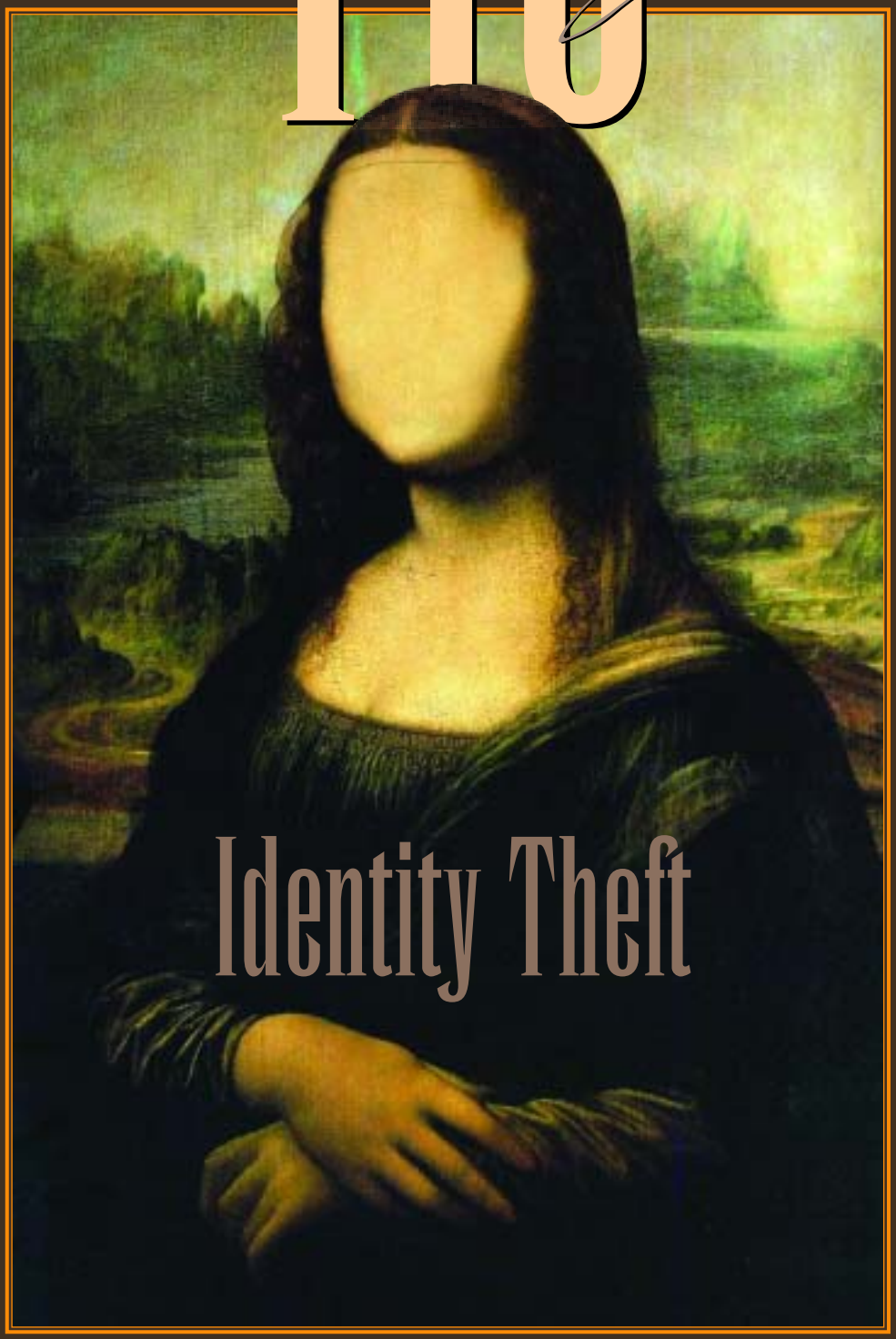
SPRING 2005 VOL. 11 NO. 4

Texas Paralegal Journal

TPJ



Identity Theft

TECHNOLOGY ETHICS EVENTS EDUCATION

PRESIDENT'S *Message*

Ellen Lockwood, CLAS, RP

CLE AND THE COLLEGE OF THE STATE BAR

As a continuation of this year's focus on ethics, we should consider the importance of continuing legal education. Canon 9 of the Code of Ethics and Professional Responsibility of the Paralegal Division states:

> A paralegal shall maintain a high degree of competency to better assist the legal profession in fulfilling its duty to provide quality legal services to the public.

In order to maintain competency, we must stay abreast of changes in the law and technology. Self study is a wonderful way to get the latest information. Everyone should read the *Texas Bar Journal*, *Texas Paralegal Journal*, advance sheets, and legal periodicals. You should also review the rules, including the local rules, codes, and statutes in your practice area on a regular basis. And staying current on technology is definitely a requirement. Know the best and most efficient ways to find information, and the cost comparison of each method, or at least know how to get this information quickly when required. Many legal periodicals now devote at least a small space in each issue to listings of helpful web sites. Keep up to date on new software and updated versions of programs you already use.

Although self study is convenient, nothing replaces attending a CLE presentation, whether in person or online. The Division offers many CLE opportunities:

Texas Advanced Paralegal Seminar – this year it will be in Dallas, September 20 – 22. This is an opportunity to earn up to 14 hours of CLE, network with other paralegals, attend two great socials, and visit our vendors in the exhibit hall

CLE in each District – Division Directors offer at least three hours of CLE each year between June 1st and May 31st

(Continued on page 3)

SPRING 2005 VOL. 11 NO. 3

Texas Paralegal Journal

TPJ

Focus on . . .

Hot "Cites"

Columns

Et Al.

(Continued from page 1)

Online CLE through the Division's website – for a small fee per hour, you can access CLE at your computer whenever it is convenient for you

CLE is also available from the State Bar, local paralegal and bar associations, and private companies. The Division maintains a state-wide CLE calendar on our website that is searchable by city and topic.

The College of the State Bar of Texas is an honorary society established by the Supreme Court of Texas that recognizes and represents attorneys and paralegals who make an extraordinary commitment to professional education. The College now welcomes qualified paralegals as associate members. Membership in the College does mean that you will need to attain more than the average amount of CLE per year. However, if you want to place yourself in a category "above the average," then you should consider joining as an Associate Member of the State Bar College. Once again, Texas has distinguished itself as being the first for this type of distinction for paralegals and I urge you to be part of it.

If you are interested in becoming a member of this elite group and distinguishing yourself by displaying your membership in the College with a distinctive certificate, as well as on your business cards and in professional listings, visit their website, www.TexasBarCollege.org.
One of the articles in this issue was recently published in the State Bar College's *Bulletin*, and we have obtained permission to reprint it here for our members. The College's philosophy is to reach out to those professionals interested in the highest of ethical standards and advanced training.

One important aspect of being a professional is to keep your knowledge and skills current. Challenge yourself to do more than the minimum CLE required to maintain your membership in the Division. Challenge yourself to EXCEL.

**TEXAS ADVANCED PARALEGAL SEMINAR (TAPS)
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CELEBRATING THE PARALEGAL DIVISION'S 25TH ANNIVERSARY
SEPTEMBER 20-22, 2006 - CROWNE PLAZA HOTEL, ADDISON, TX**

TWO TAPS SCHOLARSHIPS WILL BE AVAILABLE FOR SEMINAR. SCHOLARSHIP APPLICATION(S) ARE NOW BEING ACCEPTED. (FORM IS LOCATED ON THE WEBSITE AT WWW.TXPD.ORG. FULL DETAILS OF SEMINAR COMING TO WEBSITE MAY 2006.

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I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including multiple damages and civil penalties).

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2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15k, Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
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PS Form 3526, October 1999 (Reverse)

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EDITOR'S *Note*

by Rhonda J. Brashears

Happy Spring *TPJ* readers! I hope this issue finds you and yours happy, healthy and ready for a great rest of the year. This issue contains lots of informative articles, as well as several key dates for upcoming Paralegal Division events.

We are honored to have a featured article on identity theft by Scott Durfee. No matter your area of practice, this ever growing crime could not only affect your clients, but you personally. In addition to an overview of the Texas laws dealing with identity theft, Mr. Durfee gives some tips on how to avoid becoming a victim and what to do if it should happen to you.

Also, now is the time for you to decide to become more involved in the Division. Your district directors are in the process of providing names of committee volunteers to the Board of Directors. All that the Paralegal Division is able to for its members is accomplished by its volunteering members. There are several opportunities for you, both big and small. For example, you can help with membership, CLE in your local area, and even with the *TJP;* the list goes on and on. Contact your district director if you think you would be interested in helping the Division be everything you want it to be; he or she will be able to find a place for you.

As always, feel free to contact me with your questions or comments.

Active Membership Replacement Certificate

Order a replacement Active Membership certificate for $15.00 (includes sales tax and shipping cost). The certificate is the same quality as the original Legal Assistants Division Active certificate.

Print the pdf order form from the Division's website at www.txpd.org. Go to the Members-Only section, sign in, and choose "Active Membership Certificate" from the drop down menu.

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DEADLINE FOR SUBMISSION OF ARTICLES FOR THE SUMMER ISSUE IS APRIL 30, 2006.

Focus on . . .

Identity Theft—How to Defend Against It and Fight Back

Scott A. Durfee

Harris County District Attorney's Office

In 2001, I wrote a paper on the topic of identity theft for a seminar sponsored by the State Bar College. At that time, it seemed that the public, legislative bodies and law enforcement were just beginning to perceive the enormous challenges posed by this phenomenon. To a large extent, criminals maintained the upper hand due to a combination of governmental inertia and community indifference.

Much has changed since then. Law enforcement agencies are more willing and better prepared to investigate identity theft complaints. People and businesses are more vigilant in protecting against disclosure of identifiers and are moving faster to respond to identity thefts when discovered. Congress and the Texas Legislature have made measures against identity theft a priority. Nonetheless, the number of victims continue to grow.

I have updated my 2001 paper to include new statistics, current contact information for help, and a survey of new legislation. I can only hope that, as law enforcement inexorably catches up to and overwhelms the identity thieves out there, future updates will provide more favorable statistics.

I. Identity Theft Generally

"Described as the neoteric crime of the information technology era, identity theft is the illicit use of another's identifying facts (name, date of birth, Social Security number, address, telephone number, or other similar information) to perpetuate an economic fraud by opening a bank account, obtaining credit, applying for bank or department store cards, or leasing cars or apartments in the name of another." Kurt Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: the Identity Theft and Assumption Deterrence Act,* 8 Cornell J. Law & Public Policy 661, 662 (1999).

A 2003 Federal Trade Commission survey showed that over a one-year period nearly 10 million people – or 4.6 percent of the adult population – had discovered that they were victims of some form of identity theft. Fed. Trade Comm'n, Identity Theft Survey Report at 4 (2003) (www.ftc.gov/os/2003/09/synovatereport.pdf). This survey also established the total cost of this crime approaches $50 billion per year, with an average loss from the misuse of a victim's personal information of $4,800. *Id.* at 6.

II. How They Obtain Your Information – Don't Be "Low Hanging Fruit"

In this information age, it is impossible to defend oneself against a persistent identity thief: they can attack more places than you can defend. *See* Sun Tzu, ART OF WAR ("[I]n the case of those who are skilled in attack, their opponents do not know where to defend . . . . Preparedness everywhere means lack everywhere.") You can, however, avoid being the "low hanging fruit" that is easily harvested by the identity thieves by being aware of the ways that identifiers are stolen and taking simple defensive positions against them. Here are some ways identities are stolen and how you can keep it from happening to you:

They . . . pickpocket your wallet or purse and using the credit cards, identification, and PIN numbers stored therein.

You . . . travel light. Empty out your wallet or purse and keep only the identification information and cards absolutely necessary for your day-to-day activities. Do not carry your bank account numbers, personal identification numbers, passports, birth certificates, and, most importantly, your Social Security card. For the cards you do carry, make a photocopy of them or a list of the key numbers and keep them in a secure location so that, if lost or stolen, you can report the loss immediately. Do not carry any more blank checks with you than you need: checks may be cashed, and they may also contain sensitive information often preprinted on the checks themselves (*i.e.* address, bank account number, telephone number). For that matter, review your checks to see what kind of unnecessary personal information is imprinted on them. Do *not* wait to react to the loss, even if you think it might turn up later.

You can . . . avoid being the "low hanging fruit" that is easily harvested by the identity thieves by being aware of the ways that identifiers are stolen and taking simple defensive positions against them.

They . . . steal pre-approved credit applications, bank and credit card statements, telephone calling cards, checks, and tax information from your mailbox.

You . . . opt out of preapproved credit card offers by calling 1-888-5-OPTOUT (567-8688). Do not use unsecured mailboxes (*i.e.* "raise the flag" curbside boxes) for important mail: drop it off in a post office collection box or at the local post office. Promptly remove your mail from your mailbox after delivery, and make arrangements for gathering your mail while on vacation.

Similarly, you can opt out of information sharing by the credit bureaus (a form letter and addresses are available at www.ftc.gov/bcp/conline/pubs/alerts/optoutalrt.htm), direct mail marketing (www.the-dma.org/consumers/offmailinglist.html), telemarketing (www.donotcall.gov), and e-mail marketing (www.dmaconsumers.org/offemaillist.html).

They . . . submit change of address forms to divert mail away from you and to themselves.

You . . . have a clear understanding of which accounts you have open, when the statements are issued for those accounts, and phone numbers and addresses to report fraud for each account. If you have not received a statement at the usual time, assume the worst and notify your bank or credit provider.

Also, you should cancel dormant credit accounts, which are most vulnerable to changes of address because you will not notice anything unusual until you are billed. Likewise, you should place passwords on your accounts: avoid using easily available information like your mother's maiden name, the date of birth of yourself or a family member, your zip code, or your social security number

They . . . run credit histories or open new accounts in your name under false pretenses.

You . . . regularly check your credit history for anomalies. You are entitled to one free credit history check per year with each of the three credit bureaus – Equifax, Experian, and Trans Union. Go to **www.annualcreditreport.com** to register for these histories. Because you do not have to get the checks from each agency at the same time, you should stagger your credit history checks so that you get a fresh credit check every four months.

