But how did this impact our objectivity as experts?

**When is it time to put the client on the payroll?**

Although we may not always have great

clients like Mel, we should be aware that even without explicit retellings of sex scandals and conspiracies, most clients are capable of providing valuable assistance to an expert.

A client can be a very helpful resource for information regarding historical and background information. Since they often have firsthand, detailed knowledge of the subject matter, whether it be a business (such as in the case of a business valuation); another individual (such as in the case of a marital dissolution); or a process (such as a forensic accounting investigation), a client will often provide background and insights not normally apparent to an outsider such as the expert witness.

As financial experts, our engagements often involve a financial evaluation or investigation of a business, business process, or industry. These businesses have ranged from small single owner operations to international conglomerates, and in each of these instances we have had clients who have been able to provide us with useful information that would have been difficult to obtain if not from an insider. Some of this information has included an understanding of both official and unofficial work processes and the identification of key people to interview within an organization.

To a certain extent, clients can also prove very helpful in performing a number of the routine but essential tasks that are required prior to expert analysis. As financial experts, we generally spend a lot of time reviewing financial information. This financial information must generally be compiled into schedules that can be used for our analysis and for the presentation of our conclusions. A client can typically do quite a bit to obtain and organize the data necessary to prepare the expert reports and schedules, although the expert must oversee the process to ensure that the compiled information is true to the source documents.

Since an expert should always remain an objective party, it is imperative that when an expert is considering what work they may be able to accept from a client and what work they should not, they must



consider how the litigating parties would react if they knew the source of the work product. For an obvious example, if the client were to put together a historical narrative of the subject matter, the expert may generally use such information to the extent that it does not draw conclusions or reflect an unsupported bias.

On the other hand, having a client write any portion of the expert's opinion, or any report narrative that casts the expert as an advocate, would compromise objectivity. But what should be done if the client actually thinks that they can do a better job than the expert? Jack's story illustrates a not-so-uncommon situation.

#### The Nutty Professor

Jack was a tenured engineering professor at a prestigious California university who was involved in a dissenting shareholder action involving a company in which he was a minority shareholder. The company at issue had been designed to oversee the construction of a large professional business plaza. The general contractor, who was the majority shareholder, was also involved in a number of other contemporaneous construction projects. We were engaged to investigate the use of business funds for non-business activities such as

payments to contractors for work performed on other projects.

Since Jack had a strong background in scientific analysis and theory, albeit with an underabundance of basic social skills, he wanted to be involved in all aspects of organizing and reviewing the documentation. Furthermore, Jack wanted 100 percent attention from both us and his attorney. In fact, when the attorney indicated that he would be unable to schedule a meeting for a particular date because he was getting married, the client promptly contacted us and requested a list of other attorneys that we worked with so that he could find an attorney who was more dedicated to his cause (things ultimately worked out for all of the parties concerned, including the attorney's new bride.)

Jack was so confident in his academic background that he believed he could easily perform the analysis and then simply rely upon us to voice his opinions in a report and on the stand. To save money, Jack insisted that we use him to perform some of the tasks. The client had a number of theories and undocumented instances of how the general contractor had abused his authority and misused company assets, even though the client

had not organized the documents in a fashion that demonstrated the alleged abuses. We requested that Jack organize and prepare a narrative on the general contractor's abuses.

As we conducted our investigation and uncovered accounting improprieties, Jack would, in each instance, claim that he had previously known about the abuses we were uncovering and argued that we were billing him for information that he already knew. We were put into a situation where the client thought of himself as the expert. How would we prevent ourselves from relying upon a client's analysis?

### Don't miss the donut by looking through the hole

There are a number of reasons that an expert may want to consider using work produced by the client. (And no, "because they pay their bill" isn't one of them.) One of the main reasons for accepting assistance is the fact that having the client perform such work will reduce the amount of time that the expert will need to spend on the engagement, ultimately reducing the fees that will be billed to the client. While this may sound like a problem endemic to smaller or budget-conscious clients, we have actually found that clients who have retained us in both small and very large engagements have sought to perform at least some of the analysis that we would otherwise have undertaken. We found that we cannot generally assume by a client's size or the size of the engagement that a client will or will not want to perform some part of the analysis. Obviously, it is imperative that the expert remain involved in the client work product process to ensure that the expert understands what the client is doing, that the client is appropriately following the expert's directions, and that the work product does not become deficient due to errors or the proclivities of the client.

The other reason that accepting assistance and work product from the client may be useful is because the client, usually an insider with detailed knowledge of the subject matter of the litigation, will have insights and even access to information that is not readily available to the expert.

The main issue to be aware of in using this type of information or data, however, is that the expert does not surreptitiously fall prey to relying upon information and documents that should have been routed through the formal discovery process.

While experts routinely rely upon inside information and documents provided by clients, courts have not looked kindly upon experts who base their opinions on information that was never formally produced, sometimes going so far as to deny the admissibility of key information and imposing sanctions.

While there are some fairly good reasons why client assistance and work product can be used, there are also corresponding reasons why it should not. The client in a litigation matter is obviously invested in their case and their position and therefore lacks the objectivity that an expert is required to maintain. The client has an agenda. Therefore, any assistance and work product proffered by a client to an expert must be evaluated carefully. If the expert cannot ensure that they will be able to oversee the client's involvement, they may be unable to testify as to the integrity of anything that is received from the client.

Furthermore, while the client may be an expert in the litigated subject matter, they may not have the requisite experience to perform certain analyses nor recognize certain red flags that an expert might easily identify as a result of training or experience. Additionally, depending on the complexity of the case and the personality of the client, the client may not understand or intentionally choose not to adhere to the expert's instructions. This may lead the client to attempt to subvert the expert's work with a biased analysis performed by the client.

### Conclusions

At the end of the day, when does an expert stop becoming an objective third-party and start becoming an advocate for their client's position? While the answer can be as complex as the question is simple, the authors believe that the line in the sand is primarily dependent upon the type and amount of assistance and work product

that the expert accepts from the client. And we believe that such a line of demarcation is crossed when the expert's conclusions and opinions are directed or inappropriately influenced by the client. Essentially, an expert loses their objectivity when they compromise their integrity, whether in fact or appearance, and becomes a spokesperson for their client. Regardless of whether an expert's client is the author of conspiracy theories or a nutty professor, the plaintiff or the defendant, given the same fact pattern and circumstances, expert witnesses should usually reach similar conclusions. Unless, of course, one expert is better than the other; but that's a different story.

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*Bryant D. Petersen has over five years of professional experience and has participated in numerous litigation support and business valuation engagements. His assignments have ranged from the tracing of funds through a ponzi scheme involving offshore entities to valuing a business that was destroyed by a product liability action. Mr. Petersen may be reached by email at bryant@sagefa.com .*

<sup>1</sup> An expert witness is a specialist who, by virtue of special knowledge, skill, training, or experience is qualified to provide testimony to aid the fact finder in matters that exceed the common knowledge of ordinary people.

