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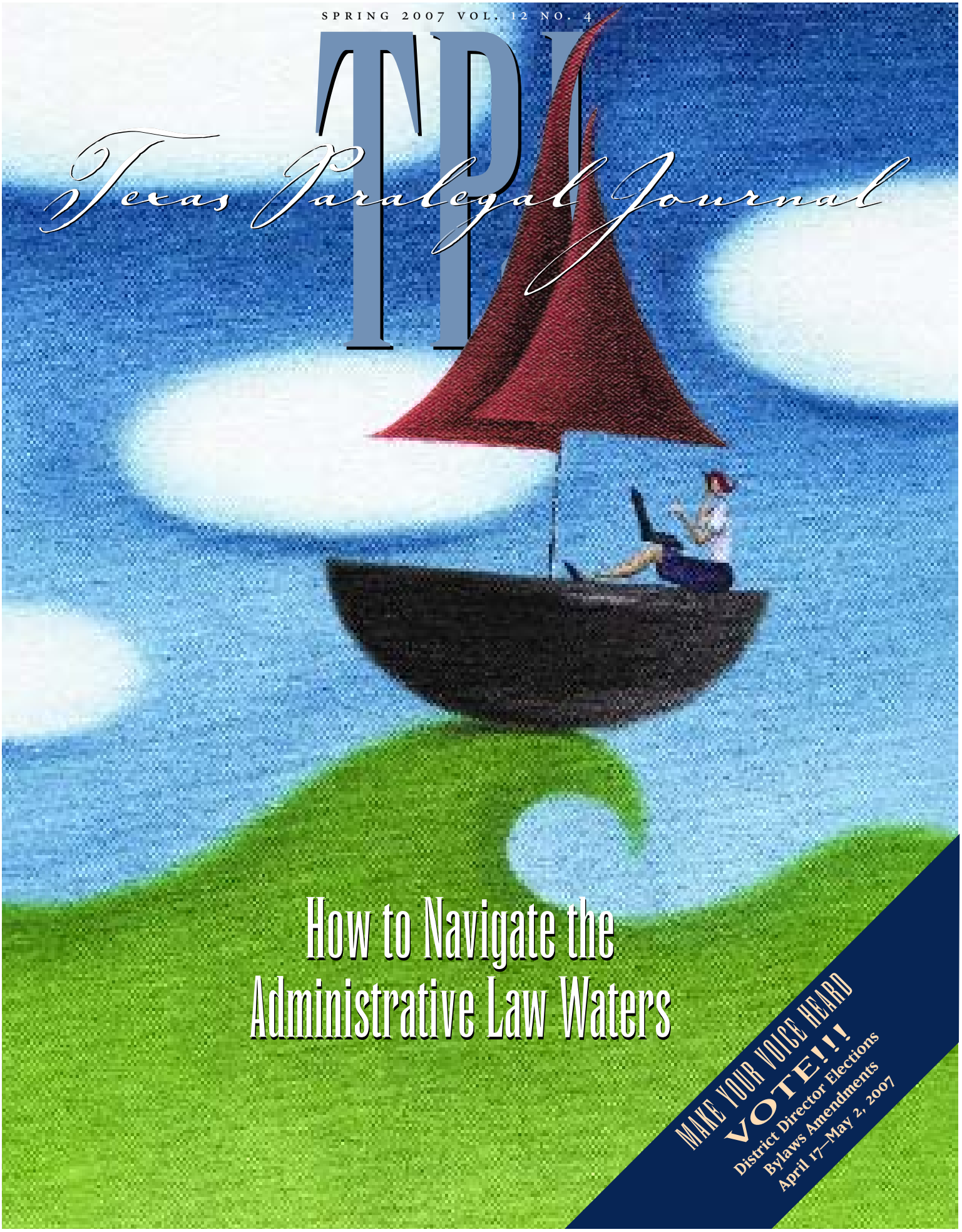
Texas Paralegal Journal



How to Navigate the Administrative Law Waters

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VOTE!!!
District Director Elections
Bylaws Amendments
April 17—May 2, 2007

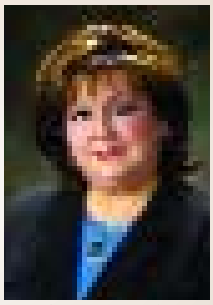
PRESIDENT'S *Message*

Javan Johnson, ACP, TBLS, Board Certified Legal Assistant, Civil Trial Law, Texas Board of Legal Specialization

It is already the time for us to begin turning our thoughts towards renewing our membership. The first renewal notices will come to you in April, with the end of our fiscal year being May 31st.

With that said, if you are an *Active* or *Associate* member, it is time to make sure that you have completed your six hours of continuing legal education (CLE) to make certain that your renewal process is smooth. All CLE hours must be completed by May 31st. It is so easy to let this time slip up on us, and not have yet earned our six hours. So, assess where you are at this time, and whether you need to begin working on getting your CLE hours in order to maintain membership.

It is so easy to get those credits. Your District Directors are working hard all over the state to offer you CLE events in your local areas, many of which are at no charge. The Division's online library continues to grow. In fact, several new courses are being added to our library at the current time. Just go to our website at *www.txpd.org*, and under the drop down menu for the CLE/Events, you will see the Online CLE. When you go into it you will see the CLE is organized by substantive area of law. These are very affordable CLE hours made available for you, and you never have to leave your desk.



Also, most local associations offer CLE events each month. If you will check out the CLE calendar on the Division's website, we post any events which we learn of all over the state. The State Bar of Texas website (*www.texasbar.com*) is a wealth of information for you, with many opportunities. So, you can see there are plenty of opportunities for you to still have time

(Continued on page 2)

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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 civil penalties).

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1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
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 are stockholders 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 15h., 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.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

PS Form **3526,** October 1999 *(Reverse)*

(Continued from page 1)

to secure those hours. And remember, two of the six hours can be in self-study – reading the substantive articles in the *Texas Paralegal Journal* and *Texas Bar Journal*, reading papers out of seminar books, reading case law updates, etc.

The Division decided to go with required CLE just a few years ago for a number of reasons, but mostly because CLE keeps us on top of our game. It keeps us abreast of current changes in the law. It keeps us fresh on current issues. And more importantly, it keeps us professional. CLE is vital to our daily work for our attorneys and the clients. Even if you are not "required" to obtain CLE hours for membership purposes, or because you hold a certification of some type, you should want to continue to learn and grow in your profession with CLE.

And talking about CLE – plans are in full swing for the Texas Advanced Paralegal Seminar (TAPS), which will once again be in Dallas, so mark your calendars for October 3-5!

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Networking Event
A fun social is being planned for
Thursday, June 21, 2007
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What Federal Judges Want You to Know About Presenting Your Case
The Honorable Xavier Rodriguez, San Antonio

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James H. Kizzire, Jr., San Antonio

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WINTER 2006 VOL. 12 NO. 4

TPJ

Texas Paralegal Journal

Focus on . . .

Hot "Cites"

Columns

Et Al.

EDITOR'S *Note*

by Rhonda J. Brashears

Greetings Paralegal Division Members:

I hope this issue finds you and yours well, and I know it finds you wishing spring would get here. Well, the Spring issue of the *Texas Paralegal Journal* is here, so maybe that will somehow move it along. This issue contains some great articles on topics that we do not always see; for example the administrative aw article and the article on Vioxx litigation. You will also find part two of three of the article on how bankruptcy affects landlords.

This issue also contains some important announcements regarding odd numbered District Director elections, upcoming bylaw elections, and membership renewals. Please pay special attention to these so that you can make sure you are a part of the decision making processes for the Paralegal Division.

Finally, this issue provides you with the dates for the Annual Meeting and TAPS 2007. The Annual Meeting is being held in San Antonio, Texas with a whole new format! It sounds like it will be a wonderful event, and I hope you can attend. TAPS 2007 is in Dallas and will be held October 3-5, 2007.

As always, I wish you the best.

HOW TO REACH US

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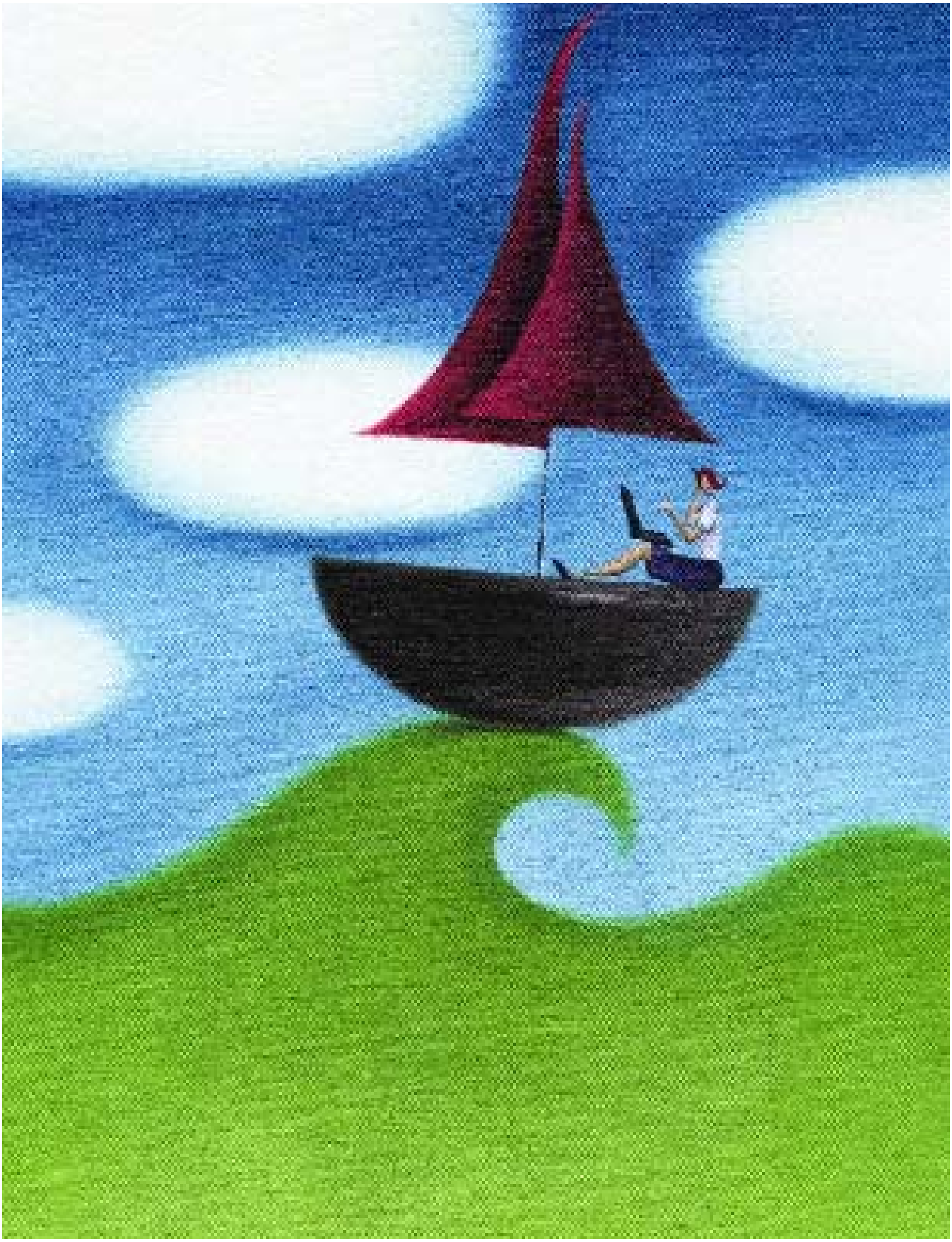

Focus on . . .

How to Navigate the Administrative Law Waters

Ann Skowronski

I knew very little about administrative law when I first became a lawyer. And, what I mean by very little is that I knew nothing. Frankly, the subject was not on the Texas Bar Exam, so that pretty much meant it was not important, right? How wrong that assumption was! It has been a bumpy ride for me during the past few years as I have learned to navigate my way through the complexities of administrative rules and procedures after being taught solely how to interpret appellate court decisions and follow the Texas Rules of Civil Procedure. No one told me that there was a whole world of law out there being written by technocrats in tiny government offices nor how that body of law has become the real workhorse of the legal system. I hope the information contained in this article saves you time researching administrative law questions, particularly if the attorney for whom you work has not had much experience with this area of law. Additionally, the article will conclude by giving the tools needed to obtain employment in agencies or firms requiring administrative law knowledge. However, before jumping straight into the deep end of the pool, let's get our feet wet by defining what exactly 'administrative law' is.

WHAT IS ADMINISTRATIVE LAW?

We all know that there are three branches of the United States government: the executive, the judicial, and the legislative branches. And, we all have a basic idea about how each branch has different responsibilities that place checks and balances on the other branches. For instance, if the legislative branch passes a statute, the judicial branch, if requested to do so in a lawsuit, has the duty to look at the constitutionality of the statute. Thus, the judiciary checks the power of the legislative branch. But did you know that both at the federal and state level, the legislative branch can delegate some of its powers elsewhere– to an agency? This means someone, someone we never elected to office, someone we have never met nor even seen on television, is writing and adopting laws we have to follow. And, this is all legal. It's called administrative law.