They . . . "phish" for your identifiers (i.e. call or e-mail you under false pretenses and obtain your information).

You . . . never give your personal information to someone who has contacted you. Legitimate businesses or governmental agencies never contact people and ask for PIN numbers or other identifying information.

They . . . intercept a calling card number by "shoulder surfing" (i.e. watch you from a nearby location as you punch in your telephone calling card number or credit card number or listen in

SUSTAINING MEMBER PROFILE

Team Legal

By James Gates, President and CFO

2006 marks the twenty-year anniversary for Team Legal, which began as a small family-owned business in Houston, Texas, specializing in record retrieval and grew into the diverse litigation support leader it is today. With modest financing and an abundance of enthusiasm, we took a bold leap of faith and ventured into the highly competitive world of litigation support.

Armed with a knowledgeable staff and strong customer service skills, we quickly earned a reputation for excellence within the legal community. It's hard to imagine now, but business was conducted rather primitively in our industry at the time, often without the benefit of fax machines and computers. That's right, no voice mail, email, cell phones or Blackberries.

Back then, Team Legal cut its teeth on med-mal record collection, being the first in Texas to chronologically arrange medical records for easy summarization by legal nurse consultants. Court reporting and video deposition services were soon added as Team Legal made a name for itself by providing customized, reliable services on mass-tort cases, such as asbestos, breast implant and diet drug litigation on a national level.

True to our trendsetting nature, today's Team Legal offers a level of efficiency and technology that's essential to your discovery. Medical records and deposition transcripts are securely maintained in Team Legal's on-line archive for easy access by attorneys, paralegals and legal secretaries. You can also check the current status of your record orders and deposition transcripts on Team Legal's user-friendly website 24-7. Now that's convenience!

Interested in electronic discovery? Check out our sister company, Servient, at *www.servient.com* for cutting-edge document scanning, coding and e-discovery services. With Servient's unique electronic document management systems, Discovery Compass and CentricSearch, you can efficiently manage high volume cases with ease and reduce the clutter of storage boxes that was once commonplace. Call today for a free consultation to learn how Servient can enhance your firm's discovery efforts.

We've come a long way since our humble beginning twenty years ago, thanks to the support of so many of you, and our ability to raise industry standards by offering innovative services you can rely on. Now operating nationally, Team Legal and Servient still take pride in giving you the same superior customer service and quality products you've become accustomed to. We appreciate the confidence you have placed in our teams and are sincere in our commitment to continue to earn your trust by exceeding your expectations.

on your conversation if you give your credit card number over the telephone to a hotel or rental car company).

You . . . be conscious of others around you as you provide this information. There is nothing impolite about asking someone to step back out of earshot, or covering your keypad as you punch in the numbers.

They . . . raid dumpsters for discarded receipts and files.

You . . . destroy identifying information that you discard. Tear or shred charge receipts, credit applications, insurance forms, bank checks, expired charge cards, credit offers, and statements that you are discarding.

They . . . hack into your computer by replay attacks or eavesdropping on your password, or by guessing your password.

You . . . use appropriate firewalls to protect your computer against hackers. Good PC programs include Trend Micro PC-cillin Internet Security 2005 and ZoneAlarm Internet Security 5.5. For Apple computer users, *MacWorld* magazine says that the OS X operating system comes with a good firewall, but for enhanced protection and ease of use, they recommend NetBarrier X3.

They . . . steal from your home or office, or from your office's personnel files.

You . . . place identifying information in a locked desk, safe, or other secure location. Know where your office's personnel files are and, if you believe they are not secure, complain to your employer in writing. For governmental employees, sign an "opt out" statement declining to allow disclosure of your personal information under the Public Information Act. *See* TEX. GOV'T CODE 6 552.024 (opt out provision of the Act).

The FTC recommends that you speak to someone in the fraud department of each creditor within two days of discovering the loss or theft to minimize your exposure, and follow up with a written communication to ensure that there is no misunderstanding.

III. What To Do After Your Identity Has Been Stolen

Contact All Three Major Credit Bureaus

The FTC recommends that you call the bureaus and tell them that you are an identity theft victim. You should request that a "fraud alert" be placed in your file, as well as a victim's statement asking that creditors call you before opening any new accounts or changing your existing accounts.

Under the Fair Credit Reporting Act, you are entitled to an investigation by the credit bureau if you believe that your file contains incorrect information. If you disagree with the results, you have the right to include in your credit file a brief statement giving your side of the story.

Under the Electronic Funds Transfer Act, your losses are limited to $50 if you report your ATM card lost or stolen within two days after discovering the loss.

Call and Write Your Credit Card Companies

The FTC recommends that you speak to someone in the fraud department of each creditor within two days of discovering the loss or theft to minimize your exposure, and follow up with a written communication to ensure that there is no misunderstanding. Under federal law (15 U.S.C. 6 1643), your losses are limited to $50 per card and you're not responsible for charges made after you report the card lost or stolen. The FDIC also recommends that you instruct your card companies to *close* your accounts instead of asking for the fraudulent charges to be removed. Open new credit card accounts with new account numbers and PINs, and ask that the password be used before any inquiries or changes can be made on the account.

Make a Police Report

Contact the police where the information was stolen, if that location is known. Otherwise, contact your local law enforcement agency. In either case, sign an affidavit verifying that unauthorized transactions in your name are fraudulent. If it is apparent that the identity thief stole your mail or has filed a falsified change-of-address form, contact your local postal inspector. *See* www.usps.gov/websites/depart/inspect.

Call and Write To Your Bank For a New ATM Card

Because the thief may attempt to access your bank account using your information, you should likewise replace your old ATM card with a new one and change your existing PIN to one that cannot be easily guessed by a thief. *Id.* Under the Electronic Funds Transfer Act, your losses are limited to $50 if you report your ATM card lost or stolen within two days after discovering the loss. If you wait between two and sixty days, you may be liable for up to $500. After sixty days, the bank is not required to reimburse you for your losses.

If a Checking Account Has Been Compromised, Notify the Bank and Check Verification Services

A list of the major check verification services is available at the Texas Department of Public Safety's website (www.txdps.state.tx.us/administration/driver_licensing_control/idtheft/idtheft2.htm.)

If Your Investments Have Been Tampered With, Contact Your Broker and the Securities and Exchange Commission

The SEC can be contacted by mail at SEC, 450 Fifth Street, NW, Washington, DC 20549-0213, by phone at 202-942-7040, or by e-mail at help@sec.gov.

Contact the Social Security Administration If Your Number is Being Used to Apply For a Job or Work

Report the misuse to the SSA's Fraud Hotline at 1-800-269-0271, and follow up in writing. You should also call the SSA at 1-800-772-1213 to verify the accuracy of the earnings reported on your SSN, and to request a copy of your Social Security Statement.

Contact the FTC

File a complaint with the FTC by telephone at 1-877-IDTHEFT (438-4338); by mail at: Identity Theft Clearinghouse, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington, DC 20580; or online at: www.consumer.gov/idtheft. The FTC has been mandated by federal law to act as a clearinghouse for victims of identity theft and to assist in providing relevant information.

File an ID Theft Affidavit

The FTC has standardized the format for disputing fraudulent debts and accounts opened by an identity thief in its ID Theft Affidavit, which can be downloaded from the web at www.consumer.gov/idtheft/affidavit.htm.

IV. Statutory Remedies

Federal Law. In the fall of 1998, Congress passed the Identity Theft and Assumption Deterrence Act, which provides that

> [whoever] knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law [commits identity theft].

18 U.S.C. 6 1028(a)(7). This offense, in most instances, carries a maximum of 15 years imprisonment, a fine, and criminal forfeiture of any personal property used or intended to be used to commit the crime. Other federal criminal statutes implicated by identity theft include credit card fraud (18 U.S.C. 6 1029), computer

fraud (18 U.S.C. 6 1030), mail fraud (18 U.S.C. 6 1341), wire fraud (18 U.S.C. 6 1343), or financial institution fraud (18 U.S.C. 6 1344).

Texas Laws

Expunction – A victim of misidentification may petition the district attorney for assistance in having his misappropriated identity redacted from court records if the identity was misused in a criminal proceeding. *See* TEX. CODE CRIM. PROC. art. 55.01(d).

Identity Theft Investigations and Prosecutions – Peace officers are now obliged, upon learning of an identity theft, to notify the victim and the DPS of the theft, and make a report. TEX. CODE CRIM. PROC. arts 2.28, 2.29; *see also* Art. 60.19 and (detailing DPS's responsibilities upon receipt of the information, which include preparing a PIN for). The system is also more victim-friendly, placing venue for identity theft crimes (Penal Code 6 32.51) "in the county of residence for the person whose identifying information was fraudulently obtained, possessed, transferred or used." *See* TEX. CODE CRIM. PROC. art.13.29.

"Phishing" Fraud – A new statute makes "phishing" for identifiers a state jail felony. *See* TEX. BUS. & COMM. CODE 6 48.001, *et seq.*

PINs for Drivers' Licenses – An identity theft victim may file a declaration with the DPS to create a PIN for his or her driver's license to prevent misuse by an identity thief. *See* TEX. GOV'T CODE art. 411.0421.

Security Freezes on Consumer Reporting Agency Files – An identity theft victim is entitled to a "security freeze" (*i.e.* a notice placed on a consumer file that prohibits a consumer reporting agency from releasing a consumer report relating to the extension of credit involving that consumer file without the express authorization of the consumer) upon written request by certified mail to a consumer reporting agency. *See* TEX. BUS. & COMM. CODE 6 20.034.

*Scott Durfee is the general counsel for Harris County District Attorney Charles A. Rosenthal, Jr. A frequent writer and speaker on identity theft, ethics, and criminal law issues, Durfee also plays keyboards for a band called Death by Injection (*www.deathbyinjection.com*) and coaches his daughter's volleyball team, the Lightning Bolts.*

Focus on...

Some Fine Points of Legal Drafting

Ten Things Legal Drafters Should Know, Part Two

Wayne Schiess

5. Words of obligation

When drafters want to impose obligations on a party, they have many options. That's one of the main problems with words of obligation: too many options. Because there are so many options, adequate legal drafters create inconsistency and confusion in words of obligation.

For example, all of the following words and phrases were used to impose contractual obligations on the parties in a contract I recently reviewed.

5a. Party agrees . . .
Party shall . . .
Party promises . . .
Party will . . .
Party shall be paid . . .
It is expressly agreed that . . .
It is understood and agreed by the Parties that . . .

This inconsistency is surprising once it's pointed out. It invites questions:

Why use a different term for the same action—imposing an obligation on a party?

What is the difference between "agreeing" and "expressly agreeing"?

What is the difference between saying that a party "will" and a party "shall"? Is there an argument that the different terms imply different types of obligations—some stronger than others?

Yet despite these obvious questions, inconsistencies like this are present in many drafted documents. To avoid inconsistencies like these, better drafters select a single word or phrase to use when imposing obligations. You then have two options.

(1) Search the document for every place that an obligation is imposed and replace inconsistent language with your preferred term.

(2) Reorganize the document so that all the obligations of one party are in one place and lead-in to those obligations with your preferred term. It might look like this.

5c. 1. Buyer's obligations . . . buyer agrees to—
(a) Pay the purchase price . . .
2. Seller's obligations . . . seller agrees to—
(a) Deliver the goods . . .

Most agreements are organized by topic or by subject matter and not by party obligations. Organization by topic makes sense for the drafter, who must make sure that all the topics are covered. But it may not make sense for the users, who are probably most interested in what their obligations are.

The other problem that arises because drafters have so many choices for words of obligation is that some drafters choose to use *shall*. But most of them use it incorrectly. Did you know that *shall* is the most misused word in all of legal language? It is. In the current edition of *Words and Phrases*, *shall* itself is followed by 109 pages of case squibs, and *shall* phrases cover 45 more pages. Yet its misuse is one of the

most heavily repeated errors in all of law.

When *shall* is used to describe a status, to describe future actions, or to seemingly impose an obligation on an inanimate object, it's being used incorrectly. For example:

5d. *Status*: "Full capacity" shall have the meaning . . .

5e. *Future action*: If . . . then the contract price shall be increased . . .

5f. *Faulty imposing of obligation*: The remaining oil shall be sold by lessee . . .

To correctly use *shall*, confine it to the meaning "has a duty to" and use it to impose a duty on a capable actor. Examples 5g and 5h show how:

5g. Lessee shall sell the remaining oil . . .

In other words—

5h. Lessee [an actor capable of carrying out an obligation] shall [has a duty to] sell the remaining oil . . .

Meticulous use of *shall* correctly may not seem worth it. After all, we know what 5f actually means, right? It imposes an obligation on the lessee to sell the remaining oil. But consider this provision, which was raised as an issue in a child-support case:

5i. The Respondent shall pay 26% of his monthly net income to the Petitioner as child support. Beginning in the year 2000, Petitioner shall receive 26% of all bonus checks.

Does the Respondent have an obligation to pay 26% of the bonus checks to the Petitioner? The language, taken literally, does not impose that obligation. Instead, it strangely imposes an obligation on the Petitioner to *receive* the money. Naturally, the court ruled that the Respondent had to pay 26% of the bonus checks.

But note two things. To reach that ruling, the court had to disregard the literal language of the provision—much to the relief of the drafter. And the Petitioner had to spend time and money litigating the issue—much to the chagrin of the drafter.

6. Poor sentence structure, including nominalizations and passive voice

Two common sentence weaknesses merit special attention here.

First is the passive-voice construction. Its main drawback in other writing appears in drafting, too: it can obscure the actor in a sentence. When a drafted document seeks to impose obligations, obscuring the actor is unwise. In the following examples, we may be able to figure out who bears the obligations, but we shouldn't have to.

6a. The oil and gas royalties shall *be paid* to lessor in accordance with the requirements of section 2.3(a) . . . [paid by whom?]

6b. Before any work is commenced, permits shall *be secured* for all swimming pools and for the safety barriers . . . [who must secure them?]