<sup>2</sup> <http://www.aicpa.org/pubs/cpaltr/sept2002/business/busind4.htm>

## LAD/PD Went to London, 2005

Mary LaRue, CP, Member, District 16  
El Paso

In April of 2005, a group of members of the Paralegal Division of the State Bar of Texas traveled to London, England for a week to learn about the British legal/governmental system and to take in some of the sights. It was an unforgettable experience for all those who went. The purpose of this report is to share some of what we learned and some of what we experienced while we were there.

### Part One: The English Legal System

Even though the British legal system is the direct ancestor of our American legal system, and we are both Common Law countries, there are quite a few differences. Some of the most significant of those differences are:

- \* **Constitutional Law:** Both countries have an area of law known as Constitutional Law, but the particulars

are quite different. While we in this country often refer to our Constitution as a "living document", in England it really *is* living because their Constitution is people: the Parliament together with the Monarch. England has no written constitution. The Acts of Parliament, signed by the Monarch, and the centuries of custom, tradition and precedent that underlie them, are their Constitution. Unlike as happened in this country, where a group of people got together at one time and place and created our Constitution as a blueprint for how our system of government would be structured and run from that time on, the English system grew, developed and evolved over many centuries to become what it is today.

- \* **Legal/Governmental Structure and Administration:** Unlike in this country, there is no State/Federal split as we are so used to here. All English law is national law. The English court system

does have the familiar lower, intermediate, and upper tiers as in this country. They also have the civil law/criminal law split that we are familiar with. The Law Lords (there are currently 15 of them) in the House of Lords are the court of last resort for criminal and civil cases. The Law Lords are roughly equivalent to our U.S. Supreme Court.

They do have juries, but only for criminal cases. Civil cases are decided by Judges, who take a very active role in trials, even questioning the witnesses and debating points of law and procedure in open court with the attorneys.

Again, since all English law is national law and they have no states as we do, there is nothing like our state legislatures and state supreme courts in England. Each county in England has local county courts and other types of courts, so that many matters can be handled locally. Finally, England, being part of Europe, (Though many Brits are reluctant to acknowledge it!) also has the European Community and all the laws and regulations that go along with it, as a part of what practitioners in its legal system often deal with.

Court decisions are reported in books called reporters just as they are here, and sometimes reported in newspapers. The *Times of London* often devotes a page or two to significant decisions and reports them in detail for the public to read.

Of course, two of the biggest differences between England and us are the fact that they still have a monarch, currently Elizabeth II, and that they have a parliamentary system of government, wherein the political party that wins the most seats in the Parliament is the party that runs the government until the next election. British subjects do not vote for Prime Minister as we vote for President – they vote for their local representatives who will sit in the Parliament in London, and the head of the party who wins the most seats in Parliament is invited by the Monarch to become his or her Prime Minister. The Monarch has little real power in England today, but does serve as a symbol of the nation and all the courts in England display the Royal Court of Arms above the



Bench and justice is carried out in the Monarch's name.

\* **The Legal Professions:** You've probably heard about the fact that attorneys in England are either solicitors or barristers, but you may not be familiar with the difference. We learned that solicitors are the branch of the profession that has contact with the public. If you have a legal problem in England, you seek out a solicitor, never a barrister. If the solicitor determines that your case will involve civil trial or criminal proceedings, he or she will hire a barrister for that. Otherwise, the solicitor will handle all aspects of your case. This split in the profession goes back at least 500 years, although it was in the 18<sup>th</sup> century that the split really became entrenched. There is some, but not much, switching between being a barrister and a solicitor.

As in this country, solicitors and barristers must graduate from law school after they obtain their undergraduate degree and are licensed by the government. Practicing law without a license is illegal, as it is here. Attorneys there are largely self-regulated. The solicitors are all members of the Law Society, headquartered in London. The Barristers are all members of one of four Inns of Court – the Inner Temple, the Middle Temple, Lincoln's Inn and Grey's Inn – all also in London. These legal societies are a centuries-old part of the legal profession in England that doesn't really have much of an equivalent in this country. These societies are part of the regulation of practicing attorneys and the education and supervision of new attorneys. There is more about the Law Society and the Inns of Court below in Part Two of this report. Solicitors and barristers are not turned loose to hang up a shingle right after they graduate from law school as they are here. They must spend at least a year or two being trained and supervised before they are allowed to go out on their own. And yes, barristers and judges still wear wigs (even the women) and black robes in court.



There are paralegals in England. They are called Legal Executives, although we found the term paralegal familiar to everyone we met who worked in the legal professions. The daily tasks of paralegals in England appeared to be quite similar to what we do: legal research, discovery, document and file management and client contact. Paralegals in England work in the private sector and the public sector just as in this country. They work for solicitors and for barristers. There are several websites that offer a wealth of information about paralegals in England. Just type "paralegals in the UK" or "Legal Executives" into your search engine for more information.

Their legal vocabulary is much the same as ours, with some interesting differences: trial notebooks are called "bundles, judges are addressed as "Your Lordship" and we learned to our surprise that the term "lawyer" is a broader, more general term in England, meaning people who work in the legal professions. Imagine our consternation the first time we were introduced as "a group of lawyers from America!"

## Part Two: Sightseeing and Meeting People

Space does not permit a full description of everything we saw and everyone we met, but here are some of the highlights: We had the pleasure of entering the Royal Courts of Justice and "the Old Bailey" to watch a civil trial and a criminal trial. We were honored to meet with His Lordship Justice Newman in his chambers at the Royal Courts of Justice.

And we had the honor to be hosted for lunch at Middle Temple Hall, which is private and not normally open to anyone but barristers who belong to the Honorable Society of the Middle Temple. At Middle Temple Hall we were served a delicious luncheon upon the dais at the "high table" which was a gift to the Middle Templars from Elizabeth I in the mid-1500s, who reportedly enjoyed very much her visits to the Hall. Near the Hall is the round church ("the Temple") built by the Knights Templar in the 12<sup>th</sup> century. Also near the Hall is the Temple Garden with its red and white roses that is the setting for Act II, Scene IV in Shakespeare's "Henry VI" about the beginning of the long conflict known as the War of the Roses. We also got to enter the Law Society building and were treated to their hospitality as well.