A. Where is it Practiced?

Administrative law is the law practiced before state and federal agencies, although the decisions and rules made by the agencies can be challenged in district court. This article will focus on Texas state agencies for the sake of familiarity, since we have all had contact with at least one Texas state agency. A state agency (the Texas Department of Public Safety) regulates our drivers' licenses, after all. Texas agencies are created by statutes passed by the Texas legislature, and those same statutes tell the agency what its purpose

and mission is. They also tell the agencies what kind of rules they want the agency to make to carry out the mission. The rules agencies make are found in the Texas Administrative Code, which is published on-line and updated frequently (*www.sos.tx.gov*).

B. What Purpose Does Administrative Law Even Serve?

One way to think about this arrangement is to imagine a company vice-president telling a project manager to make widgets. The vice-president tells the manager what kind of widget to make and gives him facilities and the budget to make the widgets, as well as some general guidelines on the size and color desired. How the manager actually sets forth the details of the widget-making, from hiring staff to the manufacturing process, is nothing the vice-president has time to worry about because it takes too much detailed, expert knowledge to get involved in the day-to-day production of widget production. This is exactly why agencies are created. Legislators, like our widget corporation vice-president, need to give regulatory power to those persons most capable of handling the day-to-day field operations. Agencies are filled with technical and legal staff that possess specialized knowledge in narrow fields of expertise, from areas as diverse as public water supply engineering and horse racing regulations. When you really think about it, if our legislators had to come up with each and every rule on how to measure bacteria levels in water supply or what kind of photography equipment to use to determine which pony wins the race, they would never have time to deal with all of the other big issues that need resolving, like property tax relief and health insurance availability for children.

STATE AGENCY POWERS IN ACTION

State agencies are mini-governments unto themselves. They not only, as discussed above, come up with rules, (legislative branch), they also hold hearings on the violation or application of their own rules (judicial branch), and have enforcement powers (executive branch). Agencies are really quite powerful since they create their own rules and then enforce them on the rest of us. To understand how an agency's parts work together as a whole, it

(Continued on page 10)

SUSTAINING MEMBER PROFILE

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The Marker Group is a full service litigation support firm located in Houston, Texas. Founded in 1985 by Marlene Marker, The Marker Group is a Certified Women's Business Enterprise that has developed a national reputation for providing quality services to some of the largest and best-known law firms, corporations and insurers in the United States. The Marker Group (MG) offers five distinct services including record collection and analysis, medical review, court reporting, record collection, and document and e-discovery services. With a staff of more than 100 highly trained and experienced people, MG is positioned to assist its clients with the development of cases of any size. MG has provided services on cases with more than 5,000 individual plaintiffs and on cases with only one plaintiff. Similarly, MG has collected records from all 50 states in the Union and a number of foreign countries. MG has the distinction of being one of a handful of record collection vendors to have provided services to the defendants in the largest mass-tort case in United States history.

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is best to look at an example. We will take a look at the inner workings of the Texas Commission on Environmental Quality (the "TCEQ"), since it is one of the biggest agencies in Texas.

A. Case Study: The TCEQ

The TCEQ, created under TEX. WATER CODE 6 5.012, is instructed at TEX. WATER CODE 66 5.103 and 5.105 to write and implement environmental rules for the conservation of our natural resources and the protection of the environment. Other code sections give the TCEQ authority to regulate specific substances and activities. For instance, TEX. WATER CODE 6 26.343 gives the TCEQ the authority implement rules regarding petroleum substances. And, even more specifically, TEX. WATER CODE 6 26.346(a) directs the agency to make rules regarding underground petroleum storage tanks, "The commission *by rule shall establish the procedures and requirements* for establishing and maintaining current registration information concerning underground or aboveground storage tanks." (Emphasis added) The TCEQ registration requirements for underground petroleum storage tanks are found at 30 TEX. ADMIN. CODE 6 334. The rules were written by technical or legal staff and published in Texas Register for comment. After that process occurred, TCEQ legal staff brought the proposed rule to the Commissioners (who are appointed by the Governor to the post) for their approval. Once the rules are adopted, they must be followed, or violators will suffer the consequences, as we will see the next example.

B. How Does the TCEQ Exercise its Judicial and Executive Powers?

1. Initiating an Enforcement Action

Let's say a convenience store named Bad Egg, located in Pasadena, Harris County, Texas, has underground storage tanks ("USTs") holding gasoline. Bad Egg has some bad management problems, though, and never quite got around to labeling the gasoline tanks with a number for identification purposes. This is in violation of one of the rules found at of 30 TEX. ADMIN. CODE 6 334.8 regarding the registration of petroleum storage tanks. Specifically, 30 TEX. ADMIN. CODE 6 334.8(c)(5)(C) requires each tank be permanently labeled, "...on the top of the fill tube or to a nonremovable point in the immediate area of the fill tube...." Bad Egg's USTs went unlabeled for a number of years, and no one seemed to notice that it was impossible to link the tanks up with the numbers on theregistration form. Apparently, Bad Egg was unaware that the TCEQ Houston Regional Office conducts random compliance reviews of all UST facilities. It was only a matter of time before an investigator visited Bad Egg's facility and this violation would be discovered. And, eventually, a TCEQ investigator visited the site and immediately noticed that the tanks were not labeled with a number. The violation was written up in an investigation report, and a Notice of Violation was mailed to Bad Egg. Bad Egg disagreed with the Notice of Violation because while then tanks were not numbered, they were color-coded, which is just about the same as numbering since it organizes the tanks. However, the TCEQ Houston Regional Office disagreed that color-coding is the same as numbering, and the case moved forward to the Office of Legal Services.

2. Administrative Litigation

The Litigation Division filed a petition at the TCEQ Central Office, and it informed Bad Egg of the agency's intention to assess an administrative penalty and require corrective actions for the alleged violation of 30 TEX. ADMIN. CODE 6 334.8(c)(5)(C). Bad Egg was adamant that it had committed no violation, and the company demanded a hearing. The TCEQ, like many administrative agencies, sends the hearings to the State Office of Administrative Hearings ("SOAH") to be heard by an Administrative Law Judge (the "ALJ"), rather than TCEQ personnel. The purpose behind this move is to give the hearings the appearance of impartiality. After the

parties conducted discovery and had a few pre-trial squabbles, a Contested Case Hearing was scheduled.

Bad Egg's attorney and corporate representative both appeared, as did TCEQ attorneys and staff. After hearing the evidence, the ALJ wrote a document called the Proposal for Decision. As you probably predicted, Bad Egg was not successful at convincing the ALJ that color-coding wasthe same as numbering the tanks since the color-coding does not match up with tank numbers on the tank registration forms. Bad Egg vehemently disagreed with the Proposal for Decision ("PFD"), so it filed a response. Months passed, and Bad Egg received notice in the mail that the Commissioners were planning to consider the ALJ's Proposal for Decision at an upcoming Agenda. The Agenda is the public forum in which the TCEQ Commissioners meet for the purpose of adopting rules and regulations, making final adjudications of PFDs, and ordering regulated entities to perform corrective actions or pay administrative penalties.

3. The TCEQ Commissioners, not the ALJ, Have the Final Say

Bad Egg gave it one last shot at Agenda. The corporate representative and his attorney signed in and waited to have the case called. Once called to order, Bad Egg's attorney stood up in front of the Commissioners and stated that the color-coding of the tanks satisfied the spirit of the identification rules in the TEXAS ADMINISTRATIVE CODE, and therefore, his client committed no violation. Next, the Commissioners listened to the ALJ justify his reasoning why the color-coding was found insufficient. The Litigation Division attorney nodded in agreement with the ALJ. The Commissioners then considered Bad Egg's arguments and argued amongst themselves for a bit, but ultimately, they decided to adopt the Proposal for Decision. Bad Egg was ordered to pay a $3,000 administrative penalty the tanks. Bad Egg was also ordered to number the tanks in accordance with 30 TEX. ADMIN. CODE 6 334.8(c)(5)(C). The order to number the tanks is called a 'corrective action'; TEX. WATER CODE 6 7.050 gives the TCEQ authority to order regulated entities to perform corrective actions. In any case, Bad Egg disagreed with the Commissioner's Decision and Order, and he requested that his attorney file a district court appeal.

However, Bad Egg's attorney explained that an appeal of the Commissioner's Decision and Order would probably fail since the district court could not hear the entire case over again. In other words, the district court review would not be *de novo*. Instead, the substantial evidence review would be applied. This means that the district court judge could only look to the

record developed at the administrative hearings to determine if the TCEQ had followed its own rules properly and some evidence supports the finding. In this case, Bad Egg has admitted that the tanks were not numbered on the date of the investigation. And, really, when you look at it, color-coding is not the same as numbering.

Conclusion

The above case study demonstrates how agencies operate as little governments on their own. From the creation and adoption of the underground storage tank rules (legislative), to the SOAH and Agenda hearings (judicial), to the enforcement mechanism of a shut-down order (executive), the TCEQ functions as the environmental law 'mini-government' in Texas. This case study also highlights the importance of using technical experts to write the administrative rules, as opposed to having the Texas legislature write them. It would be entirely too time consuming for our legislators to spend the session pondering the utility of color-coding UST labels versus numbering them. This level of detail really belongs in the hands of science professionals.

Where Do I go From Here?

Not all agencies function like the TCEQ, however. If I can stress one single item of importance to the reader, it is to find out everything you can about an agency instead of assuming it works like 'all the others' or that it is 'just administrative law.' For example, the real-life attorney for Bad Egg never did attend the Agenda session. I suppose he thought the Commissioners would accept the Proposal for Decision without question, but he was wrong. You cannot work under the assumption that if you know your district court 'stuff,' that you do not need to have any extra knowledge on administrative procedures and who the players are at the agency. The Commissioners could very well have reduced the penalty in my case. It was not very good advocacy on my opposing counsel's part to remain ignorant of the administrative procedures. And, here's how to avoid this trap.

Agency Website: Whether you are preparing for an interview or conducting research, you must visit the agency website as your first stop. A list of the agency websites is found at *www2.tsl.state.tx.us/trail/agencies.jsp.* You may want to take a look at the agency's organization chart to see who reports to whom, and, of course, read the Frequently Asked Questions. Most importantly, agencies publish all of their applicable statutes and administrative rules online, so will save yourself research time.

Litigation Pointers: Be prepared to see very wide differences in how each agency handles its hearings. Some agencies, such as the Texas Workforce Commission and Texas Department of Insurance-Workers' Compensation Division, hold their own hearings rather than outsource them to SOAH. In those two cases, a Hearing Officer, not an Administrative Law Judge, presides over the hearings. In addition, other agencies use Hearing Examiners, which may or may not be attorneys. Attorneys or not, these professionals are still the finder of fact and should be treated with respect by the attorney for who you work. To be on the safe side, refer to all these individuals as "Judge" in any letter, or use their precise title if it pleases you, but try to maintain a certain degree of respect.

SOAH Pointers: If the agency in question uses SOAH to preside over the administrative hearings, visit the website for guidance. The website is found at *http://www.soah.state.tx.us.* To help guide your research, the website contains a searchable database of Proposals for Decision that could prove key for insight into an individual ALJ's rationale on similar cases. It will be particularly helpful if you are preparing for an interview to read a couple Proposals for Decision involving the agency the firm deals with most often. This last piece of advice is even more important for those seeking state employment.

Know your Acronyms: Administrative law is chock-full of acronyms. Each agency refers to itself by its acronym, even if it leads to funny-sounding results, like DADS (Department of Aging and Disability). The State Office of Administrative Hearings has a mouthful of a name, so it is always called "SOAH" (pronounced 'so-uh'). Most agency websites have a list of common acronyms that you will encounter.

Final Tip: Last, if you are interviewing for a job that requires administrative law knowledge, make it clear in the interview that you know which code contains the statute creating the agency in question and the basic location of their rules in the TEXAS ADMINISTRATIVE CODE. Even if you have no experience in the narrow field of law that the agency handles, knowing how to navigate the administrative rules and their relationship to statutes will push you to the head of the pack.

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Focus on...

Vioxx Litigation Revisited

A Primer for the Paralegal Involved in Case Development

Nursine Shuman Jackson, M.S.N, R.N.

Paralegals need to ready themselves to participate in the screening of another group of claimants, who now qualify for the Vioxx® litigation, as a result of information acquired when Merck & Company released more data to the FDA in May 2006. Merck is the pharmaceutical company that aggressively marketed Vioxx® to the American public, even though it had little proven efficacy to the average person who would be using it, while it carried significant risks for causing a myocardial infarction or stroke. Paralegals need to have an understanding of the pharmacologic effects of Vioxx and the abnormal clotting that has caused such problems, along with the pathophysiology of cardiovascular disease and risk factors predisposing to thrombotic events. This article aims to provide a foundation for the paralegal involved in client screening and intake.

A BRIEF HISTORY

The story starts in 1996, when in one of Merck's preclinical studies, patients taking Vioxx® (*generic name: rofecoxib*) experienced a higher rate of cardiovascular events than patient taking placebo. In spite of these concerning findings, Vioxx went on the market in 1997. In 1998 and 1999 two more internal Merck studies showed much higher risk for cardiovascular events in Vioxx users. Yet another study, the 1999 Vioxx Gastrointestinal Outcomes Research (VIGOR) showed that Vioxx-users had almost double the risk for suffering thrombotic events, like myocardial infarction and stroke[i].