I consider this shoddy drafting.

Sometimes, when naming the actor or actors would be superfluous or would require a long list, the passive voice might be acceptable.

6c. All speech and assembly activities must *be conducted* in accordance with the provisions of this Chapter . . .

This is acceptable because revising to name the actor could be difficult:

6d. Students, faculty, staff, and any other person subject to these regulations must conduct all speech and assembly activities in accordance with the provisions of this Chapter . . .

But try this:

6e. This Chapter governs all speech and assembly activities . . .

The second sentence problem that infects legal drafting is the nominalization. By using a long noun instead of a shorter verb form of the same word, drafters create not only longer sentences and drier prose, but they also sometimes obscure the actor. Again, obscuring the actor is rarely desirable in legal drafting.

6f. *Nominalized*: Upon release of the Confidential Information . . .

6g. *Better*: If Recipient releases the Confidential Information . . .

6h. *Nominalized and passive*: If payment of the Deferred Amount is requested . . .

6i. *Better*: If First Bank requests that Borrower pay the Deferred Amount . . .

7. Misplaced modifiers and the doctrine of the last antecedent

Ambiguously-placed modifying words and phrases cause much litigation of drafted documents. Avoiding two modifying errors will save your drafts from the most common problems.

The first problem is listing two or more items and then adding a modifying phrase after the list, like this:

7a. *Poor*: Officers and directors who are minority shareholders must . . .

Does the phrase "who are minority shareholders" modify both *directors* and *officers*? In other words, must the officers also be minority shareholders?

7b. *Poor*: Corporations and partnerships with offices in Texas may . . .

Does the phrase "with offices in Texas" modify both *partnerships* and *corporations*? In other words, must the corporations also have offices in Texas?

My informal surveys of lawyers tell me that most of us instinctively think the modifying phrase applies to both antecedents. But the law has a canon of construction called the doctrine of the last antecedent; it holds that the modifying phrase relates only to the last or immediately preceding item. Under that doctrine, 7a and 7b would be construed this way:

7c. *Better*: Officers must . . . [and] Directors who are minority shareholders must . . .

7d. *Better*: Corporations may . . . and Partnerships with offices in Texas may . . .

The better practice is to clarify what you mean. Separate the phrases as in 7c and 7d if the modifier applies only to the last antecedent. Repeat or tabulate if the modifier applies to all the items listed.

7e. *Repeat*: Officers who are minority shareholders and directors who are minority shareholders must . . .

7f. *Repeat*: Corporations with offices in Texas and partnerships with offices in Texas may . . .

7g. *Tabulate*: Any of the following who are also minority shareholders must . . .
(a) officers, and
(b) directors.

7h. *Tabulate*: Any of the following with offices in Texas may . . .
(a) corporations, and
(b) partnerships.

Better drafters should not rely on the doctrine of the last antecedent to resolve their poorly placed modifiers. In fact, legal drafters should not rely on the canons of construction much at all. The truth is that the canons of construction are not binding law; they are merely suggestions or guidelines. Judges may employ them or not, depending on the result they want to reach. Besides, for every canon of construction, there is a countervailing canon. For example:

> If language is unambiguous, its plain meaning should be applied *unless doing so would be unjust.*

Better legal drafters create clear and careful documents without paying great heed to the canons.

The second problem that arises from modifiers is the opposite: the placement of a modifier before a list of items.

7i. The trustee may distribute funds to nonprofit corporations and associations.

Must the associations also be nonprofit? Or may the trustee distribute funds to any association?

As with the other modifying problem, this one can be fixed easily. Decide what you mean and then repeat or tabulate.

7j. *Repeat*: The trustee may distribute funds to nonprofit corporations and nonprofit associations.

7k. *Tabulate*: The trustee may distribute funds to nonprofit—
(a) corporations, and
(b) associations.

7l. *Tabulate*: The trustee may distribute funds to—
(a) nonprofit corporations, and
(b) associations.

8. Synonym strings

In many drafted documents you'll find synonym strings, either in pairs or in longer groups. Most of them are unnecessary. They not only impair reading but also invite problems of construction: if you used four different words, you must have meant four different things. And experts agree that including synonym strings without a good reason—just in case—is lazy drafting.

The better approach is to look at the string and ask yourself if the words are redundant (consult a dictionary if you must). If they are redundant, cut all but the one you want. If they are not redundant, ask yourself if you need them all. If not, cut. But if you do need them, ask yourself one more question: is there a single word that would cover all the meaning you need? If so, use it.

Common redundant synonym strings

Instead of this—above and foregoing
Use this—above, or name the specific location

Instead of this—any and all
Use this—pick one

Instead of this—by and between
Use this—between

Instead of this—ordered, adjudged, and decreed
Use this—ordered

Instead of this—true and correct
Use this—accurate

Instead of this—understood and agreed
Use this—If you mean that the party both understands and agrees, fine. Usually you just mean *agrees.*

Instead of this—will and testament
Use this—will

Four more from drafting-expert Kenneth Adams

Instead of this—interpreted, governed by, construed
Try this—governed by

Instead of this—power and authority
Try this—power

Instead of this—right, title, and interest
Try this—interest

Instead of this—sell, convey, assign, and transfer
Try this—sell

9. Archaisms

Elizabethan English (that's the 1500s) survives in today's drafted documents. Usually it has been carried along in a form through generations of drafters either afraid to remove it or believing that it serves a vital legal purpose. Generally, archaisms impair understanding and create problems of ambiguity or vagueness. Here are my comments on the worst.

aforesaid, aforementioned, foregoing
Old and imprecise. If you are referring to something that has gone before, name it specifically or describe exactly where to find it.

herein, hereby, therein, thereby and the like
Old and vague. For example, *herein* has 22 case squibs in *Words and Phrases*, and they bear out the opinions of the experts, Garner and Mellinkoff, that *herein* is

vague. *Herein* has been held to refer to a whole will, a provision in a will, a covenant in a deed, two granting clauses in a deed, a whole statutory act, a chapter of an act, an article of an act, and particular paragraphs of an act.

know all men by these presents
Should not be used in professional legal drafting.

to wit
Usually, you can replace this archaism with a colon.

whereas in recitals
All the experts are against *whereas* recitals. Just state what you have to state and call it *background*, or even *recitals*. Do not string together a series of paragraphs beginning with *whereas*.

wherefore premises considered
Unnecessary. Better drafters have eliminated this from their drafts for decades.

witnesseth
It is "archaic and inane" according to Kenneth Adams.

10. Document design, including numbering
Here are a few document design and format suggestions specifically for legal drafting.

Doubling numerals and text.
Many drafters duplicate numbers by using both numerals and text, like this:

10a. The board has a quorum if five (5) members are at the meeting.

This sentence came from a letter, not a binding document. The doubling is pointless. How does it help the document?

10b. Applicants must file the request within sixty (60) days.

This sentence came from a government regulation. The doubling seems more appropriate here, though I can't say why. Still, I wouldn't do it.

10c. The purchase price is three hundred ten and 76/100s dollars ($310.76).

This sentence came from a contract. In contracts, doubling probably arose from a desire to prevent forgery. Forgery is unlikely in a printed document, though, so the experts recommend against doubling.

Don't double the numbers in an effort to force yourself to double-check all the numbers. Do the double-checking anyway, but don't double: you're giving yourself twice as many chances to make a mistake.

Numbering
I prefer to use strictly Arabic numbers and to avoid Roman numerals (XIX) and romanettes (viii).

Decimal-point numbering systems are a common and excellent approach. Here is one possible system:

1 Section; this should also contain a title or section name.
1.1 Subsection; may also contain a heading.
(a) Paragraph; may also contain a heading.
(1) Subparagraph.
(A) Clause.

Finally, better drafters avoid leaving unnumbered text, often called "dangling" or "flush-left" text. Consider this example of unnumbered text.

10.d 1.1 Royalties.
(a) The Publisher will pay the Author a royalty on all net sales of the book or any revision done by the Author. The royalties are
(1) payable semi-annually based on the date of this contract;
(2) paid at 10% for 1–500 copies sold, 15% for 501–1000 copies sold, and 20% for 1001+ copies sold.
The Publisher may deduct from royalties the cost of any Author's alterations or corrections in the galleys and page proofs that exceed 10% of the cost of setting the type.

To refer to the last paragraph, you must say "the paragraph after 1.1(a)(2)." That's awkward, so don't leave unnumbered text dangling in this way.

10.e 1.1 Royalties.
(a) The Publisher will pay the Author a royalty on all net sales of the book or any revision done by the Author. The royalties are
(1) payable semi-annually based on the date of this contract;
(2) paid at 10% for 1–500 copies sold, 15% for 501–1000 copies sold, and 20% for 1001+ copies sold.
(b) The Publisher may deduct from royalties the cost of any Author's alterations or corrections in the galleys and page proofs that exceed 10% of the cost of setting the type.

Conclusion
Keep these ten ideas in mind on every drafting project, and you'll distinguish yourself among legal drafters.

Mr. Schiess is the director of the legal-writing program at the University of Texas School of Law in Austin and teaches legal writing, legal drafting, and plain English. He is also a frequent and favorite seminar speaker on those subjects. He has published more than a dozen articles on practical legal-writing skills, plus the book Writing for the Legal Audience. He is also an associate editor for the Scribes Journal of Legal Writing. He graduated from Cornell Law School, practiced law for three years at the Texas firm of Baker Botts, and in 1992 joined the faculty at the University of Texas School of Law.

This article is reprinted from Schiess's latest book, Better Legal Writing: 15 Topics for Advanced Legal Writers (2005), by permission of the publisher, William S. Hein & Co.

Complex Litigation Document Production & Tracking

IT WILL NEVER HAPPEN TO ME!!!

Jim Barber, CP

A light breeze kept the temperature quite pleasant as I strolled to opposing counsel's office this late Utah summer afternoon to conduct a document review. Stopping at a crosswalk, I thought about the planning and strategy meeting of last week, wherein we discussed what specific items I needed to look for in the anticipated three to five thousand page document production of opposing counsel and how quickly I could have those detailed items copied and returned to our office for use in a motion currently being drafted. My thoughts were piercingly interrupted by the audible crosswalk sound for the visually impaired at which point I continued on to opposing counsel's office.

Upon entering the reception area I was asked to take a seat and politely advised someone would be down in a minute to escort me to a conference room where the document review was to take place. Moments later a paralegal colleague appeared who escorted me to the conference room. Upon entering the conference room I noticed several banker's' boxes around three walls of the room, with two banker's boxes on the conference table. Anticipating only one banker's box, and at most two, it struck me as rather odd for all of these other boxes to be in the conference room.

"Before I could verbalize a question, opposing counsel entered the room; we exchanged greetings; he then uttered those unexpected words: 'Along these walls you have 75 banker's boxes of documents, with an additional 16 expandable file folders on the window sills and 203 banker's boxes shrink-wrapped in our clients' warehouse. Where would you like for us to have those delivered for your review?' All I remember saying is, 'Pardon me, would you please repeat what you just said very slowly?' It was at this very moment my work life dramatically changed for several months to come."

The Documents

Over 200,000 documents were contained in the banker's boxes and expandable file folders that day, not counting the estimated 600,000 documents contained in the 203 shrink-wrapped banker's boxes and 300,000 documents expected as a result of subpoenas. Some of the 200,000 documents had been placed on CD's and DVD's as single-page, non-searchable, tagged-image file format, more commonly known as tif images. A tif image is a picture, which format is used extensively for traditional print graphics.

Complicating matters further, although the documents contained Bates stamp numbers, the documents *did not contain a Bates stamp numbering sequence specific to our case.* In fact, opposing counsel adamantly stated she would not provide a Bates stamp numbering sequence for these documents specific for use in this case. As it turns out, the majority of these documents were produced in other litigation by opposing counsel and other parties, and contained Bates stamp numbers unique to those cases leaving me with approximately 30 different Bates stamp number sequences to follow.

Considering all of this it was imperative that I remember 18 subpoenas were pending service to various individuals, businesses and government agencies, where I had assigned an additional Bates stamp number sequence specific to each subpoena. Now I was facing almost 50 different Bates stamp number sequences to track.

Having gathered the background information concerning opposing counsel's documents, documents yet to be produced and the overall size of this project, I needed to form a plan which would allow me to effectively accomplish the enormous tasks associated with handling a large document case.

The Plan

After providing a detailed report and my plan for a solution, to my supervising

attorney and subsequently to the firm's administration, I was charged with the responsibility of carrying out my all inclusive economical plan which not only accomplishes the firm's document needs related to this case, but also the firm's needs in the future, where the majority of all document production would be provided to opposing counsel electronically via the internet.

It was also incumbent on me to keep in mind the firm must not only meet its specific document needs in Salt Lake City, but also the needs of the client located in Pittsburgh, the insurance company located in New York, national counsel whose offices are located in Los Angeles & New York, other counsel in Washington D.C. and a party of interest near Tallahassee, Florida.

Realizing the document production received thus far in this case, combined with the estimated documents on the way, would be virtually impossible to control manually, I knew I would need to steer this project into the world of electronic imaging, a world where the firm possessed short range plans to go within the next couple of years, but had not actually started the steps to get there.

Facing this reality, I immediately sent e-mails to various paralegal colleagues seeking advice; posting requests for advice on paralegal bulletin boards; and participating in paralegal e-group forums. Additionally, I contacted national and local paralegal associations, including the paralegal divisions of various state bar associations. I received an overwhelming response containing excellent thoughts, suggestions and comments. As a result of those responses I began a journey down the path to what I refer to as "software world."

Software World

Software world is a place where every software vendor has the answer to any and all of your needs, for a price which typically exceeds your budget. Upon arriving I began researching and testing software product after software product. After having researched over ten different software products, I decided the best and most cost effective solution for our needs was the askSam SDK Engine for user network software (www.asksam.com).