And we got to see many of London's famous sites such as Westminster Abbey, the oldest part of which was built almost 1000 years ago. Westminster Abbey is a beautiful and history-rich site. The Kings and Queens of England are crowned there and many of them are buried there, as are English notables such as Geoffrey Chaucer, Charles Dickens and many others. It is amazing to see and touch so many centuries of history in one place. London is filled with beautiful, historic churches, including Christopher Wren's St. Paul's Cathedral, which was built after the Great Fire of 1666 cleared much of the city. Near the Royal Courts of Justice you can see and go into some buildings still standing and still being used today that survived that fire.

The Tower of London, the oldest part of which is almost 1000 years old, is the home of the Crown Jewels of England, which are on public display there. It is also the site of the execution of Anne Boleyn, among others, and she lies buried in a chapel there to this day. The Tower is near a still-standing part of the ancient wall of the town of Londinium established by the Romans on the banks of the River Thames almost 2000 years ago.

Although the public is not allowed into Buckingham Palace, we were treated to a wave from the Queen and one of her

Ladies in Waiting as they returned to the Palace from a public ceremony on the day we were there to see the Changing of the Guard. Some of us got another glimpse of the Queen and Prince Phillip as they arrived at Westminster Abbey for a memorial service. One would think that the Queen travels with a large security force, but she does not. She typically has, we were told, an escort of only six motorcycle policemen around her car who stop traffic briefly as she passes when she travels out in public for routine ceremonial events. Both the times we saw her, we were only a few hundred feet away from her with little or no security barricades or police between her and us. Quite different than the massive walls of security around our president and other high officials.

Since the national elections were approaching, and the campaign for seats in Parliament was in full swing while we were there, Parliament was closed, so we were not able to go inside the Parliament Building. Around Parliament, with its famous clock tower known as Big Ben, is the area known as Whitehall, the site of many large government buildings and the site of 10 Downing Street, the home of the Prime Minister. The MI5 building was very near our hotel, but needless to say, we did not get to go inside that building at all!

We were taken to the beautiful small city of Oxford outside London to the famous University there, and were able to tour Christ Church College, one of the many colleges that make up the University. Christ Church College was established in the time of Henry VIII. There we saw

Christ Church Hall where many scenes in the Harry Potter movies were filmed and where a student known as Lewis Carroll entertained young Alice, the Dean's daughter, with stories about her large orange cat and other residents of Wonderland.

We also traveled to the village of Windsor, the site of Windsor Castle, one of the royal residences. Her Majesty was home at the time we were there, and we got to watch as a small army of caterers set up tables in one of the unbelievably ornate state rooms for a banquet a few hours off. Also there at Windsor we got to see the chapel where many royals, including Henry VIII and his favorite wife (the one who bore him a son) are buried.

Some of us went to the British Library to see an original of the Magna Carta, and were treated to the sight of the Stamp Act. If you remember your American History classes, you'll know the Stamp Act and other related Acts of Parliament was the fuse that helped ignite the American Revolution.

Due to the hard work of Norma Hackler and others of the Paralegal Division, and the people of The American Council of International Studies, especially Chris Relton, our Tour Manager, and due to the remarkable generosity of LexisNexis Butterworths, we had the experience of a lifetime in London. Words simply cannot express our gratitude to all those who had a hand in making our trip so special.

Everyone we met was polite and helpful and the City itself, although crowded and bustling, was clean and full of beautiful parks and fascinating historical sites. If you

ever have the chance to visit London, do it. You'll be glad you did. Just don't forget your umbrella!

*Mary K. La Rue, C.P., is a full-time paralegal at John M. Dickey & Associates in El Paso, primarily in the area of civil defense, and a part-time paralegal teacher at El Paso Community College. She is a member of the Paralegal Division of the State Bar of Texas, a member and Board Member of the El Paso Paralegal Association, a member of the National Association of Legal Assistants, and an Associate Member of the El Paso County Bar Association. She can be reached for comment at mlarue@johnmdickey.com.*

[Editor's Note: Please note that this article was written six weeks prior to the tragic recent events which London has suffered, and Mary has asked that a note be added to this article prior to publication. Our London travelers relied heavily on the public transportation system, during our visit. Having had our own 9/11 tragedies, we can relate to the losses now being suffered in England. Kim Cantu, 2004-2005 PD President, has since received an email from our Lexis/Nexis (parent company Reed Elsevier) sponsors that they have suffered no fatalities in their staff, but some have suffered the trauma of witnessing the events close at hand. Sadly, that same company had two top executives that were passengers in the planes that went down on 9/11 here in the U.S. and was killed. PD sends our London sponsors our best regards and thoughts.]

## Annual Meeting 2005, Dallas, TX

Kim J. Cantu, CLA, 2004-2005 PD President, presented the State of the Division address to the PD members at the 2005 Annual Meeting luncheon. Highlights of her address were accomplishments of goals set during her presidential year: Paralegal Division name change, Online CLE for PD Members, PD

members 1st annual trip to London, PD Members listed in the Texas Legal Directory, State Bar College membership for paralegals, State Bar College Division Member Representation, Legal Assistants Day now Paralegal Day, PD Representation on the Texas Access to Justice Task Force, and the many benefits



*Kim J. Cantu, CLA,*

of PD membership as well as other Division accomplishments.

Kim awarded the annual Exceptional Pro Bono Award to Martha Jones, CLA, Austin, and the Award of Excellence to Pam Horn, as well as special awards to well deserved recipients. Outgoing director plaques

were awarded to Andrea Kinzy and Ann Brusco-Webb.

## 2005 Exceptional Pro Bono Award Recipient

Martha Jones, CLA, Austin, winner of this year's Paralegal Division Exceptional Pro Bono Award, is certainly one of the most deserving paralegal volunteers that the Paralegal Division of the State Bar of Texas has ever had.

In 1994, Martha was awarded the "Outstanding Volunteer" award from Volunteer Legal Services in Austin. In addition to VLS, she has a history of volunteer service with the SBOT Paralegal Division: Martha was Chair of the Continuing Education Committee 1995-1997, the Legal Assistant University Speaker Committee in 2000, and chaired the 2001 Annual Meeting. Martha served on the Board of Directors during 2000-2002 and received the Continuing Education Committee Special Award in 1997 and the Chair of the Year Award in 2000.

Martha has been giving back to the legal community for many years. In the late 1980's and early 1990's, Martha was personally involved in organizing and getting off the ground a clinic to handle family law pro bono cases. Of course, she then volunteered her time there on a monthly basis.

Martha says it's the VLS Pro Se Divorce Clinic for people with children that captured her heart. During her years with the clinic, she has helped over 100 people get divorced that otherwise would not have been able to get their lives back on track. She says that it gives her a great deal of satisfaction to help people who feel trapped in a system they don't understand and that her volunteer work at the clinic has helped her to be more compassionate with her clients.

Martha is such a mother figure and has a way of making the pro se litigants feel respected and worthy.