Unfortunately, it wasn't until 5 years later and possibly hundreds of thousands of Vioxx-related injuries and deaths later, that Vioxx was withdrawn from the market[ii]. It was taken off the market after the release of the results of a study called the APPROVe trial (Adenomatous Polyp Prevention on Vioxx), which initially, in November, 2004, reported a two-fold increase in cardiovascular toxicity, after *18 months* of use[iii]. This drug was deemed "cardiotoxic" and "defective," but far too late.

Now, nearly two years later, Merck has revealed that the initial data released from the APPROVe study wasn't complete, and the information that was late in coming, wasn't exactly good news for Merck, because it would qualify countless additional Vioxx users as claimants in litigation against this pharmaceutical giant. The previously unreleased information showed that short term Vioxx users were also at risk for suffering cardiovascular events; in fact their serious risk for suffering thrombotic events started only days after the initiation of Vioxx use, and the risk continued for a year after discontinuing the drug! Merck now reports that some patients using Vioxx® had their first myocardial infarction (MI) shortly after achieving a therapeutic blood level of Vioxx, i.e., within six to thirteen days (with a median of *nine days*) after starting the drug[iv]. The newly released data also demonstrate that the very significant risks from Vioxx persist even one year after the patients stop taking the drug.

In early May 2006 when National Public Radio (NPR) initially released this information exchanged in a "confidential" report from Merck to the FDA, they reported that "Vioxx patients were 74 percent more likely to develop heart problems in the year after they went off the drug. In the years of taking Vioxx, they were at 90 percent higher risk of heart problems."[v] Cardiologists and clinical trial experts who have analyzed this data feel that the persistent risk of cardiovascular problems suggests that Vioxx does long-lasting damage to the arteries.

Merck still contends that the data does not show that the patients remained at an increased risk for hypercoagulability after the drug was discontinued.

MECHANISM OF ACTION

While aspirin acts by inhibiting platelet production, causing vasodilation, and as a result, preventing thrombosis; Vioxx does the opposite. Vioxx (and other drugs in its class called "Cox-2 inhibitors") causes platelet clumping and vasoconstriction, and as a result, promotes clot formation. Both aspirin and Vioxx work by affecting the complex chemicals called prostaglandins that are released when the body suffers an injury. In order to make prostaglandins, the body releases an enzyme called Cyclooxygenase. There are two forms of Cyclooxygenase that balance each other out. They are Cyclooxygenase-1 (Cox-1) and Cyclooxygenase -2 (Cox-2). Under normal circumstances, if Cox-2 production is stimulated, it results in a series of events that block clotting, (vasodilation, decreased platelet aggregation and decreases vascular smooth muscle proliferation). When Cox-1 is stimulated, it has an opposite effect, i.e., it causes vasoconstriction, increases platelet aggregation, and increases vascular smooth muscle proliferation[vi].

When Vioxx *inhibits* Cox-2, the equation becomes unbalanced, because Cox-1 enzymes continue to act, unopposed. The unopposed enzyme, Cox-1, acts in a manner that promotes clotting. Hence the patients who are a high risk for clotting due to pre-existing plaque in their arteries from arteriosclerotic disease are placed at an even higher risk for clotting when they are on Vioxx. Patients who are on hormones or on other drugs or are suffering from disease conditions that place them at risk for clotting (e.g., cancers, clotting disorders), are at even greater risk for a thrombotic event when they take Vioxx. Immobilized patients, patients with heart failure or other conditions causing sluggish blood flow, which places them at risk for developing clots even without Vioxx, are placed in even more danger when they take Vioxx. Even people with no pre-existing or no identifiable risk factors have nearly twice the incidence of thrombotic events when they took Vioxx.

One of the goals of the paralegal performing the intake interview and data collection is to identify and document the Vioxx-user's risk factors for clotting and co-morbidities that may have contributed to the thrombotic injury, so that the experts can evaluate whether Vioxx caused or contributed to the injury claimed.

LEGAL IMPLICATIONS:

Many more patients than originally estimated may have suffered thrombotic events as a result of their Vioxx use. Both short term users and those who suffered events in the year following discontinuance of Vioxx may now be included as claimants as a result of this new data release. Still, entry criterion for Vioxx claimants is far from standardized.

Barry Hill of West Virginia, who has over 500 Vioxx heart attack and stroke cases filed, or on their way to being filed as lawsuits, cast a wide net in his initial screening, and performed organized data collection. As a result of his advanced planning, as this new data becomes available, he can review his data bases to find additional claimants, rather than going back to re-interview hundreds of Vioxx-users, to determine who may now qualify. He and the other plaintiffs' lawyers, with whom he is working, believed, even before this recent data release, that *four days* of continuous Vioxx use immediately before a heart attack or stroke was long enough to increase the risk and contribute to causing the event. (They based their client intake criterion on data analysis done by Harvard cardiologist John Markis, MD, soon after Vioxx was removed from the market.)

But not all law firms used the same initial entry criteria, nor did they or do they now, use standardized interviews or intake forms. Many law firms were not set up to do the meticulous screening or data entry needed to keep up with the evolving rules in this litigation. Paralegals working with law firms involved in Vioxx litigation will have to review all past applicants' data, or re-interview Vioxx users, to determine which of them, may now qualify as claimants. They will also have to revise data collection tools, so that information from new claimants can be properly considered and stored for re-review if and when new iterations of the entry criterion evolve.

CASE INVESTIGATION AND DEVELOPMENT

So how does a paralegal get up to speed to step in on this assembly line already in motion? Unquestionably, the paralegal who presents with a sound knowledge base of the involved pathophysiology and the drug's mechanism of action will be able to perform intake interviews and data collection more effectively. Working side-by-side with a cardiac nurse to develop a good interview style and data collection tool at the outset would be optimal, however many paralegals are left to their own devices to develop a process. The paralegal, before touching his or her first Vioxx case, at a very minimum, should read nursing textbooks and nursing journal articles to gain a baseline understanding of cardiovascular disease, risk factors, and clotting disorders and on performing a cardiovascular assessment.

Attempting to gain this knowledge base by reading physician's texts tends to be

frustrating because they often provides more information than a legal professional needs or wants to know. Likewise, trying to get a foundation via the internet research is not a very efficient means to the end, since the focus of articles available tends not to be specific to the paralegal's needs. For example, upon entering the search terms "cardiovascular assessment," the first several hits provide unhelpful information (at least for these purposes). These internet hits give information on interpreting heart sounds, pulses, jugular vein distention and invasive monitoring, but fail to give the step by step overview that would give insights into devising questions for an interview as a nursing text would. A carefully constructed plan for intake questioning implemented from the beginning of client intake will save countless hours later and nursing literature tends to give practical information that is most helpful.

Following is a brief overview of the arduous task of screening and collecting meaningful data for developing Vioxx cases:

Data Collection

Once the plan for data to be collected has been laid out, defining the means for storing the data is in order. The software, whether it is Word tables, Excel spreadsheets, or CaseMap timelines, is not as important as the quality of data collected and consistency of data entry. Most efficiently, data should be entered directly into the data base, as it is obtained during the interview.

Initial Intake

The paralegals for the plaintiff have the benefit and the burden of eliciting medical historical information directly from the patient or his representative, before delving into the medical records. Many firms started by providing potential clients with questionnaires. Others found that skilled interviewers who could alter the intake questioning to meet the needs of the client and his case scenario, so was more efficient in both screening and in collecting meaningful data.

Each potential claimant's case must be screened to establish, not only his contemporaneous use of Vioxx at the time of the thrombotic event, but the medical factors that may confound establishing a causal connection between the thrombotic event and the Vioxx use. The paralegal will need to establish the claimant's medical history, family history, risk factors, Vioxx consumption, his baseline activity and employment status, then his injury and subsequent medical course[vii].

Additionally, the person, either the Vioxx user or his representative, with whom the law office will work and whom the jury will see, needs to be assessed for stamina and personality befitting a credible plaintiff.

At about this point in data collection, the law office often does a review of the potential claimant's data and makes a decision as to whether additional investigation is warranted. Common factors that may exclude a client from further investigation beyond the initial intake include:

- The injury claimed is a hemorrhagic, not thrombotic stroke;
- There is no objective proof of Vioxx use temporally related to the injury;
- The patient has too many comorbidities, or serious illness that would confound establishing a causal connection between the Vioxx use and the injury alleged;
- The patient has no objective evidence of injury;
- The patient has a serious disease process, like cancer that will result in a shortened life expectancy or serious morbidity that will confound or dwarf the Vioxx injury;
- There are personality issues unbefitting a plaintiff;
- There is inadequate or untimely medical documentation to support the case;

- Medical record are chock full of evidence of noncompliance and/or self destructive behaviors, such as drug or alcohol abuse or self neglect; and
- The client is unable or unwilling to cooperate with the needs of the law office to develop a case.

If the Vioxx user conforms to the inclusion and exclusion criterion as defined by each law firm, then the data collection can proceed to identify the claimant's providers, past and present. Only then can the daunting task begin, in collecting the medical records, pharmacy print-outs, itemized statements, lien information, and other documents that will illustrate the elements of the Vioxx case.

Each case analysis starts with the tedious process of organizing the records and numbering and tabbing them, a job either performed by or orchestrated by the paralegal. Many "paperless" offices then scan the organized hard copies, and all subsequent reviewers then work off the electronic form of the documents.

Risk Factor Identification

Because many patients who suffer injuries from Vioxx are at risk for suffering a stroke or myocardial infarction even without Vioxx, developing a causal connection between Vioxx use and the event poses a challenge. Merck will argue that patients with multiple risk factors had the thrombotic event due to factors other than Vioxx; plaintiffs will respond that patients with risk factors should not even have been given Vioxx because the drug's effects doubled their already elevated risk of suffering a thrombotic event[viii]. The reality of the case often boils down to a battle of the experts.

To expedite experts' reviews of the cases to make an assessment of the causal connection, each claimant's risk factors and confounding disease processes needs to be identified. Baseline demographic information must be compiled for each potential claimant including: age, sex, ethnicity, medical history, in addition to listing his risk factors. Specific information regarding the claimant's cardiovascular status should detail his past cardiovascular medical history, co-morbidities and adequacy of his medical management, laboratory data and radiologic data reflecting cardiovascular disease status, family history, his social history, and finally, his medication history in general.

Documenting the History of Vioxx Use

Data that needs to be collected relative to Vioxx use will be used to prove that Vioxx ingestion was temporally associated with the injury. In the best case scenario, appropriate, objective evidence of Vioxx use may consist of a physician's order stating the prescribed dose and frequency for Vioxx use, plus a pharmacy printout showing that the prescription was filled and refilled surrounding the period in which the user suffered his thrombotic event. A surprising number of patients save empty or partially empty prescription bottles of Vioxx, and these should be collected and marked as exhibits of which the defense is made aware, and then kept within a safe chain of custody until trial.

More often than not, the claimant's Vioxx history is not so simple to illustrate. The patient may have taken varying doses over time, stopping and starting, using different pharmacies, sharing prescriptions with other family members, etc. The goal in obtaining a Vioxx history is to document:

- Whether the person has taken Vioxx within four days (or whatever number of days the law office has deemed appropriate) immediately preceding the thrombotic event;
- The start and stop dates of each episode of Vioxx usage;
- The dosage prescribed;
- The dose taken;
- The total length of time Vioxx was used;
- Evidence of compliance with the prescribed regimen;
- Concurrent medications used, particularly drugs that effect clotting, such as nonsteroidal anti-inflammatory drugs, steroids, and other Cox-2 inhibiting drugs[ix], e.g., Celebrex (*generic name: celecoxib*) and Bextra (*generic name: valdecoxib*).
- *The recent Canadian study did not provide conclusive evidence of an increased risk of MI for celecoxib, but it may be related to the low doses being consumed by the study sample, since Celebrex is also a Cox-2 drug.*[x]

The supporting documents which commonly illustrate the Vioxx use include the pharmacy printouts, physician's order sheets, prescription labels, billing statements, insurance documents, and physician and nursing notes[xi].

Timelines

The style in which a timeline is developed can be idiosyncratic to the paralegal and/or the law office, however the information collected should document the following:

- Claimant's baseline status (independence in activities of daily living, health, employment, social status);
- Medication history, particularly evidence of the use of Vioxx in relation to the thrombotic event, allegedly caused by the Vioxx use;
- All medical attention, interventions, and diagnostics;
- The details of his thrombotic event, including objective evidence of the event and resulting injuries, the results of all diagnostics performed, which document the injury;
- His status following the injury (independence in activities of daily living, health, employment, social status);
- Evidence, if documented, of a causal connection to Vioxx use;
- Prognosis related to the Vioxx injury and to other co-morbidities, (e.g., the patient may have suffered a small myocardial infarction that may not change his life expectancy, but has a life

expectancy of five years due to a concurrent cancer).

Because the timeline is developed to facilitate access to information within the medical records, it should do just that by citing the date, information source, person who documented the fact and specific page number/Bates stamp number, from which the fact was excerpted. The information cited should be accurate reflections of the medical records; therefore direct quotes from the records are more likely, than paraphrased summaries, to depict the content accurately.

Documenting the Injury

In the early stages of client intake for Vioxx litigation, many different injuries were accepted, because the effects of Vioxx on a large human population were yet to be seen. Our working knowledge about Vioxx injuries is still being developed as clinicians compare notes about what happened to their patients and as researchers re-examine data collected in medical studies. Currently, objectively provable myocardial infarctions and strokes are the only injuries that most law offices accept as being clearly causally related. Other injuries in the grey zone might include pulmonary emboli; arterial clots that lodged in extremities or in the arteries leading to the kidney (renal emboli) or leading to the gut (mesenteric emboli), and deep vein thromboses (DVT's).