Major factors involved in the decision to select the askSam software were: 1) its searchable free form database format, 2) ability to manually code documents, 3) speedy search results over the internet of gigabytes & terabytes of information, 4) ability to search within results, 5) versatility, 6) ability to add customization at any time, 7) price (once you pay for it you own perpetual licensing rights, no additional fees unless you request additional services), 8) unlimited users included in base costs (do not have to pay annual per user license fees or user port fees), 9) accessible anywhere in the world you have an internet connection and 10) customer satisfaction money back guarantee (some minimal exclusions).

Remembering a previous litigation case where I received exceptional coding assistance from Bret Laughlin (bretl@litgroup.net) with the Litigation Document Group an outside coding vendor assisting firms across the United States, who coded our documents (coding which basically consisted of inputting bibliographic and keyword information into the electronic form of the document). I thought it would not only be a cost saving but a great value if, as documents are initially imported into askSam, the askSam program would automatically populate the bibliographic fields and assign master keywords to a document. I began working on a "logic flow" for custom programming by the askSam development department to achieve that goal.

The first "logic flow" project went so well, I began a second "logic flow" project for the sole purpose of automatically assigning categories to certain documents. To achieve this goal, I requested my supervising attorney to provide me with a category name such as "fraud" and fifteen "fraud" category keywords. Using this information, when the documents are initially imported into askSam, the askSam program with a match of any four or more of the fifteen "fraud" category keywords within the document, automatically assigns that document to the "fraud" category. Of course, categories and category keywords may be added, modified or deleted at any time. By implementation of these custom programmed logic flows it drastically reduced and in some cases eliminated coding costs altogether.

By joining these logic flows and the askSam SDK engine; a cost effective litigation discovery and document management software for the legal industry was born. Its name; ***CaseSeeker***. More information concerning *CaseSeeker* may be found at *www.caseseeker.org* and *www.asksam.com/caseseeker*.

As with any project, certain nuisances become apparent and this project was no different. While traveling this path I learned in order for any software to be able to search single-page tif images, those images must first be converted using an OCR method into searchable images so certain software can read them. Once this was accomplished, I learned you have to be concerned about multipage tif images, versus single page tif images, which creates the need for document unitization. At this stage, one very important item I learned was to ensure you have Bates stamp number matching; otherwise your electronic documents will contain one number and the actual tif image of the document another. Incredibly through the invaluable assistance of Kurt Lowry (kurtl@litgroup.net) with the Litigation Document Group, who offers document efficiency solutions throughout the United States, the nuisances were overcome with ease.

Conclusion

Should an enormous document project ever be assigned to you, first and foremost, stay calm, keep your wits about you, and don't overlook your paralegal *colleagues, an invaluable information source*. With the information I received from my paralegal *colleagues*, I not only saved time and steps, but was pointed in the right direction of how to approach the challenge of complex litigation document production and tracking.

Disclaimer

This article captures my experiences con-

cerning a large document project assigned to me during the course of my employment. My experiences may not necessarily reflect experiences of others who may have been associated with the project. Notably, each document production project is unique and should be considered with those specifics in mind. I encourage every law firm, attorney and paralegal to seek guidance from colleagues, coding vendors, document solution vendors, software vendors and others regarding the handling of any large document project. This article is not intended nor should it be considered legal advice.

Jim Barber is a Certified Paralegal (CP) in the Dallas/Fort Worth metroplex where he practices in the areas of real estate, civil litigation, insurance defense, labor & employment and corporate law. In his 19 years of practice he has worked to resolve the conflicts of numerous contractors, subcontractors, developers, engineers and real property managers. He received his Paralegal Diploma from Kaplan College formerly the College of Professional Studies and his Paralegal Certification from the National Association of Legal Assistants (NALA). Barber is a licensed negotiator and mediator practicing in the Dallas/Fort Worth area. Author of numerous articles, Barber has also been a speaker at numerous seminars including the CLE seminar titled "There's A New Law In Town – H.B. 136! Are Your Construction Lien Rights Protected?" Mr. Barber is a member of the Legal Assistants Association of Utah, the Rocky Mountain Paralegal Association and the Commercial Law League of America. Jim may be reached by email at jimlegal2004@yahoo.com.

Packrats Beware

Craig Hackler, Financial Advisor, Raymond James Financial Services

There's an old saying that "the devil's in the details." Many people with carefully constructed financial plans have watched their plans come unraveled because they fail to keep the records they need to meet Internal Revenue Service (IRS) rules.

Good record keeping may be as appealing as visiting the dentist, but organizing your records systematically and early will save time and energy as well as aggravation. Adopting investment and tax strategies within your financial plan can prove ultimately futile if you are unable to document and substantiate your methods to the IRS.

Good sense advocates holding onto records the IRS deems important and discarding those that no longer are necessary. Unfortunately, the IRS offers very few specifics. Rather, they insist on "sufficient documentation" and a policy of "adequacy and accuracy." However, they do "strongly advise" you to hold onto W-2 forms, 1099 forms, stock brokerage statements and tax returns from prior years. IRS guidelines generally correspond to the statute of limitations for return filing. Thus, assuming legitimate returns are filed, these records should be kept for at least 3 years from the date the return is filed.

Well-organized records may allow you to maximize your miscellaneous deductions (which includes fees for tax advice, investment management and employee business expenses) and exceed the 2% of adjusted gross income floor for miscellaneous deductions. Aside from helping you to recall and itemize these deductions, keeping receipts, canceled checks, and other records may be necessary to verify those items reported and answer IRS skepticism. Other records to be kept include receipts for all medical and dental expenses, canceled checks, insurance reimbursement, direct payment and premium payments records. Logs for business use of a car, home computer and certain other business tools are also important.

Copies of state and local tax returns, real estate tax statements, and canceled checks paying these taxes should be kept if a deduction for these taxes is taken. With the stricter reporting requirements and documentation necessary for charitable contributions (that now includes a special receipt from the charity for gifts over $250), it is also necessary to retain receipts as well as descriptions of non-cash property donated to charities. For the home mortgage interest deduction, bank statements, bank notes and canceled checks should be retained. Other significant records to be held onto would include partnership, trust and S Corporation Schedule K-1s, records of transactions by your account executive, and closing statements from the sale of your home.

Keeping good records will help, your tax preparer and your financial planner better serve your needs, save you money and help you meet your financial goals. Stuffing everything in a shoebox is tempting; but, remember, the details are in that box and that's where the devil can be found. Your financial planner and tax advisor can help you get your records in order.

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

Unauthorized Practice of Law

by Reed K. Bilz, Secretary, Fort Worth District 7 and 14B Unauthorized Practice of Law Subcommittee

What is the unauthorized practice of law (UPL)? How do you recognize it? What do you do if you observe someone committing it? What happens if you report someone for committing it? Paralegals, attorneys, judges and others in Texas are frequently asked these questions, and this article will provide some answers.

UPL Defined

To answer the first question, UPL is simply practicing law without a license. And what constitutes practicing law? Section 81.101 of the Texas Government Code defines the practice of law as: "The preparation of a pleading or other document incident to an action or special proceeding . . . on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument . . ." Therefore, if persons are doing any of these acts and they are not licensed to practice law in Texas, they are committing UPL.

It is easy to spot blatant UPL: a non-attorney representing a client in court, or preparing, signing, and filing a pleading. Subtle UPL, such as the "giving of [legal] advice," is much harder to identify. Case law offers some help. In 1985, the Texas Supreme Court ruled that selecting and preparing immigration forms constitutes the practice of law.[1] The Dallas Court of Appeals, in 1987, found that preparing and sending demand letters on PI claims and negotiating and settling such claims with insurance companies is practicing law.[2] In a 1992 case, the Dallas Court of Appeals said that selling will forms and manuals was practicing law[3], but in a 1999 case the Court said manuals and forms were okay if they conspicuously state that such items are not a substitute for the advice of an attorney.[4] The 76th Legislature amended the Government Code to reflect this latter decision, adding section (c) to Section 1 of 81.102 which stated, "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale, including . . . by means of an Internet web site, of written materials, books, forms, computer software, or similar products" if the products clearly and conspicuously have the disclaimer.[5] Finally, the Appellate Court in Corpus Christi ruled that completing and filing mechanic's lien forms was impliedly giving clients legal advice.[6]

Unauthorized practice of law is investigated and enforced by local UPL subcommittees appointed by the Supreme Court. These committees are made up of volunteers; attorneys, paralegals and others, who are assigned cases by the local chair who gets referrals from the State Committee. If UPL is observed, the State Committee has a web page (*www.txuplc.org*) with a form for reporting complaints. Complaints may also be submitted in writing. The State Committee passes on complaints to be investigated by the appropriate local subcommittee.

The addition of the State UPL web page has greatly increased the number of complaints, and consequently the committee work load.

What the UPL Committee Does:

The local committees meet 9 or 10 times per year for one to three hours depending on the status of cases. Members are assigned cases on a rotating basis; and the goal is to keep each member handling only two or three cases at a time. Being a member is worth 5 ethics CLE credits per year. Anyone interested in serving on a local subcommittee should contact the local Committee Chair.

A case begins with submission by a complainant; the case is then assigned by the Committee Chair to a member of the local subcommittee to investigate. Once UPL is established, the investigator sends a letter to the respondent stating that "the UPL committee has received information that [respondent] has engaged in activities which constitute the unauthorized practice of law." The response, if any, is reviewed by the investigator and the committee to determine if further action is necessary. In many cases, if the respondents will sign an Affidavit stating they will not engage in UPL (specifically that which they are accused of) the committee will close the case.

If there is no response, or not a satisfactory explanation, the committee invites or subpoenas the respondent for a hearing before the committee to give testimony and answer questions.

Filing Suit:

When the committee decides UPL is involved, and respondent refuses to sign an Affidavit, the local committee asks the State UPL Committee for permission to file suit in District Court. Once permission is granted, the investigator prepares a Petition to Enjoin the Respondent from the Unauthorized Practice of Law and Other Related Services. Respondent must be personally served with the petition, and a TRO may or may not be necessary. Either way, a hearing is set and the attorney and investigator (if other than an attorney) appear in court and present their case against the respondent.

If the court finds respondent has engaged in UPL, an order is issued enjoining respondent as requested in the petition. Sometimes, as in a recent Tarrant County case, the respondent will sign an Agreed Judgment Granting a Permanent Injunction, and this precludes a hearing. If there is a subsequent complaint against the respondent, the committee files a Contempt Motion with the District Court. Repeat respondents have served jail time for committing UPL in violation of a court order.

State Committee

The State Committee is also appointed by the Supreme Court of Texas and is made up of volunteer citizen members, and regional committee chairs. The committee meets on a quarterly basis around the state, and the members review reports from each local committee. When a local committee wishes to file suit against a respondent, the investigator presents a summary of the case for review and approval.

The UPL Committees are always ready to investigate valid complaints, and they welcome input from paralegals, attorneys, judges and others who are aware of existing UPL. Local committees are always in need of investigators to serve on the committee and work on cases submitted to it. This is a perfect fit for paralegals. Serving on a local UPL committee is interesting and rewarding work; a chance to give back to the legal community and work with others who are like-minded. And there is the added bonus of CLE hours.

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1. *Unauthorized Practice Committee, State Bar of Texas v Cortez*, 692 S.W.2d 47 (Tex. 1985)
2. *Brown v. Unauthorized Practice of Law Committee*, 742 S.W.2d 34 (Tex. App. - Dallas 1987)
3. *Fadia v. Unauthorized Practice of Law Committee*, 830 S.W.2d 162 (Tex. App. - Dallas 1992)
4. *Unauthorized Practice of Law Committee v. Parsons Technology, Inc. D/b/a Quicken Family Lawyer* 179 F.3d. 956 (5th Cir. 1999).
5. 76th Texas Legislature, Chapt. 799, H.B. No. 1507, Effective June 18, 1999.
6. *Crain v. Smith*, 22 S.W. 3d 58 (Tex. App. - Corpus Christi 2000).

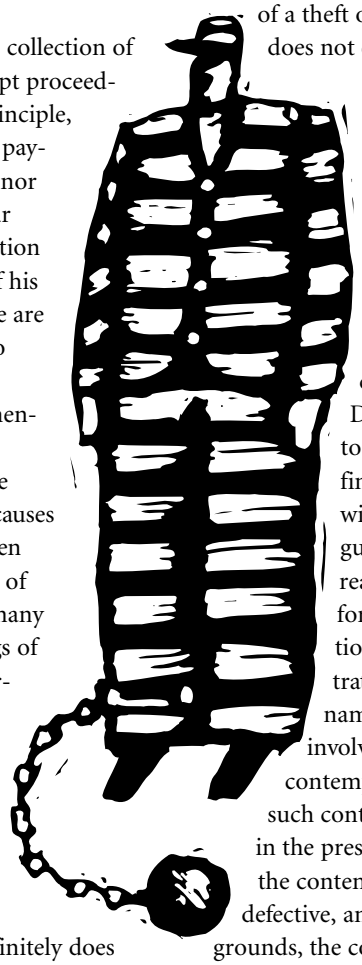
Debtor's Prison In Texas

By Fred A. Simpson[1] and Eric Muñoz[2]

We have come a long way since the days of enslaving debtors,[3] slicing up deadbeats,[4] and slitting the nostrils of non-payers.[5] But it is not always clear exactly to where we have come. Although the Texas Constitution provides that "No person shall ever be imprisoned for debt,"[6] an unequivocal guarantee found in all six versions of the state's Constitution,[7] certain situations arise where one may find himself in jail just because he owes money. This is possible because Texas courts hold that, although money is actually owed, certain obligations are not debt, notwithstanding generally accepted meanings of "debt."

> **debt** That which is due from one person to another; obligation; guilt.[8] *or*
> **debt** something owed; a state of owing; the common law action for the recovery of money held to be due.[9]

It is clear that imprisonment for debt is generally unacceptable, but imprisonment occurs where contemnors fail to observe court orders. However, as the Texas Supreme Court explained, "It is not the policy of the law to enforce collection of mere civil debts by contempt proceedings."[10] Amplifying that principle, the Court held in 1997 that payment of expenses a contemnor caused third parties to incur when he violated an injunction could not be a condition of his release from jail.[11] But there are almost always exceptions to general rules.