She has a terrific sense of humor which she brings to the clinic. She keeps everyone upbeat and smiling despite the many problems that the clinic clients are experiencing.

Martha is probably one of the best all-time family law legal assistants that Texas has ever had. She brings a wealth of experience and information to the clinic she serves. She regularly goes above and beyond what is required or expected of her. There are many examples of that – from giving her telephone number to a pro se litigant with special needs, personally checking on service, personally calling out-of-county process servers to arrange service, updating forms to keep current of legislative changes – or simply holding someone's hand or giving them a hug because they are overwhelmed by the process.

If not for Martha, there are many legal assistants who would never have desired to volunteer for VLS. She is one of the most generous and giving souls in our legal community. When Martha asks for your help, you just can't say no. What a blessing for VLS that she is so committed, capable and well loved.

Martha's long and respected volunteer career with the Paralegal Division and the VLS Clinic deserves the respect and recognition associated with winning this award. Her professionalism and loving attention paid to the clinic participants has benefited our legal community and has made an enormous difference in the lives of all of



Martha Jones

those she has helped.

Martha is a TBLS Board Certified Legal Assistant in Family Law and works in Austin, TX, as a paralegal for the law firm of Ausley Algett Robertson & Flores, LLP.

## Seminars Presented at the Annual Meeting

Christopher R. Rowley, Esq. of Vinson & Elkins, Dallas, Texas, presented a concise and informative paper on mergers and acquisitions and securities transactions, entitled "Effective Coordination of Inside and Outside Legal Teams in Corporate and Securities Transactions." We are in a world of change with much activity in the corporate world. Mr. Rowley outlined the necessity for planning and gathering information to efficiently accomplish the closing after the deal has been negotiated. He walked us through the necessary due diligence process, critical to every transaction, and stressed the necessity for good corporate record keeping. Mr. Rowley explained the team concept for the transaction and the role of everyone involved from the senior partner to the paralegal. The paralegal generally organizes due diligence materials, conducts searches of state records governing entities, prepares summaries, prepares corporate and other filings, prepares initial drafts of formation documents, resolutions, etc. Post-closing activities include formation/dissolution of entities, amendments to charter documents if necessary. He explained the paralegal's role in those activities stressing the teamwork needed to effectively complete the deal. The wave of the future . . . online data rooms will mean less travel and less expense to all parties. *Bowne's Virtual Deal Room* and *Donnelly's Intralinks* are two innovative programs currently marketed for corporate and securities transactions.

—Cecile Wiginton, CLA

The presentation on Class Action Litigation was presented by Roger B. Cowie, a Partner at Locke Liddell & Sapp,

L.L.P., Dallas, Texas. Mr. Cowie explained the differences between class action litigation and individual causes of action. He discussed the requirements under the Federal and State Rules of Civil Procedure to be able to proceed as a class action, and he detailed the many ways the paralegal can assist with a class action case.

—Jan Bufkin, CP

The last speaker of the day was Randall B. Geuy on “Offshore Outsourcing”. Mr. Geuy’s speech was very informative and covered all aspects of outsourcing jobs overseas.

Global IT outsourcing is presently estimated to be over \$150 Billion with the majority being sent to India. However, many more countries are beginning to participate including China, Brazil, Mexico, and Canada.

The key legal issues are: protecting intellectual property; tax, privacy, and regulatory issues; and termination. Each country’s team should include experts in

the following: the outsourced function, finance, operations, tax, labor and employment, and outsource contracting.

Any company considering offshore outsourcing can count on large up-front investments in money and time, and then more than likely may only realize a 20% savings.

—Debbie House, CP

## “Down the Yellow Brick Road”

### 25th Anniversary Kickoff

By: Michele Boerder,  
25th Anniversary Committee Chair

The Division Annual Meeting in Dallas served as the “kickoff” for our 25th Anniversary Celebration, culminating next year in Austin. Several skits were presented, by Lou Bugarin, Joncilee Miller, Stephanie Hawkes, and Michele Boerder

to demonstrate vignettes from the Division’s History and in the context of this past year’s theme comparative to “Oz.”

Michele presented “The Division Grows Up” with glimpses from our beginning, early years, milestones and accomplishments. Joncilee (as “Dorothy”) gave her revue of Division terminology, while Lou showcased TBLS and Stephanie described both the Gubnatorial and the Legislative proclamations (now “Paralegal Day”).

At the Division Annual Meeting Social, the “path” had bricks with different historical events listed on each one. Prizes were given to those who skipped down the Yellow Brick Road.

As we reflect upon the past quarter of a century this anniversary year, we will review various highlights of our Division’s history in the TPJ and in presentations throughout the year.

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## Notice of Election For Bylaw Amendments

Effective January 20, 2006

### Article I, Section 3, Definition of Legal Assistant

#### Current Bylaw:

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

#### Proposed Bylaw Revision:

A paralegal is a person, qualified through various combinations of education, train-

ing, or work experience, who is employed or engaged by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such person, an attorney would be required to perform the task.

#### Reason for Amendment:

This revision is necessary to replace the definition of “Legal Assistant” with the definition of “Paralegal” adopted on April 8, 2005 by the State Bar of Texas.

### Article III, Section 3, Eligibility to Hold Office

#### Current Bylaw:

Each Director shall be an active or free-lance member and shall have his principal place of business within the District represented on the Board. If a Director ceases

to be an active member or moves his principal place of business outside the District represented, the President shall immediately declare a vacancy. Any current or former Director from any District meeting the criteria as set forth in the Standing Rules is eligible to serve as President or President Elect.

#### Proposed Bylaw Revision:

Each Director shall be an active or free-lance member and shall have his principal place of business within the District represented on the Board. If a Director ceases to be an active member or moves his principal place of business outside the District represented, the President shall immediately declare a vacancy. Any current or former Director from any District meeting the criteria as set forth in the Standing Rules is eligible to serve as President or President Elect for two terms during lifetime.

#### Reason for Amendment:

This revision is necessary to limit the

number of terms that an eligible member can hold the office of President or President-Elect.

### **Article III, Section 4, Board of Directors, Districts**

The Districts of the Division shall be comprised of the following counties:

- (1) **District #1:** Harris.
- (2) **District #2:** Dallas.
- (3) **District #3:** Tarrant.
- (4) **District #4:** Bastrop, Blanco, Burnet, Caldwell, Gillespie, Hays, Kimble, Lee, Llano, Mason, McCulloch, Menard, San Saba, Travis, Williamson.
- (5) **District #5:** Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Wilson and Zavala.
- (6) **District #6:** Bailey, Borden, Cochran, Cottle, Crosby, Dawson, Dickens, Fisher, Floyd, Gaines, Garza, Hale, Hockley, Kent, King, Lamb, Lubbock, Lynn, Motley, Scurry, Stonewall, Terry and Yoakum.
- (7) **District #7:** Armstrong, Briscoe, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall Roberts, Sherman, Swisher and Wheeler.
- (8) **District #8:** Aransas, Bee, Calhoun, DeWitt, Duval, Goliad, Jim Wells, Kleberg, Live Oak, McMullen, Nueces, Refugio, San Patricio and Victoria.
- (9) **District #9:** Bell, Bosque, Brazos, Brown, Burleson, Coleman, Comanche, Coryell, Ellis, Erath, Falls, Freestone, Hamilton, Hill, Hood, Johnson, Lampasas, Leon, Limestone, Madison, McLennan, Milam, Mills, Navarro, Robertson and Somervell.