Events that are not usually accepted as injuries for purposes of litigation, include hemorrhagic strokes, edema or fluid retention, hypertension, liver and kidney problems, gastrointestinal problems, and events in which there are no objective signs of injury to explain the patient's signs and symptoms, e.g., cardiac ischemic events, (new onset angina or changing angina), and/or transient cerebrovascular events [transient ischemic attacks (TIAs) or RINDs (Reversible Ischemic Neurologic Deficits)].

The paralegal will search the medical documents, for objective evidence supporting the injury claimed. To be able to find the meaningful documents, the paralegal needs to armed with a list of studies and physical findings that are considered appropriate evidence of injury. For example, if the alleged injury is a pulmonary emboli, the paralegal will include in the timeline, results from diagnostic studies: arterial blood gas measurements from the time of the event, CT scan results, D-Dimer results (a blood study that demonstrates that a significant amount of clotting has occurred) and physical findings, on which the clinicians relied to make the diagnosis. In the event the injury is a myocardial infarction, critical evidence may lie in electrocardiogram reports; laboratory results such as cardiac markers (e.g., troponins and CPK MBs); echocardiograms and other studies reflecting the wall motion of the heart; ejection fractions; vital signs, cardiac outputs, etc. If the injury is a stroke, the paralegal would seek documentation of neurological deficits documented in reports of examinations, as would be detailed in neurological consultations or progress notes; evidence of brain injury on MRIs or CT scans of the head, etc. that are consistent with thrombotic or embolic strokes, *not* hemorrhagic strokes.

Potential claimants who did not seek treatment at the time of the event, so that their injuries were not diagnosed and documented in a timely manner, will probably be screened and included in the initial client group, but should know that without good evidence of injury and causation, they may be excluded later.

CONCLUSION

Though the expert will ultimately make the determination as to whether the injury is causally connected to Vioxx use, the litigation team must have an adequate knowledge base to sift through the clients' case presentations and determine which clients warrant the time and expense of additional investigation. Generally, the paralegal is the key team member in data collection, so his understanding of the involved pathophysiology is crucial for information gathering to allow the litigation team to make good client selections. With more than 80 million people using Vioxx between 1999 through 2004 suffering countless injuries, Vioxx litigation is certain to continue for years. Paralegals involved in medical cases should take every opportunity to familiarize themselves with these issues, because a Vioxx case is sure to come across your desk one day soon.

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How Bankruptcy Affects Landlords, Part 2 of 3

By Thomas Rice and Patrick Huffstickler

III. ASSUMPTION, ASSIGNMENT, AND REJECTION OF LEASES IN BANKRUPTCY

A. Debtor's Option

Under section 365 of the Bankruptcy Code, the trustee or debtor in possession has three options in dealing with an unexpired lease. The debtor may:

(1) assume the lease;
(2) assume and assign the lease to a third party; or
(3) reject the lease.

11 U.S.C. 6 365(a). Section 365 allows the DIP or trustee to reject burdensome agreements while requiring the other party to the agreement to continue to do business with the debtor even though they may not want to as a result of the bankruptcy filing. *See In re Chateaugay Corp.*, 10 F.3d 944, 954-955 (2d Cir. 1993). The Bankruptcy Code provides flexibility in connection with the right to assume or reject leases so as to balance the state law rights of landlords to receive the benefit of their bargain as set out in the lease with the congressionally mandated rights of debtors. *See In re Circle K Corp.*, 190 B.R. 370, 376 (B.A.P. 9th Cir. 1995).

Here, it should be recognized that issues sometimes are raised as to whether the Debtor, DIP, trustee or other party can request lease assumption. *See, e.g., In re Lil' Things, Inc.*, 220 B.R. 583 (Bankr. N.D. Tex. 1998); *In re Brewer,* 233 B.R. 825 (Bankr. E.D. Ark. 1999) (Chapter 13 Debtor could assume rental agreement).

B. Business Judgment Rule For Assumption

The decision as to whether assume, assume and assign, or reject a lease is governed by the so-called "business judgment" rule. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985). *See also, Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986). The business judgment rule essentially allows the trustee or DIP to determine, in its "business judgment", whether assuming or rejecting the lease will benefit the bankruptcy estate. As noted by the Fifth Circuit in *Richmond Leasing*, as long as the assumption of an agreement enhances the debtor's estate, it should be approved unless the assumption would be clearly erroneous, too speculative, or contrary to applicable provisions of the Bankruptcy Code. *Richmond Leasing*, 762 F.2d at 1309.

Under the business judgment rule, the court does not substitute its judgment for that of the DIP or trustee, but simply evaluates whether the decision is so manifestly unreasonable that it cannot be based on sound business judgment, but only on bad faith, whim or caprice. *See Richmond Metal Finishers,* 756 F.2d at 1047. Of course, bankruptcy courts, as courts of equity, while generally rubber stamping the decision of the debtor or trustee, do not completely vacate the field. For instance, in *In re Chi-Feng Huang*, 23 B.R. 798 (B.A.P. 9th Cir. 1982), the court stated that the business judgment test may involve a balancing of interests of the general unsecured creditors of the debtor with that of the other party to the agreement. The court stated "it is proper for the court to refuse to authorize rejection of a lease or executory contract where the party whose contract is to be rejected would be damaged disproportionately to any benefit to be derived by the general creditors…" *Id.* at 801.

Another way to describe the court's role in the assumption or rejection process is that of overseer of the wisdom of management of the debtor's property as contrasted with the decider of disputes between a debtor and its creditors, including its landlord. *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.),* 4 F.3d 1095 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994). Here, it should be noted, that when courts apply the business judgment rule they are not generally exercising their independent review and analysis of the proposed decision, but simply determining if the decision is supported by a rational business view, and that assumption and rejection matters are considered summary proceedings where the court is simply attempting to review the trustee or DIP's decision to assume or reject a lease to provide for the "swift administration" of the estate. *Orion Pictures,* 4 F.3d at 1098. With this consideration in mind, it is clear that the bankruptcy courts will generally defer to the trustee's or DIP's decisions regarding assumption and rejection issues based upon the court's view that administration of the bankruptcy estate would be enhanced. In short, while it may be unfortunate, the bankruptcy courts tend to focus a good deal less on the rights of lessors and give greater deference to the position of the debtor. This is especially true in the context of reorganization cases under Chapter 11, as the debtor will certainly argue that either assumption or rejection of the lease benefits its ability to reorganize.

C. Assumption or Rejection of Entire Agreement

While the debtor is given the opportunity to assume or reject its executory contracts and leases, it is important to recognize that assumption or rejection of the lease must be made with respect to the entire agreement. *See In re Audra-John Corp.*, 140 B.R. 752 (Bankr. D. Minn. 1992) (citing cases). Partial assumptions or assumptions of select provisions of lease are not authorized and the trustee or DIP assumes or rejects unexpired agreements

in their entirety. *Century Indem. Co. v. NGC Settlement Trust (In re National Gypsum Co.)*, 208 F.3d 498, 506 (5th Cir. 2000). In this context, it is often stated that the trustee or DIP has to assume the agreement or reject the agreement in its entirety, with both its benefits and its burdens. *See, e.g., City of Covington v. Covington Landing L.P.*, 71 F.3d 1221 (6th Cir. 1995). On the other hand, if the agreement contains separate, severable agreements, the debtor may reject some, but not others; rejection does not require rescission of executed portions. *Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735 (5th Cir. 1996); *In re Adelphia Bus. Solutions, Inc.* 322 B.R. 51(Bankr. S.D.N.Y. 2005) (citing numerous cases).

D. Extension of Time to Assume or Reject Non-residential Real Property Leases

Under BAPCPA, Congress revised the time periods relating to the debtor's ability to assume or assume and assign a non-residential real property lease. Section 365(d)(4)(A) now provides that:

> (4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of –
> (i) the date that is 120 days after the date of the order for relief; or
> (ii) the date of the entry of an order confirming a plan.

11 U.S.C. 6 365 (d)(4)(A). Initially this gives the debtor a longer period of time to review its nonresidential real property leases when compared to the previous section 365 (d)(4).[2] The DIP or trustee's previous unilateral right to request an extension, however, is then limited under BAPCPA, to a single 90 day extension of the deadline, after demonstrating "cause" for such extension. "The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause."

11 U.S.C. 6 365 (d)(4)(B)(i). While there had been previous debate over the grant of extensions to debtors, it was unquestioned that the debtor had the unilateral right to at least seek an extension. The Fifth Circuit had stated that courts should be cautious about allowing such extensions and that extensions of the section 365(d)(4) deadline should be limited in time and it is better to have several short extensions rather than a single lengthy extension. *In re American Healthcare Management, Inc.*, 900 F.2d 827 (5th Cir. 1990). On the other hand, other circuit courts had indicated that it would be appropriate to grant a lengthy extension and bankruptcy courts following those circuit court cases often extended the deadline through the date of confirmation of the plan of reorganization. *See In re Channel Home Ctrs., Inc.*, 989 F.2d 682 (3d Cir. 1993). *See also In re Klein Sleep Prods., Inc.*, 78 F.3d 18 (2d Cir. 1996) (due to potential administrative expense claims, extension of the section 365(d)(4) deadline for lengthy periods, including through confirmation, is appropriate). Under BAPCPA, if the debtor needs further extensions beyond the 210 days, then the debtor must get the prior written consent of the landlord. "If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance." 11 U.S.C. 6 365 (d)(4)(B)(ii). Numerous commentaries have been written about the impact that the new section 365(d)(4) will have on complex national retail cases involving numerous leased locations. Bruce Buechler, Esq. and Bruce S. Nathan, Esq., *The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Real Property Lessors and Owners and Other Bankruptcy Law Developments*, New York State Bar Association, Committee on Leasing, January 18, 2006; Brendan Linehan Shannon and Ian S. Fredericks, *Summary of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, ABI Committee News: Financial Advisors Committee, May 2005; Robert N.

H. Christmas, *Designation Rights – A New, Post-BAPCPA World,* American Bankruptcy Institute Journal, February 2006.

Previously, under section 365(d)(4) of the Bankruptcy Code, the trustee or DIP could extend the initial 60-day period for "cause." Cause is not defined in the Bankruptcy Code; however, several courts have enumerated a number of factors to be considered in determining if cause existed for an extension of the previous 60-day deadline. While there are no currently reported decisions relating to the establishment of "cause" under section 365(d)(4)(B)(i), it would appear that the previously established case law enumerating factors for consideration by courts would still be applicable. In *In re S & M Food Services, Inc.*, 117 B.R. 497, 498 (Bankr. E.D. Mo. 1990), the factors considered by the court included:

(1) whether the leases are a primary asset of the debtor;
(2) if the leases were rejected, whether the debtor's business operations would likely terminate;
(3) whether the decision to assume or reject is a vital consideration in the debtor's preparation of a reorganization plan;
(4) the time the debtor has had to review its position with respect to commercial leases;
(5) whether the debtor has had a reasonable period of time to determine the value of the commercial leases and the context of the various alternatives in a plan of reorganization;
(6) whether the post-petition lease payments are current;
(7) whether a dispute exists between the debtor and certain lessors with respect to the amount due pre-petition;
(8) that the commercial properties are occupied by the debtor and the debtor is conducting active business at each of these locations;
(9) whether the debtor is actively attempting to formulate a reorganization plan;
(10) no evidence indicating that the lessors would suffer unnecessary harm or prejudice if the period to assume or reject is extended.

Other factors considered by the courts are whether the case is complex and involves a large numbers of leases for the debtor to analyze and determine the appropriateness of assumption or rejection. *See In re Wedtech Corp.*, 72 B.R. 464 (Bankr. S.D.N.Y. 1987). The *Wedtech* court also noted that certain factors weigh against an extension of the deadline to assume or reject:

(1) where the debtor fails to keep current on lease payments;
(2) where the landlord is damaged beyond a point that it can be compensated under the Bankruptcy Code; or
(3) where the debtor fails or is unable to formulate a plan of reorganization within a reasonable time.

Wedtech, 72 B.R. at 472. *See also In re Burger Boys, Inc.*, 94 F.3d 755, 761 (2d Cir. 1996); *In re Beautyco, Inc.*, 307 B.R. 225, 231 (Bankr. N.D. Okla. 2004); *In re Service Merchandise, Co.*, 256 B.R. 744 (Bankr. M.D. Tenn. 2000); *In re Musikahn Corp.*, 57 B.R. 938 (Bankr. E.D.N.Y. 1986) (stating that the trustee must have time to make a "careful and informed assessment of the lease's benefits and burdens to the estate").

E. Time to Assume Personal Property Leases

In a Chapter 11 case, the trustee or the DIP may assume or reject a lease of personal property of the Debtor at any time before the confirmation of a plan. However, the court, on request of any other party to the contract or lease, may order that the trustee (or DIP) determine within a specified period of time whether to assume or reject such contract or lease. 11 U.S.C. 6 365(d)(2).