The "interpretive commentary" to the current Constitution provides some explanation. It states, "All causes of action become debts when they are placed in the form of judgments, but 'there are many instances in the proceedings of the courts where the performance of an act may be enforced by imprisonment and would not come within the prohibition of the Constitution although it might involve the payment of money.'"[12]

For instance, "debt" definitely does not include fines meted out in criminal cases.[13] A criminal incarcerated for a certain number of years and fined as well cannot claim he is destitute and is being imprisoned for failure to pay the fine until after he serves his time.[14] Violation of a theft of services statute also does not establish any "debt." Imprisonment is based on the thief's intent to take the services without paying for them,[15] similar to the punishment for fraudulently passing bad checks.[16]

"Debt" also does not include certain fines and costs in some civil cases. Due to the deference given to social policy, courts may find, even as they struggle with constitutional language, that there are good reasons why incarceration for money owed is constitutionally acceptable. An illustrative case, with the unlikely name of *In re Sam Houston,*[17] involved a $500 fine for civil contempt of a court order where such contempt was not committed in the presence of the court. Because the contempt order turned out to be defective, and therefore void on other grounds, the court found "we need not

determine whether a fine imposed as punishment for contempt arising out of a civil proceeding is a debt for which incarceration is prohibited."[18] Nevertheless, the court's opinion is instructive because of its analysis of earlier cases on the subject of civil debt and the propriety of imprisonment.

Fines in Criminal Cases

Perhaps the original case of first impression under Texas, law decided under the Constitution for the Republic of Texas, is an 1847 case involving fines due in criminal proceedings.[19] The following language of an 1840 statute designed for "punishing crimes and misdemeanors" was under attack:

> For all fines assessed and costs of prosecution in criminal cases not capital, the person convicted may stand committed to prison by order of the court until such fine and costs be paid; and when it shall be made to appear to the court that the person so committed hath no estate or means to pay such fine and costs, it shall be the duty of the court to discharge such person from further imprisonment for such fine and costs, as in its discretion may deem proper.

1 Stat. 187, sec. 47.

The Texas Supreme Court held that the words "imprisonment for debt" in the 1836 Constitution had a well defined and well known meaning - without ever explaining that definition or meaning.[20] The Court did conclude, however, that those who framed the Texas Constitution never intended the words to apply to the administration of criminal laws or the punishment of crimes.[21] According to the Court, the framers knew that other jurisdictions had held as consistent with each other laws that abolished imprisonment for debt and laws that made criminal fraud to avoid debt payment punishable by imprisonment: "It was well known to them that the abolition of imprisonment for debt in other States, where it had been effected, had been held to consist with the enactment of laws for the punishment by imprisonment of criminal frauds perpetrated to avoid the payment of debts."[22] "It could not have been there intention to degrade the subject of misfortune to the level of criminal, and to confound debt with crime."[23] It was therefore clear over 150 years ago that the constitutional guarantee was designed to shield unfortunate debtors, not to allow criminals to escape their punishment in the form of fines. For example, monetary criminal penalties that impose duties to pay restitution to injured victims may be enforced by imprisonment.[24]

In essence, if criminal defendants blatantly refuse to accept monetary punishment, they should go to prison. But if any of those defendants simply cannot pay their assessed punishment due to a lack of income or property, they should be set free. The Declaration of Rights, related to the 1836 Constitution, embraced that principle with these words: "No person shall be imprisoned for debt in consequence of inability to pay."[25] The U.S. Supreme Court agreed in 1971 when it found that a Texan who was too poor to pay his accumulated traffic fines could not be imprisoned.[26]

Imprisonment in Civil Cases

There are also circumstances within the civil context where imprisonment for money owed is within constitution boundaries. Such circumstances may involve consent orders, trusts, turnover orders, divorce, or child support.

The Texas Supreme Court has held that a husband's imprisonment for failure to hand over a portion of his retirement benefits to his spouse, as ordered in a divorce consent decree, is not imprisonment for debt.[27] The rationale is that the husband must surrender property to the wife that is already hers under the divorce decree. Similar reasoning was used by the Fifth Circuit when it found imprisonment was constitutional in Texas for money owed under a consent order to enforce the Interstate Land Sale Full Disclosure Act.[28] This money was not debt because the money already belonged to the property buyers under provisions of the order.[29] The court explained that contempt was appropriate because "[c]ourts do not sit for idly ceremony of making orders" just to have them "flouted, obstructed and violated with impunity."[30] These latter holdings are consistent with an exception to the general rule that applies to trustees, including constructive trustees, who contemptuously refuse to pay over funds to those whomever is rightfully entitled to them.[31]

Federal Cases

Federal courts have a statutory duty to follow debt imprisonment prohibitions in state constitutions.[32] Accordingly, consistent with interpretations of state law, a bankrupt person can be imprisoned for failing to hand over property to the trustee of his bankruptcy estate,[33] and, although imprisonment for failure to pay federal income tax may be unconstitutional,[34] imprisonment for failure to file tax returns is not.[35]

Turnover Orders

A judgment debtor's willful failure to comply with a federal court's turnover order was punishable by imprisonment where the contemnor could not demonstrate his inability to pay.[36] Precedent was established by a 1991 case, *Buller v. Beaumont Bank,* that tested the Texas turnover statute. A bank was challenged for attempting to use a turnover order that compelled the executrix of her husband's estate to pay money.[37] When the executrix refused to pay, she was jailed until she did.[38] The appellate court found the turnover statute was constitutional and that the executrix was not imprisoned for debt, she was imprisoned for breaching her fiduciary duty to her dead husband's creditors.[39] The appellate court distinguished a 1965 divorce case, *Ex Parte Yates,* where the husband was ordered to pay a property division of $500 per month in money he had not yet earned. That order was unconstitutional.[40] The *Ex Parte Buller* dissent focused on the Mauzy dissent in *Beaumont Bank v. Buller,*[41] noting that one must look to the controlling issue of the origin of the obligation, which determines whether it is debt.[42]

But a trial court may not enforce

turnover orders by contempt proceedings where attorney's fees are part of an award to judgment creditors.[43] In *Ex parte Roan*, the district court assessed attorney fees as part of the turnover order. When Roan violated the turnover order, he was found in contempt and ordered to be incarcerated.[44] The appellate court found, however, that a party may not collect attorney fees through contempt proceedings even if awarded in connection with a turnover order.[45] It should also be noted that the *Roan* turnover order erroneously instructed the contemnor to pay into the trial court's registry for the judgment creditor's benefit. Because the payment would benefit the creditor, not the State, it could not be classified as a fine and could not serve as a basis for contempt proceedings leading to imprisonment.[46]

Spousal payments.

Both the supreme court and the court of criminal appeals concluded long ago that community property in the physical possessor or control of a relator at the time the divorce decree is signed[47] are held by the relator in a constructive trust for the benefit of the other spouse.[48] That constructive trust principle is now codified,[49] as is the principle that courts may not enforce by contempt awards in decrees of divorce "in the nature of a debt" unless the payments are (a) money in existence at the time of the decree, or (b) "a matured right to future payments,"[50] such as vested retirement benefits. Unlike retirement pay, disability compensation benefits paid by the Veteran's Administration are not earned property rights to be shared with a divorced spouse, and a relator cannot be held in jail for failure to turn them over.[51]

In order for a property division to be paid in future installments, the divorce decree must show that the property itself, or the vested right to that property, exists at the time the divorce decree is signed.[52] If orders to deliver payments out of spousal income or property are otherwise framed as personal obligations,[53] or include interest on past due sums,[54] they may be considered as defining debt and are not enforceable by contempt proceedings.

Maintenance payments to a former spouse may be enforced by contempt, according to statutes enacted in 1997 and 2001, establishing those types of payments[55] and "may be enforced by any means available for the enforcement of judgment for debts."[56] Thus, there are situations where relators must pay out their own property or future earnings, but have affirmative defenses under the statute if the relators "lacked the ability to provide maintenance in the amount ordered."[57] While this certainly quacks like a debt for which imprisonment should not be allowed, it is likely, given public policy, that when this statute is challenged it will be upheld[58], notwithstanding the fact that the spousal relationship has terminated and despite the fact that the supreme court has previously held that judgments providing for support payments out of future earnings, cannot be enforced by imprisonment.[59]

Temporary support payments to a wife, pending divorce, may be enforced by imprisonment, as may temporary spousal support in the form of fees payable to that spouse's attorney,[60] but if a divorce court orders an opposing spouse to make note payments to a third party, that is debt that cannot be enforced by contempt.[61]

Child Support

It is commonly known that a child support order does not create a "debt" within the meaning of the prohibitive constitutional provision.[62] A 1980 application for *habeas corpus* resulted in a review of a statute enabling the collection of judgments for child support. That statute allows judgments to "be enforced by any means available for the enforcement of judgments for debt."[63] The court reflected on the well settled law[64] that the natural and legal duties of parents to support their children does not involve debt, the obligation to pay out money for food, clothing, shelter and other necessities arises from the relationship and its inherent obligations.[65]

Unless there are special circumstances described by the Family Code,[66] imprisonment to enforce payment of child support created by spousal agreement, or otherwise, ceases to be permissible if the child is emancipated[67] or when the child reaches 18 years of age.[68]

Despite the general rule that attorney's fees may not be collected by contempt proceedings,[69] the supreme court decided in 1953 that an order to enforce payment of attorney's fees or costs to collect child support are of the same nature as child support. Therefore, such an order does not violate the constitutional right against imprisonment for debt,[70] nor does an order requiring payment of a child's necessary medical or psychiatric care.[71] However, *ad litem* fees and expenses are ordinary debt.[72]

Although payment of child support and attorney's fees against the defaulting party may be enforceable by imprisonment for contempt,[73] this is not true if the order adds attorney's fees and costs allocable to the enforcement of other things such as visitation orders.[74] Nor is imprisonment allowable for failure to pay incremental weekly increases in child support payments designed solely to bring past due child support current.[75] On the other hand, incarcerating a contemnor who fails to pay attorney's fees incurred to determine paternity does not violate the Constitution because of the strong public policy that favors establishing responsibility for child support and enforcement of other parental duties.[76]

Need For Precision in Orders of Contempt

Unless coercive contempt orders strictly prescribe fines, and clearly do not compel payment of underlying debts, the orders are void if they call for imprisonment.[77] For example, failure to pay on an order for discovery sanctions of $15,000 in attorneys' fees was not punishable by imprisonment because it was not a fine and was therefore not "punitive in nature."[78] Also, failure to show in a judgment that attorney's fees and court costs are payable out of property in a relator's possession may be fatal to enforcement by imprisonment.[79] Also, where a contempt order compels a person to pay child support (enforceable by contempt, *see supra*) but includes (a) an order to reimburse a community debt (also enforceable by

imprisonment), and (b) an order to pay an ordinary debt to a third party (not enforceable by imprisonment), the entire order is void if the single penalty imposed for failure to obey all three orders is imprisonment.[80] For example, in a 1977 case it was discovered that attorneys were wrongfully paid their fees from an estate. The order compelling the attorneys to repay those fees failed to identify a specific "fund in being," and, as a result, the order was ruled a direction to pay debt which could not be enforced by contempt and imprisonment.[81] In addition, a 1959 divorce case explains that the failure of an order to show that shares of stock in a public company had an "especial value," as described in Rule 308, causes the writ of seizure to be void and the ex-husband in that case could not be incarcerated.[82] And, within the criminal context, the inclusion of attorney's fees and costs related to investigating charges of contempt, if assessed as part of the punishment, may render an entire contempt order void.[83]

Conclusion

By taking previous decisions into consideration, one can assess the odds of a debtor escaping prison under a writ of *habeas corpus.* Assuming contempt orders are not defective for other reasons, these are a contemnor's likely fate:

1. If the contempt orders describe money due for child support or temporary spousal support or food, clothing, shelter, or necessary medical care of either, or attorney's fees to enforce collection, relators stay in jail.
2. If contempt orders describe attorney's fees incurred to determine paternity, relators stay in jail.
3. If contempt orders describe a duty for relators to turn over property owned by others or property being held for the benefit of others, relators stay in jail.
4. If contempt orders describe payments enforceable by contempt (e.g. child support, reimburse a community debt) and payments not enforceable by contempt (e.g. order to pay an ordinary debt to third party), orders in their entirety may be void if a single cited penalty for failure to obey is imprisonment.
5. If contempt orders include attorney fees associated with investigating charges of contempt in a criminal context, assessed as part of the punishment, the orders may be void in their entirety.

Given all the above, it is safe to conclude that there really are times when Texans who owe money to others may go to jail for failure to pay, despite constitutional guarantees that appear to read otherwise.

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2 Eric Muñoz is a third year law student at the University of Houston and a law review editor. He received his A.B. in Economics from Stanford University in 1997.

3 *See, e.g.,* Deuteronomy 15:12, Exodus 22:2. *See also*, James Lindgren, *Symposium: Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. Rev. 29 (1996) for an interesting discussion of debts as a result of tortuous conduct and recourse available to the creditor.

4 Roman Civilization, Volume I: The Republic 103-04 (Lewis & Reinhold eds., 1951) (describing the Twelve Tables as adopted around 450 B.C.; Table III includes provisions regarding creditors rights, including dividing up the debtor among the various creditors). *See also* Livy, The Early History of Rome From Its Foundation: Books I-V 129-30 (Aubrey de Selincourt trans., Penguin Books 1981) (1951) (telling the story of an old soldier that had become indebted and who said, "[e]ven my body was not exempt from it for I was finally seized by my creditor and reduced to slavery: nay worse—I was hauled away to prison and the slaughter-house.").

5 *See*, Pratap Ravindran, *Money and Mayhem Revisited*, Business Line, Apr. 27, 1999 (stating that the Danes imposed a poll tax on the Irish and slit the noses of those that did not pay and the practice may have been the basis for the famous phrase "paying through the nose"). *But See*, Steele Commager, *Paying Through the Nose and Other Taxing Phrases*, Forbes, Apr. 13, 1981, at 146 (acknowledging that the phrase may be based on the practice but also expressing some uncertainty about the practice itself).