(10) **District #10:** Chambers, Grimes, Hardin, Jasper, Jefferson, Liberty, Montgomery, Newton, Orange, Polk, San Jacinto, Tyler and Walker.

(11) **District #11:** Andrews, Coke, Concho, Crane, Crockett, Ector, Glasscock, Howard, Irion, Loving, Martin, Midland, Mitchell, Nolan, Pecos, Reagan, Reeves, Runnels, Schleicher, Sterling, Sutton, Terrell, Tom Green, Upton, Val Verde, Ward, and Winkler.

(12) **District #12:** Archer, Baylor, Callahan, Clay, Cooke, Denton, Eastland, Foard, Hardeman, Haskell, Jack, Jones, Knox, Montague, Palo Pinto, Parker, Shackelford, Stephens, Taylor, Throckmorton, Wichita, Wilbarger, Wise and Young.

(13) **District #13:** Austin, Brazoria, Colorado, Fayette, Fort Bend, Galveston, Jackson, Lavaca, Matagorda, Waller, Washington and Wharton.

(14) **District #14:** Anderson, Angelina, Bowie, Camp, Cass, Cherokee, Collin, Delta, Fannin, Franklin, Grayson, Gregg, Harrison, Henderson, Hopkins, Houston, Hunt, Kaufman, Lamar, Marion, Morris, Nacogdoches, Panola, Rains, Red River, Rockwall, Rusk, Sabine, San Augustine, Shelby, Smith, Titus, Trinity, Upshur, Van Zandt and Wood.

(15) **District #15:** Brooks, Cameron, Hidalgo, Jim Hogg, Kenedy, Starr, Webb, Willacy and Zapata.

(16) **District #16:** Brewster, Culberson, El Paso, Hudspeth, Jeff Davis and Presidio.

### **Proposed Bylaw Revision:**

- (1) **District #1:** Harris.
- (2) **District #2:** Dallas and Ellis.
- (3) **District #3:** Callahan, Comanche, Eastland, Erath, Hood, Johnson, Jones, Palo Pinto, Parker, Shackelford, Somerville, Stephens, and Tarrant.

(4) **District #4:** Bastrop, Bell, Blanco, Bosque, Brazos, Brown, Burnet, Caldwell, Coleman, Coryell, Falls, Gillespie, Hamilton, Hays, Hill, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, McLennan, Menard, Milam, Mills, Robertson, San Saba, Travis, and Williamson.

(5) **District #5:** Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Wilson, and Zavala.

(6) **District #6:** Bailey, Borden, Cochran, Cottle, Crosby, Dawson, Dickens, Fisher, Floyd, Gaines, Garza, Hale, Hockley, Kent, King, Lamb, Lubbock, Lynn, Motley, Scurry, Stonewall, Terry, and Yoakum.

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(11) **District #11:** Andrews, Coke, Concho, Crockett, Ector, Glasscock, Howard, Irion, Loving, Martin, Midland, Mitchell, Nolan, Pecos, Reagan, Reeves, Runnels, Schleicher, Sterling, Sutton, Taylor, Terrell, Tom Green, Val Verde, and Winkler.

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(13) **District #13:** Austin, Brazoria,

Colorado, Fayette, Fort Bend, Galveston, Jackson, Lavaca, Matagorda, Waller, Washington, and Wharton.

(14) **District #14:** Anderson, Angelina, Bowie, Cass, Cherokee, Freestone, Gregg, Harrison, Henderson, Houston, Kaufman, Leon, Limestone, Madison, Marion, Morris, Nacogdoches, Navarro, Panola, Rains, Rusk, Sabine, San Augustine, Shelby, Smith, Trinity, Upshur, Upton,

Van Zandt, Ward, and Wood.

(15) **District #15:** Brooks, Cameron, Hidalgo, Jim Hogg, Kenedy, Starr, Webb, Willacy, and Zapata.

(16) **District #16:** Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, and Presidio.

## Reason for Amendment:

This amendment is necessary to dissolve District 9 which has not had a director in several years, and to move several counties to other districts to better serve those members. These revisions reflect the recommendations of the PD AD Hoc Redistricting Committee Report of February 2005.

## 2005 FALL ELECTION CALENDAR

### August 15, 2005 KEY DATE

Voter Registration Deadline

(Standing Rules, V.B.5.e., 75 days prior to Ballot mailing or posting date, Bylaws, definitions)

**September 26, 2005** (mailing date for TPJ)  
Publication of Notice of Election in *Texas Paralegal Journal*

### October 21, 2005

Approval and Preparation of Ballot by Parliamentarian to Executive Director (No later than 10 days prior to Ballot Mailing or Posting Date, Standing Rules V.B.9.a.3.)

### October 31, 2005

Ballot Mailing Date for Bylaw Election (Set by President Elect, Bylaws, Definitions)

### November 15, 2005

Marked Ballot Deadline Date for Bylaw Election (Set by President Elect, Bylaws, Definitions; 15 days after Ballot Mailing or Posting Date, Standing Rules V.9.a.3.)

### November 16, 2005

Tabulation of Ballots (Next day following deadline, Standing Rules V.B.13.a.)

### On/before November 23, 2005

Results Announced (At least 5th business day after marked ballot deadline, (Bylaws IX, Sec. 10, A.))

According to Standing Rules XV: "When computing time deadlines, holidays and weekends shall not be included for those deadlines consisting of 14 days or less. For

those deadlines consisting of 15 days or more, holidays and weekends shall be included."

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## 2005-2006 BOARD OF DIRECTORS



*First row from left to right:* Mona Hart Chandler, Cecile Wiginton, Ellen Lockwood, Javan Johnson, Debbie Skolaski  
*Second row from left to right:* Pam Horn, Joncilee Miller, Jan Bufkin, Deborah Hathaway, Paige McCoy, Patti Giuliano, Ginger Williams, Debbie House, Virginia Gil, Heidi Beginski, and Robert Soliz

### President: Ellen Lockwood, CLAS, RP



Ellen Lockwood, CLAS, RP, received her Bachelor of Music (BM) degree from Southwestern University and her paralegal certificate from

Southwestern Professional Institute in Houston.