Here it should be noted that there is a potential fourth option if both debtor and the landlord are indifferent (or cagey?) as to a personal property lease or residential real property lease, which is to not really address the agreement in the bankruptcy and let it "ride through" the bankruptcy.[3] While this scenario really shouldn't exist under Bankruptcy Code section 365, it does seem to occur in rare instances and, when faced with the situation, the courts seem to take the position that the failure to address the agreement in the bankruptcy case means that it continues to exist and that the party's rights are essentially unchanged, such that they should look to state law after the bankruptcy case is concluded to determine the parties' respective rights and obligations. This is known as the "Ride-Through Doctrine." *See, e.g., Stumpf v. McGee (In re O'Connor),* 258 F.3d 392 (5th Cir. 2001); *In re Hernandez,* 287 B.R. 795 (Bankr. D. Ariz. 2002) (good discussion of doctrine). *See also, In re Nat'l Gypsum Co.*, 208 F.3d 498 (5th Cir. 2000).

To a certain extent, the "Ride Through" doctrine has been modified by BAPCPA. In the case of an individual that is a chapter 11 debtor, section 365(p)(3) now provides that:

> In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

11 U.S.C. 6 365 (p)(3). The fact that unexpired personal property leases will now be deemed rejected, if they are not assumed by the debtor in the plan confirmed by the court, should limit any argument that the unexpired personal property lease "Rides Through" the bankruptcy case.

F. Duty to Perform

Pending the decision to assume or reject, the trustee or DIP is required, with respect to leases of non-residential real property, to perform all of the obligations in a timely fashion. 11 U.S.C. 6 365(d)(3). The trustee or DIP is also required to immediately surrender the premises under the non-residential real property lease in any case where the lease has been deemed rejected by expiration of the initial 60-day period or any extended period. 11 U.S.C. 6 365(d)(4). Once the lease has been reject-

ed, it cannot be revived by a plan of reorganization. *In re Tri-Glied, Ltd.,* 179 B.R. 1014 (Bankr. E.D.N.Y. 1995); *In re BSL Operating Corp.*, 57 B.R. 945 (Bankr. S.D.N.Y. 1986).

In connection with the decision to assume or reject, it should be noted that the Bankruptcy Code provides for a distinction between the treatment of unexpired residential leases and unexpired non-residential leases. Under section 365(d)(2) of the Bankruptcy Code, in a Chapter 11 bankruptcy, the trustee or DIP may assume or reject an unexpired lease of *residential* real property at any time until the confirmation of the Plan unless the court shortens or lengthens the time period. The distinction between residential and non-residential leases was implemented under the Bankruptcy Amendments and Federal Judgeship Act of 1984 as there was no distinction prior to this time between residential and non-residential real property leases. Prior to the 1984 amendments, the trustee or DIP had until confirmation to assume or reject its executory contracts, including its leases. The Bankruptcy Amendments and Federal Judgeship Act of 1984 enacted the 60-day period to assume or reject non-residential real property leases unless the court extended the period and placed the burden on the debtor to obtain the extension or risk rejection of the lease by operation of law under section 365(d)(4). *See In re Circle K Corp.*, 190 B.R. 370 (B.A.P. 9th Cir. 1996).

It is also important to note that the bankruptcy court has the ability to excuse the debtor from performing its lease obligations that arise during the first 60 days of the bankruptcy case, but the delay in performing such obligations cannot extend past 60 days. 11 U.S.C. 6 365(d)(3).

G. Shortening the Time for Assumption or Rejection of an Unexpired Lease

A non-debtor party to an unexpired lease may request that the Court require the Trustee or DIP to determine whether to assume or reject an unexpired lease at any time. 11 U.S.C. 6 365(d)(2). In this circumstance, the court balances the equities to determine if the Trustee or DIP should be required to take such action. The determination of a reasonable time to compel the debtor to assume or reject the unexpired lease is within the Bankruptcy Court's discretion "in light of the circumstances of each case." *In re Burger Boys*, 94 F.3d 755, 761 (2d Cir. 1996). In determining what constitutes a reasonable time, the Second Circuit has set out a number of factors, including: (1) damage the non-debtor party will suffer beyond the compensation available under the Bankruptcy Code; (2) the importance of the contract to debtor's business and its reorganization; (3) whether the debtor has had sufficient time to appraise its financial situation or the potential value of its assets in formulating a plan; (4) whether exclusivity has terminated; (5) the complexity of the case; (6) the number of similar contracts or leases the debtor must evaluate; and (7) the need for judicial determination of whether a lease exists. *See In re Enron Corp.*, 330 B.R. 387 (Bankr. S.D.N.Y. 2005) (citing *Theatre Holding Corp. v. Mauro,* 681 F.2d 102, 105-06 (2d Cir. 1982) and *In re Burger Boys, Inc.*, 94 F.3d at 761 for the relevant factors and consideration of a reasonable time to compel assumption or rejection of a contract).

H. Curing of Defaults and Adequate Assurance of Future Performance

In connection with an assumption, in order for the court to approve the assumption, the debtor must cure its prepetition and post-petition defaults pursuant to section 365(b) of the Bankruptcy Code. Under BAPCPA, the ability of the trustee or DIP to cure non-monetary defaults was expanded. Previously, there was a split among the Circuit Courts as to whether a trustee or DIP had to cure non-monetary defaults prior to assumption. Compare *In re Bankvest Capital Corp.,* 360 F.3d 291 (1st Cir. 2004) (non-monetary defaults do not need to be cured) with *In re Claremont Acquisition Corp.,* 113 F.3d 1029 (9th Cir. 1997) (non-monetary defaults must be cured). In the *Claremont* case, the debtor sought to assume and assign its interest in a dealership agreement. The debtor had previously failed to operate the dealership for a period beyond seven (7) consecutive days, which was a non-monetary default under the dealership agreement. In considering an appeal of the bankruptcy court's decision to approve the assumption and assignment, the Ninth Circuit Court of Appeals was required to consider whether the debtor was required to cure the non-monetary default in order to assume the contract. *Id.* at 1032-35. The Ninth Circuit held that the debtor was required to cure non-monetary defaults and that since the debtor was unable to cure its previous inability to operate, the dealership agreements could not be assumed. *Id.* at 1034-35. The new provisions of BAPCPA provide that:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee-
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph.

11 U.S.C. 6 365(b)(1)(A). This new provision allows the trustee or DIP to assume a contract, which may have been subject to a non-monetary default that could only previously be cured with the use of a time machine, by providing that performance

of these provisions must occur at the time of assumption. The non-debtor party to the lease will also be entitled to recover any pecuniary losses that were associated with the debtor's failure to previously perform its non-monetary obligations.

If the debtor is in default, it must also show it can provide adequate assurance of future performance. *In re Rachels Industries, Inc.*, 109 B.R. 797 (Bankr. W.D. Tenn. 1990). What constitutes adequate assurance of future performance is decided on a case-by-case basis. *See, e.g., In re Texas Health Enters.*, 246 B.R. 832 (Bankr. E.D. Tex. 2000). The courts state that adequate assurance of future performance is generally less than an absolute guarantee of performance. The courts often refer to simply a showing by the debtor that its financial condition reflects an income stream and financial strength sufficient to meet the debtor's lease obligations, that the general economic outlook in the debtor's industry is sufficient for debtor to operate and, to the extent applicable, that a guarantee of the lease obligations by a liquid third party exists. *See In re Carlisle Homes Inc.*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

The burden of proof for demonstrating that adequate assurance has been provided is on the debtor. *In re Rachels Indus., Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990). A debtor cannot choose to accept the benefits of a contract without accepting the corresponding burdens imposed by the same agreement. *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

The Second Circuit discussed the importance of requiring debtors to demonstrate adequate assurance of future performance in *In re Ionosphere Clubs, Inc.*, 85 F.3d 992 (2d Cir. 1996), stating that Congress's intent in imposing conditions on the ability of the debtor to assume the contract was "to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance." *Id.* at 999(citing *In re Superior Toy & Manufacturing Co.*, 78 F.3d 1169, 1174 (7th Cir. 1996) ("If the trustee is to assume a contract or lease, the court will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain." (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5845; H.R. Rep. No. 595, 95th Cong., 2d Sess. 348 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6304-05.)). Bankruptcy courts need not approve every contract that is beneficial to the debtor if the debtor cannot assure performance on the contract. *Richmond Leasing Co.*, 762 F.2d at 1309. Assurance of performance provides a measure of protection to the non-debtor. *In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000). *See also In re General Oil Distributors, Inc.*, 18 B.R. 654, 658 (Bankr. E.D.N.Y. 1982)("What constitutes adequate assurance is a factual question to be determined on a case by case basis with due regard to the nature of the parties, their past dealings and present commercial realities."). A recent case out of the Fifth Circuit, *Tex. Health Enters. V. Lytle Nursing Home (In re Tex. Health Enters.)*, No. 02-40734, 2003 U.S. App. LEXIS 15490 (5th Cir. July 31, 2003) highlights the consideration courts must undertake in determining whether the debtor has provided adequate assurance of future performance. In *Texas Health*, the debtor sought to assume a management contract to operate a nursing home for the benefit of the estate. The counterparty to the management agreement objected to its assumption. The debtor presented testimony that the management contract was beneficial to the estate and that the debtor was prepared to cure its defaults and provide adequate assurance of future performance. Testimony on behalf of the counterparty demonstrated that the debtor had a history of monetary defaults, poor communication, and outright refusals to follow instructions from the counterparty. The bankruptcy court found in favor of the counterparty and held that the contract could not be assumed. *Id.* at **7. On appeal, the debtor argued that the bankruptcy court must allow assumption if the contract would benefit the estate and that the bankruptcy court could not rely on evidence of prior defaults to support its conclusion that the debtor was unable to perform. The Appellate Court noted that assurance of performance provides a measure of protection to the non-debtor. *Id.* at **8. The Court of Appeals then addressed whether it was appropriate to consider prior defaults and found that "[e]vidence of prior defaults, though, is probative of whether the debtor will be able to perform in the future." *Id.*

I. Compensation for Pecuniary Loss

In connection with an assumption, the debtor is required to compensate the other party to the lease (or provide assurance that it will promptly compensate the other party to the lease) for its actual pecuniary loss in connection with any defaults under the lease. *See* 11 U.S.C. 6 365(b)(1)(B). As previously stated, BAPCPA also provided under section 365(b)(1)(A), that previously losses resulting from certain non-monetary defaults must also be cured in order to assume an unexpired lease. 11 U.S.C. 6 365(b)(1)(A). This can be an important provision as actual pecuniary losses have been found to include attorney's fees. *In re Westworld Community Healthcare, Inc.*, 95 B.R. 730, 733-34 (Bankr. C.D. Cal. 1989) (Section 365 creates an independent ground for recovery of attorney's fees in connection with the assumption of a lease). However, it should be noted that the majority of courts require that the underlying lease provide for attorney's fees and that section 365(b)(1)(B) does not create an independent right to recover attorney's fees. *See In re Westside Print Works, Inc.*, 180 B.R. 557 (B.A.P. 9th Cir. 1995). *See also Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843 (4th Cir. 1999); *In re Child World*, 161 B.R. 349, 353-54 (Bankr. S.D.N.Y. 1993); *In re Hillsborough Holdings Corp.*, 126 B.R. 895, 898 (Bankr. M.D. Fla. 1991) (rejecting *In re Westworld); In re Joshua Slocum, Ltd.*, 103 B.R. 601, 607-08 (Bankr. E.D. Pa. 1989) (rejecting *In re Westworld* and holding subsection (B) does not create an independent right to attorney's fees).

In an interesting Texas case, *In re Eagle Bus Mfg.*, 148 B.R. 481 (S.D. Tex. 1992), the bankruptcy court addressed the issue of whether the cure provisions of section 365 require payment of interest in connection with assumption. The bankruptcy court found that where the lease was silent and state law failed to provide for interest on unpaid rents, payment of interest was not a pre-requisite for assumption of an unexpired lease. *In re Eagle Bus Mfg.*, 148 B.R. at 482-83.

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Dealing with Dividends

Craig Hackler, Financial Advisor, Raymond James Financial Services

It would seem that the income taxation of dividends ought to be a pretty simple topic. Alas, nothing is simple when it comes to taxes. As you get ready to look at your taxes, here's a summary of some of the basic rules regarding the taxation of dividends.

For our purposes, we'll restrict our discussion to dividends paid by tax-paying "C" corporations. Many smaller companies are organized as "S" corporations. An S corporation has all the state law attributes of a regular corporation (limited liability, perpetual life, etc.) but is taxed much like a partnership with earnings and losses flowing through the corporation to the returns of the individual shareholders. We're also not going to deal with mutual fund dividends.

The "garden variety" dividend that is paid by a corporation is taxable to individuals as a qualified dividend and is taxed at their long-term capital gains rate. An individual pays taxes on the dividends based on the year in which they are received, not in the year on which the dividend is based. A dividend is taxed to the buyer of a stock if the stock is purchased after it is declared but before it is paid if the purchase occurs before the ex-dividend date. Similarly, the dividend is taxed to the seller if the sale occurs after the ex-dividend date but before payment date. This holds true even if the dividend is reflected in the selling price of the stock.

Sometimes a company will make a dividend payment that is in excess of its accumulated earnings and profits. This is probably most common among utility companies. These dividends are deemed to be "return of capital." Return of capital dividends are not taxable. However, the taxpayer must reduce his/her basis in the stock by the amount of the return of capital dividend. Return of capital dividends in excess of basis are taxed as capital gains.

Some corporations permit dividends to be reinvested in company stock. Generally, these reinvested dividends are taxable to the shareholder. In addition, depending on how the plan is structured, the shareholders may have to pay taxes on the commissions or other transaction costs paid by the corporation in running the plan. The shareholder receives basis in the reinvested shares equal to the amount of the dividends included in income. Note, that from 1982 to 1985 taxpayers were allowed to exclude up to $750 ($1,500 on joint returns) in certain reinvested utility dividends. These reinvested shares have a zero cost basis.