6 Tex. Const. art. I, 618

7 *See Beaumont Bank, N.A.. v. Buller,* 806 S.W.2d 223, 229 (Tex. 1991)(Mauzy dissent).

8 Webster's Dictionary and Roget's Thesaurus, 41 (1997).

9 Merriam-Webster's Collegiate Dictionary, 297 (10th ed. 1993).

10 *Ex party Britton,* 127 Tex. 85, 92 S.W.2d 224, 227 (Tex. 1936).

11 *In re Nunu,* 960 S.W. 2d 649 (Tex. 1997)(adjudicated debt may be enforced by other legal processes, but not by imprisonment), citing to *Ex parte Hall,* 854 S.W.2d 656, 658 (Tex. 1993); *Wallace v. Briggs,* 162 Tex. 485, 348 S.W.2d 523, 525-26 (1961).

12 Tex. Const. art. I, 6 18, Inter. Commentary (Vernon 1997), quoting from *Ex parte Davis,* 101 Tex. 607, 111 S.W. 394 (1908).

13 *Lyons v. State,* 835 S.W.2d 715, 718 (Tex. App.—Texarkana 1992, pet ref'd).

14 *See Shafer v. State,* 842 S.W.2d 734, 736 (Tex. App.—Dallas 1992, no pet).

15 *See Rhodes v. State,* 441 S.W.2d 197, 198 (Tex. Crim. App. 1969, no pet.).

16 *See Colin v. State,* 145 Tex. 371, 168 S.W.2d 500, 501 (Tex. Crim. App. 1943, no pet.).

17 *In Re Sam Houston,* 92 S.W.3d 870 (Tex. App. – Houston [14th Dist.] 2002, orig. proceeding).

18 *Id.* at 876.

19 *Dixon v. State,* 2 Tex. 481 (1847).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* at 483.

24 *See Thompson v. State,* 557 S.W.2d 521, 525 (Tex. Crim. App. 1977).

25 *See Ex parte Wagner,* 905 S.W.2d 799, 802 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding) (Justice Fowler providing a summary of the bloody history of imprisonment for debt in footnote #1 of her opinion).

26 *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 688, 28 L.Ed.2d 130 (1971). *See also Ex parte Tate,* 445 S.W.2d 210 (Tex. Crim. App. 1969), on remand, 471 S.W.2d 404 (1971).

27 *Ex parte Gorina,* 595 S.W.2d 841, 847 (Tex. 1979).

28 *Pierce v. Vision Investments, Inc.,* 779 F.2d 302, 310 (5th Cir. 1986).

29 *Id.*

30 *Id.* at 309, citing *Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir. 1985) (citations omitted).

31 *See Ex parte Rogers,* 633 S.W.2d 666, 670 (Tex. App.—Amarillo 1982, orig. proceeding), citing to *Ex parte Preston,* 162 Tex. 379, 347 S.W.2d 938, 940 (1961); *Ex parte Thomas,* 610 S.W.2d 213, 214 (Tex. Civ. App.—Houston [1st Dist.] 1980, orig. proceeding).

32 28 U.S.C.A. 6 2007(a).

33 *See In re Schesenger,* 102 F.117 (N.Y. 19000).
34 *See Ex parte Chacon,* 607 S.W.2d 317, 318 (Tex. Civ. App. – El Paso 1980, orig. proceeding).
35 *See United States v. Merritt,* 639 F.2d 254, 256 (5th Cir. 1981).
36 *Santibanez v. Wier McMahon & Co.,* 105 F. 3d 234, 242 (5th Cir. 1997), citing to *Ex parte Buller,* 834 S.W.2d 622, 626 (Tex. App.—Beaumont 1992, orig. proceeding).
37 *Buller v. Beaumont Bank, N.A.,* 806 S.W.2d 223 (Tex. 1991).
38 *Ex parte Buller,* 834 S.W.2d 622 (Tex. App.—Beaumont 1992, orig. proceeding).
39 834 S.W.2d at 626.
40 *See Ex parte Yates,* 387 S.W.2d 377, 380 (Tex. 1965).
41 *Beaumont Bank, N.A. v. Buller,* 806 S.W.2d 223, 229 (Tex. 1991). Mauzy's dissent focused on the inappropriateness of using the turnover statute, because it could not be applied to Buller in her individual capacity.
42 Citing to *Ex parte Shaver,* 597 S.W.2d 498 (Tex. Civ. App.—Dallas 1980, orig. proceeding) ("The nature of the obligation depends on its origin, not the manner of its enforcement.").
43 *See Ex parte Roan,* 887 S.W.2d 462 (Tex. App.—Dallas 1994, orig. proceeding).
44 *Id.* at 463
45 *Id.* at 465
46 *Id.*
47 *See Troutenko v. Troutenko,* 503 S.W.2d 686 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).
48 *Ex parte Preston,* 162 Tex. 379, 347 S.W.2d 938 (1961); *Ex parte Latham,* 47 Tex. Cr.R. 208, 82 S.W. 1046 (1904).
49 Tex. Fam. Code Ann 6 9.011.
50 Tex. Fam. Code Ann 6 9.012.
51 *See Ex parte Johnson,* 591 S.W.2d 453, 454 (Tex. 1979).
52 *See Ex parte Neff,* 542 S.W.2d 268, 270 (Tex. Civ. App.—Fort Worth 1976, orig. proceeding).
53 Contractual alimony or support payments to an ex-wife are personal obligations. *See Francis v. Francis,* 412 S.W.2d 29, 32-33 (Tex. 1967).
54 *See Ex parte Sutherland,* 515 S.W.2d 137, 141 (Tex. Civ. App.—Texarkana 1974, writ dism'd).
55 Tex. Fam. Code Ann 66 8.009(a) and 8.059(a).
56 Tex. Fam. Code Ann 66 8.009(b) and 8.059(b).
57 Tex. Fam. Code Ann 66 8.009(c)(1) and 8.059(c)(1).
58 *See, e.g., In re: Taylor,* 130 S.W.3d 448 (Tex. App. – Texarkana 2004, orig. proceeding). *See also In re: Dupree,* 118 S.W.3d 911 (Tex. App. — Dallas 2003, orig. proceeding).
59 *Ex parte Yates,* 387 S.W.2d 377, 380 (Tex. 1965). *See also Ex parte Choate,* 582 S.W.2d 625 (Tex. Civ. App.—Beaumont 1970, orig. proceeding); *Ex parte Duncan,* 462 S.W.2d 336, 338 (Tex. Civ. App.—Houston [1st Dist.] 1970, orig. proceeding); *Ex parte Jackson,* 590 S.W.2d 775, 776-77 (Tex. Civ. App.—El Paso 1979, orig. proceeding.).
60 *See Ex parte Kimsey,* 915 S.W.2d 523, 527 (Tex. App. – Corpus Christi 1995, orig. proceeding).
61 *Ex parte Delcourt,* 868 S.W.2d 373, 375 (Tex. App.—Houston[1st Dist.] 1993, orig. proceeding). *See also Ex parte Weatherly,* 605 S.W.2d 661, 663 (Tex. Civ. App.—Amarillo 1980, orig. proceeding).
62 *See Freeland v. Freeland,* 313 S.W.2d 943, 946 (Tex. Civ. App.—Dallas 1958, no writ).
63 Tex. Fam. Code Ann. 6 14.09(c)(Vernon 1975).
64 *See Ex parte McManus,* 589 S.W.2d 790, 792 (Tex. Civ. App.—Dallas 1979, orig. proceeding).
65 *Ex parte Shaver,* 597 S.W.2d 498, 500 (Tex. Civ. App.—Dallas 1980, orig. proceeding). *But see Ex parte Harwell,* 538 S.W.2d 667, 671 (Tex. Civ. App.—Waco 1976, orig. proceeding). *Compare Ex parte Willbanks,* 722 S.W.2d 221, 224 (Tex. App.—Amarillo 1986, orig. proceeding.)
66 Tex. Fam. Code Ann. 6 154.001(a).
67 *See Ex parte Williams,* 420 S.W.2d 135, 136 (Tex. 1967).
68 *See In re Cobble,* 592 S.W.2d 46, 49 (Tex. Civ. App.—Tyler, 1979, writ denied).
69 *See Wallace v. Briggs,* 162 Tex. 485, 348 S.W.2d 523, 525-26 (1961).
70 *Ex parte Helms,* 152 Tex. 480, 259 S.W.2d 184, 188 (1953). *See also Ex parte Hightower,* 877 S.W.2d 17, 21 (Tex. App.—Dallas 1994, orig. proceeding); *Ex parte Myrick,* 474 S.W.2d 767, 771-72 (Tex. Civ. App.—Houston [1st Dist.] 1971, orig. proceeding). *See Ex parte Hall,* 611 S.W.2d 459, 461 (Tex Civ. App.—Dallas 1980, orig. proceeding); *but see Ex parte Prevost,* 598 S.W.2d 310, 311 (Tex. Civ. App.—Beaumont 1979, orig. proceeding).
71 *See Ex parte Davila,* 709 S.W.2d 15, 18 (Tex. App. – Corpus Christi 1986, orig. proceeding).
72 *See Ex parte Hightower,* 877 S.W.2d at 21. *But see Ex parte Shields,* 779 S.W.2d 99, 101 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).
73 *See Ex parte Binse,* 932 S.W.2d 619, 621 (Tex. App. – Houston [14th Dist.] 1996, orig. proceeding).

74 *See Ex parte Rosser,* 899 S.W.2d 382, 386 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding).
75 *See Frank v. Reese,* 594 S.W.2d 119 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).
76 *See Ex parte Wagner,* 905 S.W.2d 799, 803 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding).
77 *See Ex parte Roan,* 887 S.W.2d at 465.
78 *Ex parte Dolenz,* 893 S.W.2d 677, 679 (Tex. App. – Dallas 1995, orig. proceeding).
79 *Ex parte Choate,* 582 S.W.2d 625, 628 (Tex. Civ. App.—Beaumont 1979, orig. proceeding).
80 *See In re Roberts,* 584 S.W.2d 925, 926 (Tex. Civ. App.—Dallas 1979, orig. proceeding). *See also Ex parte Harwell,* 538 S.W.2d 667, 671 (Tex. Civ. App.—Waco 1976, orig. proceeding).
81 *Currei V. Drake,* 550 S.W.2d 736, 741 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).
82 *Ex parte Prickett,* 159 Tex. 302, 320 S.W.2d 1 (1958).
83 *See Ex parte Morris,* 352 S.W.2d 125, 128 (Tex. Crim. App. 1961).

Litigation Corner E-DISCOVERY—GO NATIVE OR GO BROKE

by Bob Sweet

As the volume of e-Discovery continues to grow, so dothe providers, seemingly exponentially. The rhetoricand sales pitches articulated are both deep andconfusing. There still exists an industry bias that electronic files need to be converted into TIFF or PDF for review. Many companies overbuilt capacities and overestimated that the legal market, in light of Zublake and other such cases, would be forced to do it; when in reality the blind conversion of e-Discovery came to a near screeching halt due to the rapid escalation of costs.

With one gigabyte (GB) representing 75,000 pages, andTIFF/PDF file conversion costing on average $0.10 per page, the step of getting e-discovery to image is $7,500 per GB in additional cost. Think for a moment what it would cost to convert just your PC's hard drive?

With client companies' computers storing terabytes of data (noting a terabyte of data is estimated to represent 75,000,000 pages or $7.5 million to convert), one can see why many vendors thought the gold rush was on. However, a funny thing happened on the way to the store. An alternative was born – known as meet and confer, allowing parties of reasonable minds to work out how they would gather and exchange data to keep client costs as low as possible for the matter at hand.

The vendor market responds with what is affectionately known as Native File Review. After all, they have all this computing capacity, why not try to use it for another service. Again, an almost overbearing number of companies are offering a variety of native file review services at a wide spread in pricing. Most of these involve using their existing services, including webhosted repositories.

With an estimated 93% of communication now performed electronically, the days of associates rifling through boxes of paper documents in a warehouse are becoming much less common. Daily email communication alone in the United States has far surpassed the annual mail messages delivered by the US Postal Service.

While I couldn't agree more that native file review is the way to go, the number of options for doing so all seems to require some sort of repository with the vendor. What is not being said is that if you have Summation or Concordance software, you are able to be your own host for in-house review of native files.

In my humble opinion, there is still one step that is being overlooked before you ever get that far. That is the age-old "getting your arms around the collection" to know what you have before you decide what to do with it, including native review. Anyone who deals with discovery understands the importance to scope out the cost of the project before the processing and conversion work gets underway.

There are several questions that arise in costing out an e-Discovery project, including:

- What kind of file formats are you dealing with?
- How many different formats are there?
- Are there uncommon file types that may require decryption or special software for viewing?
- How many pages are estimated to be contained in the native files?
- How many of your client's electronic files need to be reviewed by the attorneys and paralegals for a particular production set?

How these questions are answered will impact the final project cost. A recent advertisement asks - "Will it make sense to convert all files to TIFF images immediately if costs are reasonable or should a native review be conducted first?" It almost always makes sense to review in native mode before spending moneys on conversion to TIFF or PDF.

Taking time to step back and see what you have, then making a plan for de-duping and searching out what you really need and setting it all up in-house for review will give you the knowledge you need to make timely and cost-conscious decisions for your client and the review team.

Open Door Solutions, LLP is a sustaining member of DAPA. Bob Sweat received his education in Business Administration and Economics at the University of Wisconsin and advanced work at Purdue University. He holds a Paralegal Certificate in Civil Litigation with Computer Emphasis from The Center for Legal Technology, MBTI, Milwaukee, WI, and has 16 plus years experience working with local and national vendors on large, complex litigations. Bob is currently a partner and Automated Litigation Specialist at Open Door Solutions, LLP, Dallas, Texas.

ET *al.* . . .