She previously served on the Board of Directors of the Division from 1995 to 1997 and 2001 to the present. She served as Treasurer of the Division from 1996 to

1997 and again from 2002 to 2004. Ellen also served as the Chair of the Professional Ethics Committee of the Division from 1997 to 2004, as well as serving on various other Division committees. She is a past president of the Alamo Area Professional Legal Assistants and a frequent speaker on paralegal ethics and intellectual property.

Ellen has thirteen years of paralegal experience in intellectual property and civil litigation. She is currently employed as the Intellectual Property Specialist for Clear Channel Communications, Inc.

### President-Elect: Javan Johnson, CLAS

Javan Johnson, CLAS, is a freelance paralegal who began her own business in Longview in February 1999, specializing in



civil trial work, after working for 20 years with Ken Ross. She has a bachelor's degree in Business Administration and Education from Baylor University.

Javan obtained her CLA in 1990, earned the NALA civil litigation specialty designation in 1993, and became certified in Civil Trial Law by the Texas Board of Legal Specialization in 1996. Javan has served the Paralegal Division of the State Bar of Texas (PD) for many years as subchair and chair on various committees, served on the Board of Directors, served as President in 2000-2001, and will again serve as President in 2006-2007. She was the recipient of the Award of Excellent in 2004. In

addition to being a charter member of PD, Javan is also a charter member of the Northeast Texas Association of Legal Assistants, Inc. (NTALA), in Longview, and has served that organization since its inception in 1988, in a number of different capacities, including President, as well as chair of a number of committees. Javan participated in the start-up of the Legal Assistant program at Kilgore College in 1988, and has been a part time instructor in that program since that time. Of all of these professional accomplishments, Javan is most proud of her family - husband of 20 years, Brett, and son, Cameron, age 17.

## Treasurer: Cecile Wiginton, CLA



Cel serves as District 11 Director and Treasurer. She is serving her second term as Director of the Paralegal Division and has previously served on its Membership

Committee, Public Relations Committee and Elections Committee as subchair for her district. A charter member of the Division, Cel earned her certification from the National Association of Legal Assistants (NALA) in 1985. She has served as President, Vice President, Secretary, Education Chairman, Program Chairman, Pro Bono Chairman and currently is the NALA Liaison for her local association, Legal Assistants Association/Permian Basin, and was honored as Legal Assistant of the Year for 2003. She received a degree in Fine Art from Angelo State University. Cel has over 20 years experience as a paralegal, a slight detour from her goal of teaching art. Cel works with the law firm of Cotton, Bledsoe, Tighe & Dawson, P.C. in the Business/Corporate Section. Cel volunteers with Casa de Amigos Pro Bono Clinic and Teen Court. Cel teaches a kindergarten class at First Baptist Church

on Sundays. Cel and husband Eddie live in Midland and have two sons. Chad is a mechanical engineer in Houston where he and wife Kelley and daughter Lauren live. Jeff and his wife, Christine, are teachers and they live in Midland.

## Secretary: Mona Hart Chandler, CP



Mona serves as the District 14 Director. She is a NALA Certified Paralegal and earned her bachelors degree from East Texas Baptist University in

Marshall. She has worked at Hill & Calk, P.C., in Longview, for a year and a half under the direction of Jimmy Calk, TBLS Board Certified Attorney in Commercial and Residential Real Estate Law. Mona has worked in the area of real estate law for most of the 24 years she has been in the legal profession. She plans to sit for the TBLS exam in Real Estate Law in October 2005.

In 2004, she was elected as Director of District 14 of the Paralegal Division. In just a little over a year of her service on the Division Board of Directors, Mona has seen some exciting things happening. She has made it her goal during her term in office to exert every effort to make CLE readily available to the members of District 14 by organizing as many CLE events in the district as possible.

She is currently President of the Northeast Texas Association of Legal Assistants (NTALA). Although not a large group, NTALA is making a difference in the professional lives of paralegals in the area.

Mona has four daughters, who all live near by. She also has 14 grandchildren, 11 boys and 3 girls; and yes, they are really

grand. Her mother and step-dad live just around the bend, and they all have a very close relationship. In her spare time, Mona enjoys reading, doing genealogy, and a little scrapbooking.

## Parliamentarian: Debbie Skolaski, CP



Debbie Skolaski is the current District 1 Director for the Legal Assistants Division and is a NALA Certified Paralegal with over 15 years experience. She

received a B.S. in Business Administration and a Masters of Business Administration from LeTourneau University. She has practiced as an intellectual property paralegal in the law firm environment and in corporate law departments. She has served as the District 1 Director since June 2003. Additionally, Debbie was the 2004-2005 Parliamentarian for the Division. Prior to serving as the District 1 Director, she served at the local level as the 2001-2002 President Elect, 2002-2003 President, and 2003-2004 Secretary of her local association, Houston Corporate Paralegal Association (formerly known as ACLAA). At the international level, Debbie has served since 1997 on various committees for the International Trademark Association (INTA) including appearing as a guest lecturer at several CLE forums located in Houston, San Francisco and Washington D.C. She has co-authored a published trademark textbook (2005 Edition of the Trademark Administrator's Handbook) and is currently co-authoring the companion workbook which will be used in a trademark paralegal course sponsored by INTA. She has also written several articles for *Legal Assistant Today*.

# Scruples

## An Ethical Overview

*of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

*Laurie Borski, Ethics Chair*

**O**n April 20, 2005 the Bankruptcy Abuse

Prevention and Consumer Protection Act of 2005 was signed by President Bush. Most provisions of this bill will become effective 180 days after signing, or on October 17, 2005. If, like me, you do not practice bankruptcy law, you have probably only heard that this new law requires those who have the ability to

repay at least a portion of their debts to do so. However, those who are not able to make these payments will have their debts discharged. The law makes special accommodations for family farmers, active duty military personnel, low-income veterans and those with serious medical conditions. The law also requires that debtors undergo approved consumer debt counseling within 180 days of filing bankruptcy and file any unfilled income tax returns within weeks of case filing. It is hoped that this new law will protect those who genuinely need help, stop those who try to commit fraud, and “help make credit more affordable, because when bankruptcy is less

common, credit can be extended to more people at better rates.” (1)