Stock splits and stock dividends are generally not taxable events. Taxpayers merely adjust their basis to spread it among more shares in proportion to the fair market value of old and new shares on the date the stock dividend is distributed. There are a few cases where a dividend paid in stock may be taxable. The most common occurs when the shareholder is given a choice to receive a dividend paid in cash or in stock. A distribution of stock rights, in most cases, is also not a taxable event. The holding period of shares acquired by virtue of a stock split relates back to the original shares. In other words, the holding period of the old shares is "tacked on" to the holding period of the new shares.

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

Ten Ways to Mess Up E-Discovery

Malcolm Wells, Litigation Solution, Inc.

On December 1, 2006, the new Amendments to the Federal Rules of Civil Procedure Addressing Discovery of Electronically Stored Information went into effect. More simply put, the rules on how to use E-Discovery changed on that date. While the rotation of the earth did not stop, and there were no major riots in the streets, the changes were significant to attorneys and paralegals alike. The degree of understanding the rules and what they mean can give you either a substantial competitive advantage, or a devastatingly competitive DISadvantage.

E-Discovery is still a mystery to many people, so the rules changes add yet another layer or two of confusion. So, in an effort to make things a little simpler, here are ten common ways we've seen clients ruin perfectly good E-Discovery:

10. Not Checking CDs for Viruses and Malware

This is easy enough: you receive a CD as evidence and you want to see what's on it. Most of us, however, have an "autorun" feature for our CD drives that automatically runs whatever executable may be on the CD. There have been cases where a person being investigated "accidentally" leaves a CD to be found; unbeknownst to the finder of said CD, the suspect has put a file on the CD that launches a virus or worm onto the hard drive (and potentially the office network), or it launches malevolent software (malware) that wipes out the entire hard drive. To resolve this, you can:
deactivate the autorun feature being holding down the shift key while the CD is inserted (not always reliable);
change your registry to turn off the autorun feature permanently (not something a typical user should do);
scan the CD for viruses on a "safe" PC. In some firms, this may be done automatically by your virus-scanning software — please check with your Network Administrator or helpdesk to be sure;
Work with a third-party vendor to scan the CDs as part of their E-Discovery services; this is particularly a good thing to do if you have a lot of CDs to review.

9. Connecting Hard Drives to your PC or Network

Your IT person is probably one of the most knowledgeable folks around when it comes to data stuff; however, that doesn't mean that they have been trained to work with the data in a *forensically sound and admissible manner.* That's no slight to them; they just may not understand the legal ramifications of handling evidence. Just because they *can* find information on the hard drive received doesn't mean they *should.*

This can be a bad thing for several reasons:

- Every time a hard drive is powered-up or booted-up, the operating system writes files to it. That may write over "deleted" information on the hard drive that could be used for evidence;
- If the hard drive is attached to a network, files from your users could accidentally be written to that hard drive, tainting the evidence. This happened in a Department of Justice case where proprietary information was written to the hard drives in question, and then produced to the opposing side; See ***United States v. Rigas, 281 F. Supp. 2d 733 (S.D.N.Y. 2003).***

If the IT staff (or even your current vendor) do not use write-blocking devices, the hard drive WILL be altered. Write-blocking devices prevent information from being written to the hard drives, and prevent the last access dates for files and folders from being changed.
If the people handling the hard drives have not been properly trained or credentialed, then the evidence may be disallowed (see Reason #2).

8. Viewing PST Files in Your Own Outlook

Most of us have done this one time or another. You receive a CD from your client or opposing counsel containing several Microsoft Outlook mailboxes (otherwise known as .pst files). You naturally want to see what's in them. So you import one of those .pst files into your Outlook, and you print out one of the messages: what is on the top of the page? YOUR name, not the name of the original owner; you now "own" that mailbox. Don't produce anything from that folder; opposing counsel may say that the data has been spoliated, or tainted. If you still want to do this, it is suggested you first copy the .psts to other media, then import to your Outlook; just make sure you don't use the original files.

If you have several .pst files to review, you should consider a third-party vendor who could help cull-down or filter thousands of emails (and their attachments) in hours or days by using keyword searches and date ranges; this could save you weeks or months of review.

7. Letting the Client Do All of the Data Harvesting

Even clients with the best intentions and talent will miss something. Chances are they will be supplying only the active files from the custodians' computers. There may be deleted files that could be forensically saved that may be valuable to your case. One of our clients won their case by finding such a file forensically.

Again, as discussed in Reasons #9 and #2, the qualifications of whomever is gathering the data will be questioned, so make sure they are properly trained and have the right certifications (see Reason #2).

Finally, it just looks bad that a client's employee is gathering the data for a case. Opposing counsel will try to discredit them by suggesting that they just got files favorable to their case, thus protecting their paycheck. Data acquisition by a third party helps eliminate those perceptions. In

addition to this, simply "Ghosting" a hard drive is not a forensically sound method of acquiring hard drive.

6. Don't Have A Plan (or Plans)
You need to take a systematic approach, like you would in the paper world:

- Create procedure manuals, so everyone's doing it the same way.
- Is law firm going to host the data during review?
- Is vendor going to host the data during review?
- Keep production in mind when designing review procedure.

And who will do the reviews? Typically, the Law Firm will perform the subjective review, determining a document's relevance, issues, privilege, etc. The objective review can be performed by a third-party vendor by searching key words, date ranges, individuals, filetypes, etc. We did an objective review for one client, reducing 13GB of emails (a million pages) to a little over 900MB (70,000 pages) in a matter of hours.

5. Print Everything or Convert Everything to TIFF Images
We hear this a lot, but it is just impractical from several angles:

Very slow to search:
Let's assume about 20GB of information: that would generate about 1,540,000 printed pages. If we assume it takes 1 second to review each page for relevance; that's 25,667 minutes, or about 427 hours. That is almost 11 forty-hour work weeks. Since it is unlikely that the second-per-page review would actually happen, let's assume 10 seconds per page; that increases the review time to 2 years! And that is just to review for relevance!

Loss of metadata:
Most Windows-based software products embed information about the document within the document itself. Information such as the author, creation date, modification date, last print date, even the directory structure can be saved in the metadata. This can be valuable data for your case. When you print the document, the metadata does not print; if you image the document, the metadata is not included. It can be searched, however, by several software products that analyze and review native-format files, and can be included in keyword searches. More and more companies are masking and scrubbing their metadata, but there is a good chance it is still available for your case.

Cost:
We had a client that was adamant about printing the E-Discovery he received. 17 Microsoft Outlook mailboxes were going to generate about 600,000 pages, take about a week to print and cost about $185,000. As an option, converting everything to TIFF would take 2-3 days at an approximate cost of $136,000. To do an objective review with keyword searching of the native-format files could be done in less than 24 hours at a cost of $4,250. Guess what he ended up doing?

4. Not Understanding Your Client's Systems or Data
The new rules mandate that the attorneys

discuss their E-Discovery needs at a Meet-and-Confer early in the case. If the attorney does not understand his client's information infrastructure, he may not realize what opposing counsel is asking for, or understand what it will take to get it. It doesn't mean that he needs to start wearing a pocket protector, but he should probably get help from someone who does.

The kinds of questions that will come up in the Meet-and-Confer will include:

- What information is to be examined: email, edocs, web mail, instant messaging, PDAs, cell phones?
- Where is the information stored? Hard drives, backup servers, email servers, "ghost images"?
- How will it be produced? CDs, TIFFs, printed out, hard drives?
- Will it be "unduly burdensome" to access and review?

You need to prepare a collections plan: Interview IT staff to determine retention policies and physical location of data and backup media. Not just the CIO, but the people that do the actual work—you'll be amazed at what they know and where it is. How many PCs? What operating systems? What are the sizes of the hard drives, etc.? How many servers? Where are they? What network operating systems? What are the sizes of the hard drives, etc.? What is the email system? Where are the files stored (on individual workstations? On Exchange Server? Both?) How many custodians? Is there a log in HR file of what equipment was issued to particular employees? What are the document retention/destruction policies and plans? What are the litigation hold policies and plans? Do they even have plans? How can you help them create those plans?

3. Making Promises You Can't Keep

Make sure you get your client's IT department and/or outside consultants involved early on. Just because a plan has been agreed to doesn't mean it's the right plan. Don't agree to produce the last ten years of emails if you don't understand what that really means. Accept that there are things you don't know you don't know. Most attorneys know the law, but don't know IT; on the other hand, the IT guys know bits and bytes, but don't know the law. You need to find a common language between legalese and techno-babble and work together to develop a successful E-Discovery plan and procedures.

2. Using the Wrong People to Collect the Data

Two key phrases in the E-Discovery world are "forensically sound" and "admissible evidence". Acquiring evidence in a forensically sound manner means that certain procedures are followed and documented in accordance to established industry standards; it is critical that the person or persons acquiring and searching the evidence are properly trained and certified in these procedures. There are several certifications to be had, most of which are hardware and/or software specific. One of the certifications that is hardware and software independent is the Certified Computer Examiner (CCE), sanctioned by the International Society of Forensic Computer Examiners (ISPCE); this body also trains and certifies many of the law enforcement agencies around the globe.

In the State of Texas, according to the Texas Occupations Code, Sections 1702.101 and 1702.104

> "Unless the person holds a license as an investigations company, a person may not:
>
> ...engage in the business of securing, or accepts employment to secure, evidence for use before a court..."
>
> There are certain exemptions to this according to Texas Occupations Code Section 1702.324
>
> (1) A licensed attorney while engaged in the practice of law; (and by extension, a direct employee of a licensed attorney, engaged in the practice of law, working under their direction;)
>
> (2) A Certified Public Accountant (CPA); or
>
> (3) A Licensed Private Investigator.

What this says is that in the State of Texas, you may have invented computer forensics and followed every procedure, dotted every "i" and crossed every "t", but if you are not in one of the categories mentioned above, there is a chance that the evidence found could be tossed out. It may seem a minor point, but it is the law, and motions have been filed to exclude evidence that was gathered by a computer forensics expert who was not also a licensed private investigator.

So, as you deal with evidence located on hard drives, CDs, cell phones, digital cameras, whatever, make sure that you are doing so in a forensically sound manner in order to have admissible evidence.

1. Working From the Original Media

While this may seem like common sense, we have seen instances where backups or clones of the original media were not made, and the files were corrupted, damaged or lost. Further, as you access files, the metadata on those files change, potentially tainting or spoliating the evidence. There is no "Undo" button for this; if the digital evidence is not properly acquired in the beginning, it can ruin the entire E-Discovery.

Extra Credit – Waiting

Every moment you wait, potential evidence is over-written, destroyed or just lost. People are becoming more and more sophisticated in hiding digital information and evidence; the longer you wait, the more likely valuable information may be lost.

The usage of E-Discovery can save you and your clients a great deal of time and money. By understanding and embracing the new federal rules, you can set yourself up to have a strong competitive advantage. So, avoid the common mistakes in this article and be sure to hug your "propellerhead" the next time you see him (or her); they may save your next case.

Mr. Wells is a Certified Computer Examiner (CCE), Texas Licensed Private Investigator and CT Summation Certified Trainer. Prior to joining Litigation Solution, Inc., he was an Owner and Partner at CUW LitSupport, a company specializing in training legal professionals in litigation support software, including CT Summation, Trial Director and Sanction. Previous to CUW LitSupport, Mr. Wells spent 23 years with AT&T, Lucent Technologies and Avaya, specializing in selling to and consulting with clients and their voice and data communications and networking needs.

ET *al.* . . .

CONGRATULATIONS ARE IN ORDER

Two District 3 (Fort Worth) members were honored at the Fort Worth Paralegal Association's annual Holiday Luncheon held on December 7, 2006.

Julie K. Sherman, TBLS, was chosen as Paralegal of the Year; and Debbie House, CP, received the Volunteer of the Year award.

Julie has 21 years experience as a paralegal and, since 1996, has been employed by Cantey Hanger in its litigation section. She is an extremely active member of FWPA, having served on its board for many years.

Debbie is a real estate paralegal with Beadles, Newman & Lawler, PC. She has served as the Paralegal Division of the State Bar, District 3 Director for the past three years. She is currently President-Elect of FWPA and has served on its board since 2001.

Legislative and Case Law Updates 2006

By Heidi Beginski

The following is a very brief synopsis of some of the significant legal developments in Texas during the past year. This summary is not exhaustive in either the topics included nor the breadth of scope of changes to each topic, but will provide some general information in areas of interest to paralegals.

Life, Taxes and Other Inevitables

Calling Children to Testify
Chapter 104 of the Family Code provides several methods to procure testimony which attempt to significantly insulate children from the emotional distress of having to face a parent in the courtroom. These provisions made admissible a recorded audio statement and also allow the recorded video testimony of a child. Remote televised broadcast of a child's testimony is also admissible. But note that Section 104.005 actually prohibits a child from being compelled to testify if any of these other methods are used.

Redefining Covenants Not to Compete
In late October, the Texas Supreme Court issued *Alex Sheshunoff Mgmt Svcs v. Johnson,* 2006 WL 2997287 (Tex. Oct. 20, 2006), the court held that a non-compete covenant is not initially enforceable against an at-will employee if the employer has no corresponding enforceable obligation, but it becomes enforceable when the employer performs the promises it made in exchange for the covenant.