Court Case Update/ Technology Updates

Court Case Updates

Creditors will not be able to use the theory of "deepening insolvency" as a separate tort against lenders, for the reason that it would be duplicative of other torts already established in Texas. In the case of *Official Committee of Unsecured Creditors of VarTec Telecom Inc., et al v. Rural Telephone Finance Cooperative*, pending before the Honorable Harlin D. Hale, U.S. Bankruptcy Judge of Dallas, Judge Hale dismissed the Creditors Committee's deepening insolvency claim, but left its other claims pending before the court. Judge Hale wrote "The willful and malicious lending of money is not a tort in Texas and likely will not be recognized as one anytime soon through a theory of deepening insolvency." The idea behind the theory of "deepening insolvency" is that a defendant's conduct fraudulently prolonged a company's life beyond insolvency, resulting in damage to the company because of increasing debt.

Technology Updates

Confusion Reigns in the field of electronic data discovery ("EDD") for 2006. There are now 300-500 vendors offering some form of EDD product or service. These products and/or services may include search engines, archiving tools, document management solutions, litigation support systems, just to name a few. Some may offer licensed software, other sell EDD as a service.

The biggest issue facing firms when assessing their needs and looking to implement EDD is "which part of the EDD process do we need to address?" The confusion arises not just from which features to seek but how to implement EDD. Whether to subcontract or license the software and do it themselves. Other issues involve managing the costs of EDD. With the volume of electronic data rising dramatically, clients have a powerful economic necessity to reduce the amount of data to be processed and analyzed. The amendments to the Federal Rules of Civil Procedure now give official standing to EDD in addition to promulgating numerous rules regarding EDD. But even Rule 26(B)(2), which stipulates date should be reasonably accessible, is unlikely to reduce volumes.

The top nine (9) popular EDD prod-

PARALEGAL DIVISION VOTE 2006

The **PD's FIFTH ONLINE ELECTION** will take place April 17, 2006 through May 2, 2006. The election of district directors to the Board of Directors will be held in even-numbered districts (Districts 2, 4, 6, 8, 10, 12, 14, and 16). Due to the election of Patti Giuliano, current District 5 Director, as 2006–2007 President Elect, there will be a special director election held in District 5. All ***active members*** of the PD in good standing as of February 1, 2006 will be eligible to vote. **All voting must be completed on or before 11:59 p.m., May 2, 2006.**

Please take a few minutes to logon to the PD's website and cast your vote for your district's director (only even-numbered districts vote in 2006). The process is fast, easy, anonymous, and secure.

Between April 17th and May 2nd, go to **www.txpd.org** In the Member-Only section, click on "Vote." Follow the instructions to login and vote (you will need your bar card number in order to vote).

If you do not have access to the Internet at home or the office, you can access the TX-PD website at your local library. No ballots will be mailed to members as **all voting will be online.** A postcard will be mailed to each Active voting member in April giving notification of the voting period. If you need any further information, contact the Elections Chair, Jennifer Fielder at **jfielder@riewelaw.com.**

ucts are: Concordance, Summation, CaseMap, Microsoft Access, Attenex, Encase, IConect, Introspect and LiveNote. However, no single tool or service handles everything. Firms are usually left to piece together multiple tools.

The search capabilities in most tools cover email and Microsoft Office file formats and attachments. The more powerful tools also search relational databases, images, instant messages, RSS fees, CAD/CAM files and more. However, most firms are barely getting started with EDD basics.

With more and more plaintiffs starting to pursue electronic discovery issues, most law firms and corporate legal departments are turning to outside companies to help them manage and process portions of the data. Doing this can save time, money and energy. However, it is important to establish a relationship with a reliable vendor before taking on large cases. But, smaller cases that just require looking through Microsoft Office, Word or Excel documents are easier to handle in-house.

It is important to avoid disaster when dealing with EDD. In the case of *Coleman Parent Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 674885, Fla.Cir.Ct., March 23, 2005, Morgan Stanley, was fined millions of dollars for a "willful and a gross abuse of its discovery obligations." The company neglected to reveal and produce electronic discovery evidence, and the court ruled that "many of these failings were done knowingly, deliberately, and in bad faith." The cost of mismanaging electronic data can also be huge. In the case of *Laura Zubulake v. UBS Warburg LLC, et al*, 217 F.R.D. 309, 312 (S.D.N.Y 2003), a New York jury awarded securities broker Laura Zubulake $29-million in a sex discrimination suit after she claimed her employer, UBS, failed to retain incriminating emails. In the *Zubulake* case, Judge Scheindlin opined a "list of e-discovery action items," and other points, including the new Federal Rules of Civil Procedure.

Legislative Updates

All current legislation is in committee and no committee is currently meeting.

Paralegals Go to Paris— April 23-29, 2006 Winner of Membership Contest Announced

And the Winner is TERESA FLORES of San Antonio, TX. During 2005, the Paralegal Division announced a Membership Contest. The winner of the contest receives a "free" trip to Paris traveling with other Texas Paralegals on April 23 – 29, 2006.

Teresa is currently a Student member of the Paralegal Division. She received her paralegal certificate from The University of Texas San Antonio Paralegal Program in August 2005. Teresa interned in the Law Office of Steven C. Burke, a family law attorney, from October 2005 – December 2005. Various projects that she was involved in were corresponding with law firm clients and creating various divorce pleadings and motions using the Pro Doc software. In January, 2005, Ms. Flores was hired permanently by the same law office and is working as a paralegal in the areas of family law, estate planning and probate, and wills.

Upon learning she won the trip, Teresa was totally taken by surprise. She is very excited to be joining Division members traveling to Paris. In her words, "this is an experience of a lifetime and I cannot wait to meet all of the other paralegals from around Texas."

The Division is excited to be able to give this unique experience to one of its members. It will truly be an *experience of a lifetime*.

Tracking those CLE Credits

Norma Hackler, CMP Coordinator, Paralegal Division/State Bar of Texas

The task of tracking one's attendance and completion of continuing legal education (CLE) programs has become a monumental task for most paralegals. Different CLE attendance requirements among the various certification programs and paralegal organizations have become a maze to those individuals who have successfully completed more than one certification examination or proving CLE attendance to continue their membership with paralegal organizations [specifically the Paralegal Division of the State Bar of Texas]. Hopefully, this article will assist you in keeping up with the different educational seminars you have attended. The most important task is to keep a copy of all brochures, attendance certificates, and any other materials issued by the sponsoring agent of the seminar proving your attendance at a CLE event. Build a personal CLE file by year of attendance. Include in this file any self-study [CLE hours] that may be accepted as continuing legal education by the various certifying entities or organizations. If you have any questions regarding the number of CLE hours you receive for a particular seminar, please contact the sponsoring agent within the six months following the event. As time goes by, it may be difficult for the sponsoring agent to offer assistance because of the ability to keep records on file. It is up to you to make the contact within a reasonable period of time. The sponsoring agent is *not responsible for keeping a record of your CLE attendance.* Below is a summary of the different certifying organizations and the Paralegal Division and their requirements for tracking CLE:

Texas Board of Legal Specialization (TBLS)

To prove CLE hours to TBLS, the sponsoring agent should apply for credit directly to the Texas Board of Legal Specialization. If credit is issued by TBLS, the sponsoring agent will distribute to each seminar attendee a "Certificate of CLE Attendance for Paralegals" at the seminar being attended. This Certificate will have a place for the number of hours attended and should be signed by the sponsoring agent. If you are a TBLS board certified legal assistant and have received a TBLS file number, you may send a copy of the certificate to the Texas Board of Legal Specialization at P. O. Box 12487, Austin, TX 78711 to be placed in your record file. Keep a copy of this certificate in your personal CLE file along with a copy of the seminar brochure. If you are not yet board certified but plan to take the board certification examination, keep this Certificate in your personal CLE file along with a copy of the CLE brochure. For more information regarding the TBLS examination and requirements, please contact TBLS at 512/463-1463, ext. 1454 or 1-800-204-2222, ext. 14546 or visit their web site at *www.tbls.org.*

National Association of Legal Assistants (NALA)

To prove CLE hours to NALA, the sponsoring agent may or may not distribute a NALA Certificate of Attendance form to seminar attendees. Most sponsoring agents for paralegal continuing legal education will have the forms on site. This form can be received directly from NALA and brought to the seminar by the attendee. The Certificate must be signed by the sponsoring agent at the seminar. It is wise to attach a copy of the brochure (or list of topics attended) to the NALA Certificate of Attendance to forward to NALA for CLE credit hours. For more information

regarding keeping track of CLE for NALA, please contact NALA at 918/587-6828 or visit their web site at *www.nala.org*.

National Federation of Paralegal Associations (NFPA)
To prove CLE hours to NFPA can be accomplished by one of two ways. The sponsoring agent may or may not forward a list of attendees to the NFPA's continuing legal education chairperson stating your attendance at a seminar. Please ask the sponsoring agent at the seminar if they will be forwarding a list of names to NFPA for CLE credit. If the sponsoring agent does not forward a list [check with seminar sponsor on site], you may forward a copy of the brochure and any certificate of attendance that you received at the seminar. It is wise to attach a copy of the brochure to the certificate that is forwarded to NFPA for CLE credit hours. For more information regarding keeping track of CLE for NFPA, please contact NFPA at 206.652.4120 or visit their web site at *www.paralegals.org*.

State Bar of Texas Minimum Continuing Legal Education (MCLE) Department

As most of you are aware, the MCLE Department of the State Bar of Texas keeps track of all attorney CLE hours [this is the purpose of the MCLE Department]. This State Bar Department will also keep track of CLE hours for paralegals who are members of the Division and who have attended a seminar that is *approved for MCLE credit*. In order for a seminar to be approved by the MCLE Department of the State Bar of Texas, the seminar must be targeted primarily to attorneys. Seminars [targeted primarily to paralegals] that are sponsored by various organizations/companies may not meet the criteria for MCLE approval and attendance at non-approved MCLE seminars will not be tracked for Paralegal Division members. If the sponsoring agent distributes the State Bar computer cards at the seminar, it will indicate the seminar was approved by the MCLE Department. If you attend a seminar that has been approved for MCLE credit, please complete the MCLE computer card and return it to the staff person *on-site*. This information will be entered into the MCLE Department computer database. In order to receive a print-out of the CLE hours you have attended [approved by the MCLE Department], you must forward a check in the amount of $5.00 to the MCLE Department at P. O. Box 13007, Austin, TX 78711. Please call the MCLE Department at 1/800-204-2222, ext. 2118 or 512/463-1463, ext. 2118 with any questions.

Paralegal Division (PD) – ACTIVE AND ASSOCIATE PD MEMBERS ONLY State Bar of Texas

To prove CLE hours to the Paralegal Division to renew as an Active or Associate member, the member is required to complete (*list* the courses attended or viewed for self-study) the CLE Reporting Form on back of the Membership Renewal Form. **Please do not attach any certificates to this form**. The information requested on this form is the date of the seminar or online course, name of the sponsor of the CLE, CLE topic/speaker location, receipt of attendance form, CLE accrediting organization, and the number of CLE hours. The Paralegal Division suggests each member *keep a copy* of the CLE Attendance Certificate in your personal CLE file along with a copy of the seminar brochure. The CLE Reporting Form must be signed and dated the member as well as a notary public before submission to the Paralegal Division. The CLE that is accepted by the Paralegal Division is as listed below:
Mandatory CLE Requirement by the Paralegal Division

Active and Associate members must complete six (6) hours of substantive continuing legal education (CLE) by May 31 of the membership year. CLE hours must be obtained between June 1 – May 31 of each year in order to renew membership for the next fiscal year. carry-over of hours are allowed for one year only. Members are allowed no more than two (2) hours of self-study during each membership year. Members must report their CLE hours on the back of the membership renewal form. The Division will use the following criteria for approval of continuing education courses for credit towards mandatory CLE requirements for membership:

a. The Division will accept substantive law CLE presented by the Division, approve by the State Bar of Texas, approved by the Texas Board of Legal Specialization, approved by the National Association of Legal Assistants, approved by the National Federation of Paralegal Associations, and presented by local bar or paralegal associations for credit towards the Division mandatory CLE requirement.
b. If the CLE course is not accredited by any of the above-referenced groups, the Division will accept a seminar, if it is a substantive law course offered by a qualified presenter that would qualify for approval if submitted to one of the above organizations. "Substantive Law Course" means an organized program of legal education dealing with:
   i. substantive or procedural subjects of law;
   ii. legal skills and techniques;
   iii. legal ethics and/or legal professional responsibility; or
   iv. alternative dispute resolution.

Additionally, law office management programs accredited by the State Bar of Texas will be accepted.
A "Qualified Presenter" means an attorney, judge, or legal assistant/paralegal that is familiar with the topic presented, or an expert in the particular subject matter comprising the course.
Speaking and writing credit will be considered for approval under the same criteria as (a) and (b) above.

Membership renewal forms will be mailed to all current members in April for renewal for *fiscal year* beginning June 1 – May 31 of each year.

PARALEGAL DIVISION

STATE BAR OF TEXAS

EXCEPTIONAL PRO BONO SERVICE AWARD

The 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 Annual meeting, his/her expenses to attend the Annual Meeting will be incurred by the Division, and a profile of the individual will be published in the *Texas Paralegal Journal.*

Please complete the following nomination form, and return it **NO LATER THAN MARCH 31, 2006.**

Sharon D. Taylor, CP
Boyar & Miller, P.C.
4265 San Felipe, Suite 1200
Houston, TX 77027
832.615.4228 (o)
713.552.1758 (fax)
staylor@boyarmiller.com

Individual's Name: _____

Firm: _____ Job Title: _____

Address: _____

Phone: _____ Fax: _____ Yrs. in Practice: _____

Work Experience: _____

_____

Give a statement (on a separate sheet using "Nominee" rather than the individual's name) using the following guidelines as to how the above-named individual qualifies as rendering Exceptional Pro Bono Service by a Paralegal Division Member.

1. Renders service without expectation of compensation.

2. Renders service that simplifies the legal process for, or increases the availability and quality of, legal services to those in need of such services but who are without the means to afford such service.

3. Renders to charitable or public interest organizations with respect to matters or projects designed predominantly to address the needs of poor or elderly person(s).