The ethics impact of the new law are in the restrictions placed on attorneys who represent debtors and on their clients. Lawyers representing debtors will be open to personal liability for monetary sanctions should their debtor client prove to be ineligible for Chapter 7 or if the facts in the petition are later disproved. As a practical matter, attorneys representing debtors will have to carefully screen potential clients — not only to determine whether they are eligible to file a Chapter 7 case and have an adequate amount of dischargeable debt, but also to ensure that the potential client has met the filing prerequisites such as receiving approved budget and credit counseling within 180 days of filing and that unfilled income tax returns have been or are ready to be filed. Business and bankruptcy lawyer Cathy Moran says that this new law “imposes new duties on debtors and their attorneys, and failure to timely perform those duties will result in dismissal of the case or lifting of the automatic stay.” For lawyers “the consequences of mistakes, inattention, or misfortune become far more serious, as the court and the trustee have less discretion to deal with human frailty and intervening circumstances. The presumption that the debtor is entitled to relief from his debts is effectively replaced by presumptions that the debtor’s filing is abusive until the debtor proves otherwise.” (2)

The new law provides that the court may award the trustee’s fees and costs against an attorney who files a Chapter 7 bankruptcy in violation of the rules. The attorney may also be subject to civil penalties. By signing the bankruptcy petition, “the debtor’s attorney will be required to certify that he or she has performed a reasonable investigation into the circumstances giving rise to a client’s bankruptcy petition and



that it is well-grounded in fact.” (3) According to Sheila M. Williams, editor of CCH Bankruptcy Law Reporter, “[t]he Act essentially requires attorneys to guarantee Chapter 7 means testing. With attorneys facing the prospect of such penalties, the Act is likely to have a chilling effect on Chapter 7 filings making it the exception rather than the rule. Attorneys have great incentive to err in favor of filing Chapter 13 and, in close instances, will be forced to weigh their best interests against that of the client’s.” (4)

The new law also reflects Congressional intent to strengthen professional standards of those who assist consumer debtors with bankruptcy cases. Now defined as “Debt Relief Agencies,” these professionals, including attorneys, must provide notices to consumer debtors that include alternatives to bankruptcy and matters pertaining to the integrity of the bankruptcy system. Attorneys and others advertising bankruptcy assistance services “must disclose that the services provided are for bankruptcy relief. In the advertisement, the

agency must include the following statement: ‘We are a debt relief agency. We help people file for relief under the Bankruptcy Code.’” (4)

In the view of some, such as debt relief marketer Charles Essmeier, “[t]he net result will probably be chaos, as fewer attorneys will handle bankruptcy cases, credit counselors will raise their fees, and more consumers with problem debt will be clueless as to what they should do next.” Essmeier cites statistics suggesting that a large number of bankruptcies formerly thought to be personal bankruptcies of the frivolous are in actuality filings by small businesses. “As a result, the new law may be unfairly targeting consumers for punishment when they are not actually the biggest part of the problem. Worse, it could be harming small businesses.” (5) One thing is for certain: attorneys who practice debtor bankruptcy law will soon be making changes in the way they practice law in order to protect themselves as well as their debtor clients.

(1) “President Signs Bankruptcy Abuse Prevention, Consumer Protection Act, 04/20/05, [www.whitehouse.gov](http://www.whitehouse.gov)

(2) Cathy Moran, “Bankruptcy Law Changes,” <http://www.lawyers.com>

(3) George Basharis, J.D., Andrew Turner, J.D., and Sheila M. Williams, J.D., “Bankruptcy Reform Legislation Passes House,” <http://business.cch.com/bankingfinance/focus/news/20050414.asp>

(4) Sheila M. Williams, J.D., “Bankruptcy Overhaul Enacted—New Rules for Bankruptcy Implemented,” 04/21/05, <http://business.cch.com/bankingfinance/focus/news/20050421.asp>

(5) Charles Essmeier, “New Bankruptcy Law – Targeting the Wrong People?”, <http://EzineArticles.com/>

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*Laurie Borski is Chair of the Professional Ethics Committee of the Paralegal Division, State Bar of Texas. She has served on the Division’s Annual Meeting and Election Committees and is a past president of the Alamo Area Professional Legal Assistants in San Antonio. You can reach her at 210.250.6041 or [laurie.borski@strasburger.com](mailto:laurie.borski@strasburger.com).*

## Opinions TO THE EDITOR

**T**he TPJ wants to hear from you! Beginning with this issue, the Publications Committee will poll members concerning their thoughts on some of the “hot topics” of the day. During each quarter, the Committee will draft a question, which will be distributed to membership, through the Directors. Each question will direct you as to where to send your response. We will print the responses in the following TPJ, reserving the right to edit for space considerations. While we prefer to print a name and city with each response, we understand that some of you may prefer that we not print your name. We will honor this request, so long as the response is not contrary to the objectives of the Paralegal Division or the Publications Committee.

We hope that this column provides a way for PD members to express themselves, constructively, on issues that impact our profession, our communities and our country.



QUESTION OF THE QUARTER:  
*The U.S. House of Representatives recently passed an amendment to ban the desecration of the U.S. flag. The amendment stands a very good chance of passing the U.S. Senate. Do you feel that this amendment is good policy for the US? Why or why not?*

RESPONSE 1: This is in response to the question of whether there should be a Constitutional amendment banning the desecration of the flag. I am strongly against such an amendment, because it directly conflicts with freedom of speech and expression, freedoms which are, to me, among the most important and precious freedoms we have in this country. People risk their lives (and often lose them) daily to come to this country precisely because we have such freedom to express ourselves without fear (so far) of reprisal by our government.

For example, many of you may remember the struggles of people in East Germany (where freedom was repressed) to escape to the West, where such freedoms were allowed.

Such an amendment sounds good, because it speaks to our patriotism and love of country. However, the flag, as much meaning as we put into it, is a symbol. Merely that. It has no more or less meaning than any other symbol. And what does "desecration" mean? That you can't put one on your denim jacket? That you can't wear shorts made of one? And where does this all stop? Shades of George Orwell.

If we begin to restrict our freedoms by doing things such as this, we begin a slide down a very dangerous, slippery slope and turn to the type of government we so strongly criticized in the Soviet Union — one which denies dissenters a voice. I may not agree with the person who burns a flag, but I will fight for that person's right to do so. That's what America is all about, to me. The fact that Congress is even considering this appalls and horrifies me. — Debra Crosby, San Antonio

RESPONSE 2: It is a very good policy.