An Expanded Business Tax
In May 2006, Governor Rick Perry signed into law an expanded business tax, commonly known as the new Texas margin tax. The bill replaces the franchise tax. As a result, many businesses and professionals that paid no franchise tax, including some law firms, must now pay. First returns are not due until May 2008, but many taxpayers began accruing liability for the tax on January 1, 2007.

Third Party Dram Shop Liability
On November 3, the Texas Supreme Court withdrew its prior opinion in *F.F.P Operating Partners L.P. v. Duenez*, No. 02-0381, 2004 WL 1966008 (Tex. Sep. 3, 2004) and issued a new opinion regarding the interplay between the Dram Shop Act and the Proportionate Responsibility Statute. The majority's rationale is that imposing liability on the dram shop for the conduct of the drunk conflicts with the Proportionate Responsibility Statute. The court points out that a dram shop should only be held jointly and severally responsible if it is greater than 50 percent responsible. Further, the court notes that a fundamental tenet of tort law rests on the premise that liability stems only from one's own conduct. Finally, the court reasons that the Dram Shop Act's intent to deter providers from serving obviously intoxicated individuals is still being accomplished because, among other reasons, the provider is still subject to having its license to serve alcohol revoked.

If You Think You've Mastered the Nuances of HIPAA, Think Again (and Other Issues in Personal Injury/Medical Malpractice Cases)

HIPPAA Enforcement
Effective March 16, the secretary of Health and Human Services adopted rules for the imposition of civil money penalties on entities that violate the rules implementing the administrative simplification provisions of the Health Insurance Portability and Accountability Act (HIPAA). The final rule amended the previously existing rules relating to the investigation of noncompliance to make them apply to all of the HIPAA administrative simplification rules, rather than exclusively to the privacy standards. The final rule also amended the rules relating to the process for imposition of civil money penalties and elaborates on the investigation process, bases for liability, determination of the penalty amount, grounds for waiver, conduct of the hearing, and the appeal process.

Paid v. Incurred

CPRC section 41.0105 included a change regarding damages in personal injury cases. The statute reads, "….recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." There is debate as to what this law means. The distinction is important. Plaintiffs' attorneys may assert that gross medical bills are incurred by the plaintiff, making gross medical bills recoverable with the Collateral Source Rule intact. Defendants may argue that this law eliminates the Collateral Source Rule completely. If a defendant gets the benefit of reduced medical bills, it reduces the value of the case.

Non-Economic Damages in Medical Malpractice
You've probably heard of this one: the non-economic damage caps under the medical liability statute. In a medical malpractice case, under CPRC section 74.301, doctors and nurses can only be held liable for non-economic damages up to $250,000. Up to two institutional defendants, such as hospitals or nursing homes, can allow for an additional $250,000 each. That allows for a maximum possible benefit of $750,000, provided the case has the combination of defendants necessary.

The Long Arm of the … Board

Texas Medical Board Changes
The Texas Medical Board adopted numerous changes to its rules in 2006, many of which were intended to implement changes made to the Texas Medical Practice Act in the previous legislative session. For example, effective May 1, the rules regarding acupuncture (Chapter 183) were revised extensively. Effective June 29,

PARALEGAL DIVISION VOTE 2007

District Director Elections
Bylaws Amendments

District Director Elections:
The **PD's SIXTH ONLINE ELECTION** will take place April 17, 2007 through May 2, 2007. The election of district directors to the Board of Directors will be held in odd-numbered districts (Districts 1, 3, 5, 7, 11, 13, and 15).

Bylaws Amendments:
All Active members as can vote for or against the proposed **Bylaws Amendment(s)** of the Division. For an explanation of the proposed Bylaws amendments, please go to *http://txpd.org/TPJ/46/etal04.asp.*

All ***active members*** of the PD in good standing as of February 1, 2007 are eligible to vote. **All voting must be completed on or before 11:59 p.m., May 2, 2007.**

Please take a few minutes to logon to the PD's website and cast your vote for your district's director (only odd-numbered districts vote in 2007). 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.*

TAKE THE TIME, MAKE YOUR VOICE HEARD!

the rules regarding office-based anesthesia (Chapter 192) were significantly modified to expand the application of the Board's office-based anesthesia regulations to the outpatient setting under certain circumstances. In addition, a new rule (199.5) was added, which requires physicians to notify the Texas Department of State Health Services of any ownership in a niche hospital.

Criminal Law

Testimonial Statements

The Supreme Court clarified the scope of testimonial statements under *Crawford v. Washington, 541 U.S. 36 (2004):* "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Supreme Court also observed that 911 operators, while not themselves law enforcement officers, may at least be agents of law enforcement when they conduct interrogation of 911 callers.

Other Decisions by the Supreme Court

Hyundai Motor Co. v. Vasquez was brought by the parents of a 4-year-old killed in an automobile accident. During voir dire, the trial judge refused to allow the plaintiffs' lawyers to ask potential jurors whether they could consider rendering a verdict for the plaintiffs even though the child was not wearing a seat belt. In a 6-3 decision, the court held that a trial court may refuse to allow a voir dire question that asks potential jurors whether a particular piece of relevant evidence will determine their verdict.

In *Tooke v. City of Mexia* the court ruled that Texas statutes and municipal charters providing that a government entity may "sue or be sued" do not, in and of themselves, waive immunity from suit.

In *Hoover Slovacek L.L.P. v. Walton*, the court ruled that a payment-on-termination provision in an attorney's contingent fee contract is contrary to public policy and unenforceable.

In *re Palacios*, the court found that an order compelling arbitration under the Federal Arbitration Act ordinarily is not subject to mandamus review.

In *Feiss v. State Farm Lloyds*, the court held that the standard Homeowners Form B insurance policy does not cover losses caused by mold.

In *GuideOne Elite Insurance Co. v. Fielder Road Baptist Church,* the court held that an insurance company's obligation to defend its insured ordinarily must be determined from the "eight corners" of the policy and the plaintiff's petition, even if extrinsic evidence establishes that the allegations in the petition are false.

Heidi Beginski, Board Certified Legal Assistant-Personal Injury Trial Law-Texas Board of Legal Specialization, Member, Professional Development Committee,

Technology Update

By Sharon D. Taylor

Paralegal Division, State Bar of Texas District 16, Rincon, Mounts, P.C., 1014 N. Mesa, Suite 200, El Paso, TX 79902

VISTA – the successor to Windows XP, and after 5-years efforts, is finally complete. Vista is a major Windows update with lots of new features. Microsoft describes it as "Confident, Clear and Connected." But will law firms be rushing to upgrade?

While Vista's appearance is beautiful with new typeface and animation to liven up the experience, the more important improvements are its security, stability, ease of implementation, support and improved performance. However, unless your PC is relatively new, chances are it won't have adequate processing power, graphics capability and memory to run Vista. For most of us, migrating our PCs to Vista will mean updated drivers for our printers, Ethernet card, audio card and other hardware, not to mention we will have to deal with incompatible programs. We may also have to relearn how to use our PC's operating system.

Microsoft says businesses will find it easier for companies to deploy on multiple PCs and it will save costs by reducing the number of times computers will have to be rebooted. Vista Business includes Windows Meeting Space, used for setting up secure ad hoc wireless peer-to-peer meetings or collaboration sessions. Vista can support the new Hybrid Hard Drives. The biggest selling point for businesses is the fact that Vista can help reduce interruptions and help desk calls. When a system error occurs caused by an application or device, Vista will automatically attempt to heal itself, avoiding user interruptions and help desk calls.

Before upgrading to Vista, you can go online and use Microsoft Vista's Upgrade Advisor on your current PC to inventory your current hardware and determine which version of Vista is best-suited for you. Microsoft offers six version of Vista: (i) Vista Ultimate (Best), (ii) Vista Enterprise (only for software assurance or enterprise agreement customers), (iii) Vista Business, (iv) Vista Home Premium, (v) Vista Home Basic, and (vi) Vista Starter. Its top 10 features are: (1) Stunning Graphics, (2) User Account Control, (3) Shadow Copy (without a File Server), (4) Internet Explorer 7, (5) Windows Defender, (6) SuperFetch, (7) Network Center, (8) Metro, (9) Windows Search with Vista, and (10) Security. For more on these features, please visit Microsoft online.

Vista is not a fancier version of XP. It is a much-improved operating system with a better user interface, more intelligent navigation, more powerful file-manipulation tools and built-in applications that will provide greater efficiency. However, the decision to upgrade now or wait depends on the firm and the age of its PCs. The pros include the beautiful user interface and security improvements, while the cons include significant hardware requirements and compatibility issues with current hardware and software.

For XP users, Microsoft recently announced that Service Pack 3 will be released in 2008. XP will continue to be significantly used for the next few years, but with less priority. Looking back at past Microsoft Windows transitions, we can expect most third-party applications to be available for XP users for quite some time.

Sharon D. Taylor, CP,TBLS, NALA Certified Paralegal; Board Certified Paralegal — Civil Trial Law, Texas Board of Legal Specialization; Chair, Professional Development Committee, Paralegal Division, State Bar of Texas; Co-Sub-Chair, Public Relations Committee, District 1, Paralegal Division, State Bar of Texas, *Boyar & Miller, 4265 San Felipe, Suite 1200, Houston, Texas 77027*

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. 1454 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 by May 31 of the membership year. Substantive continuing legal education 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. Members are allowed no more than two (2) hours of self-study during each membership year. Members must report their CLE on a form approved by the Division. 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.

IMPORTANT ANNOUNCEMENT

2007—2008 MEMBERSHIP RENEWALS

The 2007-2008 membership renewals will be mailed to the current members of the Paralegal Division in March/April 2007. Renewals will be accepted beginning April, 2007; renewals *received on or after August 1 requires a $20 late fee* in addition to the normal dues payment; any renewal *received on or after October 1 will be returned to you and not processed.* **No exceptions for these deadline dates**.
Please make sure your address is correct on the Paralegal Division's membership roster (procedure located at *http://txpd.org/page.asp?p=Address%20Change).*

All **ACTIVE** and **ASSOCIATE** members must obtain 6 hours of CLE by May 31 to renew membership in the Paralegal Division for 2007-2008. If you are working as a paralegal and currently an Active or Associate member, the CLE requirement is mandatory to continue membership in the Paralegal Division.

Below pertains to Active and Associate membership renewals:
Substantive continuing legal education 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. Members are allowed no more than two (2) hours of self-study during each membership year. Members must report their CLE on a form approved by the Division. 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 or approved by the MCLE Department of the State Bar of Texas, the Texas Board of Legal Specialization, the National Association of Legal Assistants, the National Federation of Paralegal Associations, and/or presented by the Paralegal Division, local bar associations, paralegal associations, or law firms for credit towards the Paralegal Division mandatory membership renewal 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 Paralegal/paralegal who is familiar with the topic presented, or an expert in the particular subject matter comprising the course.

c. Speaking and writing credit will be considered for approval under the same criteria as (a) and (b) above.

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 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:

Deputy Assistant Secretary of Defense Charles "Cully" Stimson publicly criticized law firms for their pro bono representation of suspected terrorist detainees and encouraged corporate CEOs to force those firms to choose between "representing terrorists or representing reputable firms (companies)." Do lawyers have an ethical obligation to represent these individuals, if they do so, as part of pro bono service?

RESPONSE 1: It seems to me that to represent anyone who is trying to destroy our nation would be committing treason. Are we not bound to protect our nation?

—Monty L. Mayes, Arlington

RESPONSE 2: While I'd like to think that firms use the best of judgment as to what pro bono cases they take, would Deputy Assistant Secretary of Defense Charles "Cully" Stimson publicly criticize a criminal defense law firm for representing a suspected mass murder? Does profit to

the firm determine the worthiness of the case?

—Linda S. Harrell, Greenville

RESPONSE 3: In my opinion, Mr. Stimson is as full of crap as a Christmas goose. The detainee business has become too politicized. The military lawyers appointed as counsel for the detainees put their careers on the line if, and as they should as a true lawyer, put up an aggressive defense for their clients. The law firms should not be castigated for providing pro bono service. His remarks have the same sound and smell as DOJ's "Thompson Memorandum" where DOJ lawyers threatened to go after companies, i.e., KPMG, if they continued to pay for employees attorney fees as called for in their contracts.

—Pete Siegel, San Antonio

RESPONSE 4: The question is "Do lawyers have an ethical obligation to represent these individuals (suspected terrorist detainees), if they do so, as part of pro bono service?"

I think the answer has to be – absolutely, yes.

If the question is, do lawyers have an ethical obligation to represent those individuals, the answer must be "absolutely". In this time in our country, where we are so fearful of terrorist attacks and have implemented many Homeland Security measures to prevent that, we must still carefully guard the premise of "innocent until proven guilty". The people who enforce our laws, the people who investigate possible subversives, the people who protect us are diligent, careful, and dedicated to their tasks. However, mistakes still happen. Evidence still sometimes points to the wrong person. As citizens, we cannot cede the protections of our Constitution.

If the question is, as part of pro bono service, I still think the answer is "yes" under appropriate pro bono guidelines. If a citizen can qualify to receive pro bono service, then it should be provided.

—Jane Middleton, Sherman

RESPONSE 5: I think all attorneys have an obligation to do pro bono work. I think the attorney should be able to choose the citizen or citizen group they want to perform work for. However, the key word is "citizen." I do not agree that illegal aliens, including terrorists, have the same rights as U.S. citizens. Their representation at terrorist hearings should be solely up to them and the expense should be theirs. As a taxpayer I resent having to provide legal services to illegal individuals when our own citizens can not obtain needed legal services.