4. Renders legislative, administrative, political or systems advocacy services on behalf of those in need of such services but who do not have the means to afford such service.

5. Assists an attorney in his/her representation of indigents in criminal and civil matters.

Paralegal Division

From Path-Finders to Trail-Blazers: 25 Years and Still Leading!

invites you to attend

Annual Meeting of the State Bar of Texas

June 15-16, 2006 in Austin, Texas

Hilton Hotel – Convention Center

Celebrate
25th Anniversary
of the Paralegal Division

Commemorate
Our History
And Progress
At Our Booth!

The Paralegal Division is offering a two-track line of CLE with a two-day review prep course for the CP/CLA exam and a separate track of CLE titled "Electronic Litigation."

June 15-16, 2006

CP/CLA review course topics: Business Entities; Litigation; Research; Judgment/Analytical Ability; American System; Communications; Interviewing, Ethics, and Human Relations; and Contracts

June 16, 2006

Electronic Litigation topics: The Paperless Trial, Updates on Electronic Discovery, Electronic Filing, and Researching Public Records Electronically

Admission to the State Bar Annual Meeting and 2 Full Days of CLE

Only $35!!!

ANNUAL MEETING LUNCHEON

From Path-Finders to Trail-Blazers: 25 Years and Still Leading!

Friday, June 16, 2006 12:00 noon – 1:30 pm

Celebrate the Division's 25th Anniversary and honor our past presidents

(register for the luncheon for an additional cost of $35)

Early Bird Registration – April 1 thru May 12, 2006: $35 (plus luncheon = $70)

After May 12, 2006: $65 (plus luncheon = $100)

Go to www.TexasBarCLE.com to register and for more information

Scruples

A Paralegal Change of Employment

and the Duty to Protect Client Confidences
Part 2

Laurie Borski, Ethics Chair

This is the second installment of a two-part article. In the first installment, we presented Ethics Opinion 472 and began to unpack the committee's conclusion with a discussion of paralegal obligations under the Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas and the definition of "confidential information" under Texas Disciplinary Rules of Professional Conduct. In Part 2, we conclude our discussion with the definitions of "conflicts of interest" and "former client conflicts of interest" followed by a summary of the opinion, the definitions and the ethical obligations of a paralegal to protect client confidences.

The question posed is: does a paralegal have an ethical duty to protect confidential information regardless of whether they are currently employed by the client's attorney? The answer is yes.

In Part 1, we discussed the Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas, [1] Ethics Opinion 472 [2] and the Ethics Committee's conclusion that the supervising lawyer of the paralegal who changed jobs from an opposing lawyer must protect client confidences so as to ensure that the paralegal's conduct is compatible with the lawyer's professional obligations. Rule 1.05(a) defines a client confidence as any information about the client gained during the course of representation and includes both privileged and unprivileged information. A paralegal has an ethical duty to safeguard client confidences regardless of whether he or she is currently employed by the client's attorney.

Ethics Opinion 472 also addressed compliance with Rules 1.06 and 1.09 concerning conflicts of interest and former client conflicts of interest. The Opinion concluded that so long as the supervising lawyer of the new paralegal complied with Rules 1.05, 1.06 and 1.09 so as to ensure the paralegal's conduct was compatible with the professional obligations of a lawyer, then under the Disciplinary Rules, the new law firm was not ethically required to disqualify itself from representation of a party adverse to the former employer's client. [3]

Conflicts of Interest

Next, in order to fully understand the Ethics Opinion, we explore "conflicts of interest" as defined under Rule 1.06:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advan-

tages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

See Rule 1.06, Texas Disciplinary Rules of Professional Conduct.

The first Comment to Rule 1.06 says it all: "Loyalty is an essential element in the lawyer's relationship to a client." If a conflict exists before representation, that representation must be declined and if a conflict arises during representation, it must be cured, even if it becomes necessary for the lawyer to withdraw from representation. [7] Conflicts of interest do not arise only in litigation. There may be a conflict between parties to a real estate transaction, potential beneficiaries in estate planning situations, or the duty an in-house lawyer owes to the employing corporation and its board of directors. There may be a conflict with the lawyer's own interests or responsibilities to others, financial or otherwise. In these instances, the lawyer must decide if any potential conflict will materially and adversely affect the lawyer's independent professional judgment. [8]

Former Client Conflicts of Interest

And finally, "former client conflicts of interest" is defined under Rule 1.09:

(a) *Without prior consent*, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
  (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
  (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
  (3) if it is the same or a substantially related matter.

See Rule 1.09(a) Texas Disciplinary Rules of Professional Conduct [*Emphasis added*].

Absent prior consent from the former client, a lawyer cannot represent a client adverse to that former client if the obligations owed under Rule 1.05 might be violated. That is, if an unauthorized disclosure of confidential information or an improper use of that information is "a reasonable probability" then the lawyer must decline representation. [9]

Nor can a lawyer represent a client adverse to a former client if the representation involves the same or a substantially similar matter. "[T]his prohibition prevents a lawyer from switching sides…and representing a party whose interests are adverse to *a person who sought in good faith to retain the lawyer*." [10] [*Emphasis added.*] You will note that the term "former client" includes one who sought to retain the lawyer. So, even if the lawyer declined to represent the party, the duty is owed to them as a "former client" because the lawyer could have acquired confidential information. It does not matter that the lawyer may not have acquired any confidential information or that the lawyer declined to represent the party.

Rule 1.09 goes further:

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so …

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so …

See Rule 1.09(b) and (c) Texas Disciplinary Rules of Professional Conduct.

In the situation addressed in Ethics Opinion 472, the Ethics Committee said that the new law firm was not ethically required to disqualify itself from representing a party adverse to the former employer's client. However, had the transferring employee been an associate lawyer, the new law firm may well have had to disqualify itself from representation based on Rule 1.09 (b) and (c).

Lawyers will and do hire paralegals that have worked on cases adverse to the firm's client's interests if an effective Ethical Wall can be erected. There are also situations in which the lawyer may decide that the risk is simply too great to consider employing a paralegal that presents a potential conflict of interest. Full disclosure on the part of the interviewing paralegal is essential in order that all parties can be fully informed.

Paralegals must be loyal to a former employer's client, keeping the confidences learned during the former employment and not acting in a manner that is adverse to the former employer's client. The supervising lawyer of a transferring paralegal must ensure that the newly acquired paralegal adheres to this standard of behavior while at the same time protecting his or her client's interests to avoid a conflict of interest.

Citations for Parts 1 and 2:

1 Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas, Canon 4.

2 Tex. Comm. On Professional Ethics, Op. 472, V. 55 Tex. B.J. 520 (1992).

3 Texas Disciplinary Rules of Professional

Conduct, Rules 1.05, 1.06 and 1.09.

4 *Id.*, Rule 1.05(d).

5 *Id.*, Rule 1.05(d).

6 *Id.*, Rule 1.05, Comment 5.

7 *Id.*, Rule 1.06, Comment 1.

8 *Id.*, Rule 1.06, Comments.

9 *Id.*, Rule 1.09, Comment 4.

10 *Id.*, Rule 1.09, Comment 4A.

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.

Opinions TO THE EDITOR

The TPJ wants to hear from you! 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 a 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: *What are your thoughts on "warrantless surveillance of some U.S. citizens by the National Security Agency" which as recently been making the headlines?*

RESPONSE 1: According to the Rasmussen Report, 64% of Americans believe the National Security Agency (NSA) should be allowed to intercept telephone conversations between terrorism suspects in other countries and people living in the United States. Only 23% disagree. Given these figures, that is not to say that the U.S. is—or should—monitor calls of just anyone. The primary goal of my country should be to keep the citizens of our country safe to the highest extent possible.

This country watched helplessly in horror as terrorist attacks invaded this country, destroying two massive buildings and over 3,000 lives. Unfortunately, this was not the first incident in which our country has been targeted by terrorists. In fact, New York and other major cities have been bombed several times before. One of the most devastating facts to discover was that the terrorists had come into our country, portrayed themselves as ordinary citizens taking flying lessons, entering universities, and enjoying life here, and then commandeering our planes to destroy property and lives in our country. It was almost as if we had a gun in our hands and someone forced us to turn it on ourselves and fire it.

I believe that aggressive acts against this country require aggressive action by our leaders to prevent such tragedies from occurring again. Some people are worried and horrified that someone's rights could be violated. But these are not ordinary people who should be monitored. Most job applications in our country require a response to the question of prior criminal activity or convictions. I believe the same should be asked of aliens who come into this country—what their intentions for being here are. And for a period of time—with cause—their activities should be monitored until it is determined that their move to this country is genuine and innocent.

I do not blame our country's leaders for taking what looks like drastic actions. I believe the world we live in today warrants it. And I sleep better at night knowing that my country has our best interests in mind.

Gail Lungaro, Houston

RESPONSE 2: If we let the terrorists push us to turn our backs on our own Constitution, then we have let them win a great victory.

Mary K La Rue, El Paso

RESPONSE 3: This is a time of war. Have we forgotten September 11, 2001? I don't think surveillance is warrantless at this time. It is absolutely necessary for our country's protection and safety.

Jan McDaniel, Midland

RESPONSE 4: As Americans, we must understand that our Freedom is not free. Today's United States is not the same as it was 50 years ago. We elect government officials, who in turn appoint others, to protect us and guarantee us the freedom we enjoy, and often take for granted. If 'spying' is intended for the good of every U.S. citizen to ensure our safety, I'm all for it. After all, I've done nothing I need to hide.

J. Bond

RESPONSE 5: The Foreign Intelligence Surveillance Act (FISA), which was passed by Congress in response to former President Nixon's "national security" claims, was implemented to strike a delicate balance between national security interests and the privacy rights of American citizens. The current administration's failure to use the FISA Court for obtaining warrants on its claim of national security in the war on terror, seeks to undermine the rules that serve as our foundation for freedom. The standard as laid out by General Hayden is a "reasonable basis to believe," which is a lower standard than "probable cause" – the standard on which the FISA Court was created.

To quote wise founders of this country: "The executive shall never exercise the legislative and judicial powers, or either of them, to the end that it may be a government of laws and not of men." – John Adams; and "The accumulation of such powers in the hands of a single man or group may justly be pronounced the very definition of tyranny." – James Madison

Caro E. Dubois, Austin

RESPONSE 6: I am in favor of whatever it takes not to let a 9/11 event take place again on American soil. And, although characterized as "warrantless," I believe the President has, and indeed should have, this authority. We cannot be lulled into complacency by self-serving organizations seeking to enhance individual rights to the detriment of the nation. Your right to individuality stops when it infringes on my safety. The United States is still a checks and balances/majority-rule country. Our domestic balance is being eroded by concession to misguided checks and I trust the majority will realize this.

Lucille Borella, Dripping Springs

RESPONSE 7: I concur. Not only warrantless surveillance but more aggressive "Terry" stops as well. Of course it goes without saying that the borders should be armed and any undocumented alien should be rounded up and deported. "A cynic is a man who, when he smells flowers, looks around for the coffin."

Anonymous

RESPONSE 8: Debating this question with my older son, I realized as parents we do the very same thing that the President is "accused" of. As my son grew older I "eavesdropped" on his conversations upon occasion. Did I think he was a bad kid? No, but I DIDN'T KNOW how the other child on the end of that conversation was raised. Did his/her parents teach them to say no to drugs, alcohol, skipping school? Did they realize that stealing from a store was not a kid's prank? Did their parents teach them to stay away from guns and to never pick one up? I didn't know. So yes I listened and if a note fell out of his pants while I was washing them I read that too. I upon occasion heard or read something that caused me to find away to talk to my son about a problem or situation that could cause him trouble down the road. Fortunately my extra listening, paying attention and reading a letter or two has allowed me and my husband to raise a young man who will graduate, has a job, has never been involved in drugs, alcohol or skipped school. He understands that anger and bullying can have negative affects on others. He has never seen the inside of a police station nor has he ever been expelled or sent to rehab.

So as parents if (and you have to be honest with yourself about this) you didn't listen to your kids conversations and just let them try and figure life out all by themselves, would we have more teenagers like the young man in California who was convicted as a terrorist. Remember his parents let him learn about life without interfering.

So listening in on a conversation between a suspected terrorist and another suspected terrorist to protect an entire country possibly more, I don't have a problem with. Is it legal I don't see anywhere in the constitution where it says that "All your conversations are private and we will never listen to them". Yes we expect the right to our privacy but it is not a grantee when it comes to protecting the lives of others. Besides you wouldn't walk up to a suspect and say, "oh by the way I am going to listen to your calls". I think we worry too much about the rights of those that are terrorists and criminals than we do about the average citizen that would like to live in a safe place. Personally spending my tax money to do this and save a life as compared to burying over 4000 people is better spent.

Anonymous, Dallas

RESPONSE 9: Let's be perfectly clear on who authorized the warrantless surveillance of Americans—the President of the United States. I am strongly opposed to the Administration's continuing arrogant behavior as if the laws of the land don't apply to them. I don't believe the President and all those who serve him, even in a time of war, are above the law. I believe that the Administration's actions since 9-11 have put our basic civil liberties in jeopardy, and I agree completely with Benjamin Franklin's view that "those who would surrender freedom for security deserve neither".

Suzi E. Crane, San Antonio

Sustaining Members—Paralegal Division, 2005-2006

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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 and select CLE/Events.

CLE REQUIREMENT
Active and Associate members are required to obtain six (6) hours of CLE (2 of which can be self-study) by May 31 of the membership year. CLE completed during any membership year in excess of the minimum six (6) hour requirement for such period may be applied to the following membership year's requirement. The carryover provision applies to one (1) year only

CLE CALENDAR
A statewide CLE calendar can be found on the PD website at 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; 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 CERTIFICATE (Active Members Only)
Need to replace your membership certificate? Please complete the order form found on www.txpd.org and follow instructions. The cost to replace an Active Membership Certificate is $15.00.

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

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 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, click on Members-Only and choose E-Group. There will be directions on how to sign up. **You will be required to respond to an email confirmation**. Once you have completed the 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, 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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