It is illegal to kill a bald eagle which is a symbol of our country. It should be illegal to desecrate our flag which is our country. — Mary Kirby Jones, Plano

RESPONSE 3: Is a constitutional amendment the only road to stop desecration of our national symbol, the Star Spangled Banner? Most people exercise flag desecration in protest of the government. The flag in no way represents the government, it represents the people of this great nation who enjoy freedom unlike any other. It also represents a will to never give up and to unite as one. Just as in the 9/11 attacks, our country was able to unite under one thing, that being our flag. If a person feels it is necessary to protest the government do it in a way it will work. Organize a group that will support a party with the ideals you look for. Too many men and women have given their precious lives just so we can see that flag waiving in the sky. Though it would be nice to see flag desecration banned, it may be very difficult to pass in the legislature. Proud Americans look at the flag as more than just a flag; a proud family will see it as a soldier's life lost in war, an immigrant will see it as a new life, while other degrade it...we all know it is a symbol of more than just freedom, it is a symbol of the people who love their country. — Mary Helen Valdez, Lubbock

RESPONSE 4: I have always felt this was a Freedom of Speech issue. As American citizens, we should be allowed to question our government and to speak out if we disagree with it. That is what freedom is and why we defend it. No one likes to see our flag burned or destroyed, except those who want to make a display of hurting the U.S. Forbidding such action only invites desecration displays. Forbidding freedom of speech is what despots, dictators and tyrants do to control their country's citizens from dissenting with them. — Caro E. Dubois, CLA, Austin

RESPONSE 5: The proposed amendment to ban the desecration of the U.S. Flag is good policy for the US because the flag has

long been a symbol of what the United States was founded upon — freedom. Persons who desecrate the flag are in essence making a statement that they have no respect for the principles of this country or its people. We demand and receive respect and protection of our property through laws. We likewise should demand and receive respect for our principles and protection of all that symbolizes those principles, particularly the US flag. — Grace Duplessis, CLA, Corpus Christi

RESPONSE 6: I wish that people's manners and moral conduct simply prevented the U.S. flag from being desecrated. It is a sad day when we have to legislate and/or take away the freedoms of people because of poor taste or bad manners. The U.S. flag is a symbol of our great country and should not be desecrated. People living in this country who think so ill of our country to burn or desecrate the flag should not be living in our country. — Laura, Amarillo

RESPONSE 7: I think a better solution would be for anyone caught desecrating the flag to be given a one-way, nonrefundable ticket to the country of their choice since it's obvious from their actions that the U.S. isn't it. — Helen, Beaumont

RESPONSE 8: Anyone in the United States of America should be allowed to burn anything they want to burn, as long as it is not a living thing, or someone else's property. This is the home of the free. Freedom means I don't have to believe what you believe, because I am free to believe what I believe.

My Daddy, who passed away in November, was a serviceman in World War II (more precisely a Marine), and I still put my hand over my heart when I hear the Star Spangled Banner. That has nothing to do with the right to refuse to do so, or to burn a flag. God Bless America, and save us from those who would rewrite a constitution that has functioned quite efficiently for over 200 years. — Nan Gibson, Houston

# IMPORTANT NEWS

## Continuing Legal Education

### ONLINE CLE

- The Paralegal Division offers online CLE via the PD website. To participate in online CLE, please go to [www.txpd.org](http://www.txpd.org) and select CLE/Events.

### CLE REQUIREMENT

- ACTIVE AND ASSOCIATE members of the Paralegal Division are required to obtain six (6) hours of CLE (2 of which can be self-study). CLE hours must be obtained between June 1 – May 31 of each year.

### CLE CALENDAR

- A statewide CLE calendar can be found on the PD website at [www.txpd.org](http://www.txpd.org) under Upcoming Events/CLE. You can find a variety of CLE programs offered around the State. Please check the PD website often because the calendar is updated weekly.

## Membership Information

### CHANGES TO MEMBER INFORMATION

- Paralegal Division members can now change their credentials, addresses, email addresses, preferred mailing address and/or phone numbers via the State Bar of Texas website. Go to [www.texasbar.com](http://www.texasbar.com); click on MyBarPage (top of home page). If you have never visited this page, you will need to set up a pin/password. Your password to set up your **NEW Pin/password** is the last four digits of your social security number (**if the State Bar does NOT have your social security number on file, you will not be able to use this area nor will you have access to MyBarPage**); once you set up the new pin/password, you will be able to enter this section of the website to update your member records. If you have any problem accessing this page, please contact the Membership Department at 1/800-204-2222, ext. 1383.

### MEMBERSHIP CARD

- Need to replace your membership card? Please send \$5.00 made payable to the Paralegal Division along with a letter requesting a new membership card to the Membership Department, State Bar of Texas, P. O. Box 12487, Austin, TX 78711.
- Were you ever issued a membership card? If no, please contact the Membership Department of the State Bar of Texas at 1/800/204.2222, ext. 2114 or email at [jmartinez@texasbar.com](mailto:jmartinez@texasbar.com)

### DELL COMPUTER DISCOUNT

- The number assigned to the Paralegal Division by Dell Computer Corp is: SS2453215. This is the number you should use to receive the 10% discount for purchase of computers. However, Dell **does not** have the 10% discount special continuously. Dell sends a notice when the discount is offered to our members at which time it is forwarded to the PD members via the PD E-group. You may try to use this number anytime, but there are no guarantees that you may receive the discount at the time of access. Notices will continue to be forwarded to the PD E-Group when the discount is offered by Dell Computer Corporation.

## PD Website Information

### MEMBER DIRECTORY ONLINE

- A membership directory is set up on the PD website under the Members Only area. By default, your membership information is listed in the online membership directory. If you would like to suppress showing your listing to other members, go to the Members Only "Edit My Profile" function to display your listing and then uncheck the "publication" box. If you haven't already done so, you might want to include info about adding member specialties through the same interface. If you need changes made to the online membership directory, you must make those changes using the procedures set

out in the above **CHANGES TO MEMBER INFORMATION** procedures.

### MEMBERS ONLY AREA

- The Members Only area of the PD website is for current members of PD only. If you are a member of the Paralegal Division and cannot access this area, please send an email to [pd@txpd.org](mailto:pd@txpd.org) with your particular problem. Access is automatically given to members of the Paralegal Division. Access to the members-only area is available within two weeks from the date of the acceptance notice mailed to the individual by the Paralegal Division Coordinator.

### PD E-GROUP

- **How do I sign up for the PD E-Group?**
- Going to trial in a "foreign" jurisdiction and want some tips from those who have gone before? Need a form but do not know where to turn? Then you need to sign up for the PD E-group! This is a members-only group and a benefit of being a member of the Paralegal Assistants Division (PD).
- To sign up, go to [www.txpd.org](http://www.txpd.org), click on Members-Only and choose E-Group. There will be directions on how to sign up. Once you have signed up, you will begin receiving emails from the members of PD.
- For those who prefer not to be interrupted with email notifications, select "digest" for the PD email exchange. Emails are collected and distributed one time a day in one email.
- **How Do I change my PD E-group email address?**
- **Instructions:**
- The PD E-Group created by the member is Password-protected, only the member has access to change a member's PD E-Group email. Go to [www.txpd.org](http://www.txpd.org), click on Members-Only, click on PD E-Group, enter your password, unsubscribe the current email address, and create a new email address where you want to receive your PD E-Group messages.



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