—Lisa Sprinkle, CPS

RESPONSE 6: My initial thought is that instead of pro bono U.S lawyers representing suspected terrorists, the suspects should be represented by lawyers from their country of origin at that country's expense. If the charges are highly questionable and the suspects are American citizens, that is a different story.

—Donna R. Kay

RESPONSE 7: Giving aid and comfort to the enemy during the time of war is treason, anyway you look at it. Just because

you are a rich and/or bored lawyer is no excuse. Terrorists do not deserve a lawyer, or a trial, they deserve and merit either a bullet or a hangman's noose.

—Bob Harrison

RESPONSE 8: Simply, NO pro bono service for alleged terrorists or illegals. They have their own embassys that can represent them for any criminal charge in our country. We should not be using pro bono services for alleged terrorists against our government, but instead, utilize our pro bono for legal citizens that need our services, including supporting our border agents that are being charged for civil actions while securing our borders against illegals crossing the borders.

—Kathy Langley

RESPONSE 9: Have you ever had a friend accused of a heinous crime, found guilty, and imprisoned for life only to find out it was a case of mistaken identity? I did. My friend spent 7 years in prison accused of rape and murder, and just coincidentally, the actual perpetrator confessed to the crimes after my friend had been in jail for 7 long years. The key word in the op. ed. Question is "suspected". Thank God that in our country, you are presumed to be innocent until you are proven guilty, and (although we probably all know the equality of representation is sometimes lacking), you are entitled to counsel at no cost, if you can't afford it. Of course, we should provide those who can't afford it representation. If it were your friend, would you want to make certain they were afforded the protection our constitution offers? Yes, 9-1-1 was horrendous; yes, I have an extreme dislike for those who would harm us to prove their dedication to some madman. Does that mean I would support the violation of the Constitution of the United States of America? Not on MY life.

—Nan Gibson, Houston

RESPONSE 10: It would be my opinion that representation of terrorists would be approached much the same as the defense of a criminal accused of a heinous crime. Certain rights probably need to be guarded for any individual in any dealings with the Court system. However, I could not support extensive defense motions trying to prove them innocent.

Therefore, I would not think a firm should need to designate much time or resources to any one case of representation. Chances are any such representation would have to be pro bono as the terrorists are not likely to have funds for representation or if they could get them, would not choose to do so in this present-day twisted way of thinking. In short, I would think no more than 10% of a firm's pro bono work would want to be focused on this type representation and use the remainder of offered services for more important representation.

Thank you for the opportunity to voice an opinion.

—Beth Barnett

RESPONSE 11: That question is exactly like asking a criminal defense attorney "how can you defend a murderer?"

I'm not going to cite chapter and verse (or Article and Case) but last I looked, the Bill of Rights of the United States entitled people to due process, which courts have (correctly in my opinion) interpreted to mean representation by counsel, and the courts have authority to designate attorneys to defend an accused, pro bono. I don't know that the attorney has a choice not to represent someone once appointed—even when said attorney has no expertise in criminal law. Along the same line, one is still considered innocent until proven guilty in a court of law (except where the IRS is concerned). Merely being accused of murder or terrorism does not make one guilty of those crimes.

To paraphrase a famous quotation concerning the Holocaust, "first they came for the Gypsies, but I said nothing because I was not a Gypsy. Then they came for the Jews, but I said nothing because I wasn't a Jew. Then they came for me." We must vigorously defend our freedoms against those who would take them away in the name of "security." Someone must guard the Guardian, and it is the obligation, duty, and indeed the honor, of the members of the Bar to stand guard, and make the government prove their case, no matter the accusation, in order to (attempt to) secure liberty for us all. The firms which voluntarily provide such pro bono services are to be respected for their actions, not criticized.

—Laurie A. Kmieciak, Addison

RESPONSE 12: Yes. A "suspected terrorist detainee" is not (necessarily) a terrorist. And our assumption from the git-go that he is guilty and does not merit representation — even before any kind of investigation is conducted — reflects poorly on our morals, to say nothing of our ethical obligation.

More telling are the questions: How have we arrived at the point where we are debating the question of whether we should represent people who may be innocent? And why have we allowed our country to come to this point?

—Linda West, ACP, Dallas

RESPONSE 13: No, they aren't obligated to represent terrorists.

—Donna Chance

RESPONSE 14: "The trouble with fighting for human freedom is that one spends most of one's time defending scoundrels. "For it is against scoundrels that oppressive laws are first aimed, and oppression must be stopped at the beginning if it is to be stopped at all."

H. L. Mencken

Defense lawyers very seldom *like* the people they defend. But as the quote from H.L. Mencken says, if we don't stop the oppression at the beginning, it can't be stopped at all. The State Bar encourages *pro bono* representation. There is nothing that says the lawyer should believe in the person's innocence. In fact, most defense lawyers don't even want to know if the client is guilty or innocent. They provide the best defense possible to protect human rights from being violated by the criminal justice system. For it is not the terrorist whom we wish to protect, but our own personal liberties and freedoms.

—Brenda K. Denny, CP, Amarillo

RESPONSE 15: In response to the SBOT/PD Question of the Quarter, I believe that regardless of the crimes the terrorist detainees are suspected of having committed, they are still innocent until

proven guilty and should be no less entitled to legal representation than any other suspect. Our system of justice will only be weakened by discriminatory determinations as to who receives pro bono representation and who doesn't based on the unpopularity/shock value of the allegations. If we allow ourselves to become no better than the terrorists and the injustice their objectives represent, terrorism wins.

—Natalie G. Taylor, San Antonio

RESPONSE 16: I find it outrageous that a DOD representative felt compelled to publicly chastise any law firm who wished to represent a suspected terrorist detainee (unclear whether detainee is a U.S. citizen or not) by calling upon company CEOs to pressure their attorneys. The decision to represent or not represent an individual is not the prerogative or the business of the DOD. It is a law firm or independent attorney's decision to provide pro bono assistance or charge a potential client, accordingly.

Aside from the constitutional issues this raises, this "encouragement" that CEOs are expected to pursue by reining in their attorneys or law firms is tantamount to interfering with a client / attorney privilege.

Following this rationale by Deputy Assistant Secretary of Defense, Charles 'Cully' Stimson, it suggests anytime that a governmental agency does not like a particular legal practice by the SEC, ICC, etc., all the agency needs to do is publicly announce its disdain for such an offense and then have a CEO pressure a company's law firm.

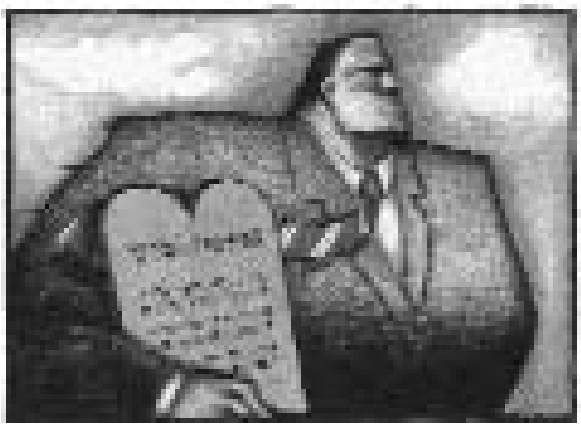
—Harry E. Watson

Scruples

Ethical Considerations in Electronic Discovery

Laurie Borski, Professional Ethics Chair

Conducting discovery in litigation once required no more than a copier, some boxes and a handcart. Suddenly, it seems the discovery process has now evolved from digital documents to electronic discovery, or e-discovery as it is more commonly known. The definition of "discovery materials" is no longer limited to tangible items but now includes emails, spreadsheets, word processing documents and other data files. Data is various forms, and the quantity of production is measured not in reams or boxes but in megabytes or even terabytes. Identifying responsive documents once may have entailed a trip to the client's office to



search through boxes. Now that identification requires a search of all locations in which data can reside by qualified information systems personnel and computer forensics specialists.

The tools for managing discovery have evolved as well, from simply Bates numbering documents and preparing an index, to the use of web-based databases of electronic evidence. The courts have also kept pace with the progress in technology. District and county clerks are adding digital files and documents to allow for remote access via the Internet. More recently, state and federal clerks have progressed from paper and fax filings to permissive or even mandatory electronic filings.

In 2006, there were over 175 federal court opinions related to e-discovery issues. Over half of these opinions were devoted to discovery requests and spoliation/sanctions issues, with the remainder addressing the form of production, preservation/litigation holds, privilege/waiver issues and costs. [1]

While the technology has changed, the ethics of e-discovery are not far removed from that of traditional discovery. The duties owed to the client, the parties to the case and the court are unchanged. The major changes are simply in the technology employed and the quantity of data involved. Paralegals practicing in this area need to learn about e-discovery and the preservation and management of electronic evidence. Becoming a computer expert is not necessary, but you should realize that specialized knowledge could be required. Do not hesitate to call upon vendors and knowledgeable information systems personnel who can serve as valuable resources. You may need to share the information learned on electronic discovery with your supervising attorney(s) or clients as well.

The Federal Rules of Civil Procedure were changed on December 1, 2006 to address electronic discovery, that is, the discovery of ESI or electronically stored information. Many states have already implemented similar changes or have proposed changes to address e-discovery issues.

In a nutshell, the federal rules changes: (1) include ESI as a category under materials to be disclosed and in the description of materials included as business records; (2) provide notice to the court early in the case that electronic discovery is contemplated; (3) compel discussion and agreement by the parties in the discovery conference as to how claims of privilege will be handled and whether these agreements will be memorialized in an order; and (4) the form or forms in which any ESI will be produced; (5) provide for limitations on production of ESI from sources not reasonably accessible because of undue burden or cost; (6) include a default form of production and specify that a party need not produce ESI more than one form; and (7) limit sanctions for failing to provide ESI lost as a result of routine, good-faith operation of an electronic information system.

One of a paralegal's premiere ethical considerations in e-discovery is to know and honestly represent your limitations. Electronic data is fragile; merely powering on a computer can change the data on a hard drive. And time is of the essence in recovering electronic data before deleted files are overwritten. A paralegal tasked with collecting electronic evidence should know that improperly harvesting data could result in irrevocable damage. This is not the time to employ "drag and drop" technology. Forensically sound copies of computer storage devices must be made using special hardware devices that are read only so as not to update or modify a file's date and time stamps. Exact bit-for-bit copies replicate hard drives and include deleted files, unallocated space and file stack rather than just making a copy of active files. [2]

Many production requests seek files such as emails, word processing documents, spreadsheets, HTML and .PDF files in their "native format" which allows for the examination of metadata. Depending on the file, this metadata can provide creation, edit and copy history, identify the owner and user of the computer(s) on which the file was created or edited and reveal the identity of persons who were blind copied on emails. [3]

Additionally, each digital file contains a unique "digital fingerprint" called a MD5 hash. If the case involves questions of stolen data or file origin, such as in intellectual property litigation, an analysis of this MD5 hash can be performed. [2] Examination of the MD5 hash will also verify a complete capture of data. [3]

Data can reside in many locations and is not limited to just desktop and laptop computer hard drives and server backup tapes. Given a proper production request and a demonstrable need for the information, data may have to be collected from sources external to the normal hardware and software of a computer system such as PDAs, cell phones, external media (flash drives, SD cards, CDs, DVDs), voicemail and e-fax systems, swap files, online storage and web sites. *Id.*

Given the universe of ESI that is potentially available and responsive, a paralegal should keep in mind the requirements for fairness in adjudicatory proceedings set out in the Texas Disciplinary Rules of Professional Conduct and the law regarding obtaining evidence set out in Texas statutes:

> "A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act." [4]
>
> The right of a party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions, including Texas, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. [5]

Arm yourself with knowledge so you will be prepared to enter the brave new world of e-discovery!

[1] *Case Law Update and E-Discovery News*, Kroll Ontrack, Jan. 2007, Vol. 7, Issue 1. (www.krollontrack.com)
[2] *Defensive Exit Interviews and Records Retention*, Jason Park; Law Journal Newsletters, Employment Law Strategist, July 2006.
[3] *Tame the Digital Tiger*, Lauren Rogers, Litigation Solution, Incorporated, October 2006. (www.lsilegal.com)
[4] See Rule 3.04, Fairness in Adjudicatory Proceedings, Tex. Disciplinary R. Prof. Conduct.
[5] See Texas Penal Code, 66 37.09(a)(1), 37.10(a)(3).

The author wishes to thank Lisa Kish of Kroll Ontrack for sharing her presentation on *Electronic Discovery: Tips, Tactics and Technology.*

Laurie Borski is the Chair of the Professional Ethics Committee of the Paralegal Division. She has served on the PD Annual Meeting and Election Committees and is a past president of the Alamo Area Paralegal Association in San Antonio.

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

CLE CALENDAR
A statewide CLE calendar can be found on the PD website at *ww.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 Active membership certificate? Please complete the order form found on *www.txpd.org* under **Members-Only** area 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. 1383 or email at rcarbajal@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 ***CHANGES TO MEMBER INFORMATION*** procedures located on this page.

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 (access by USER ID and Password), click on PD E-Group, enter your *E-Group password*, unsubscribe the current email address, and create a new email address where you want to receive your PD E-Group messages. **You will be required to *respond to an email confirmation.***

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