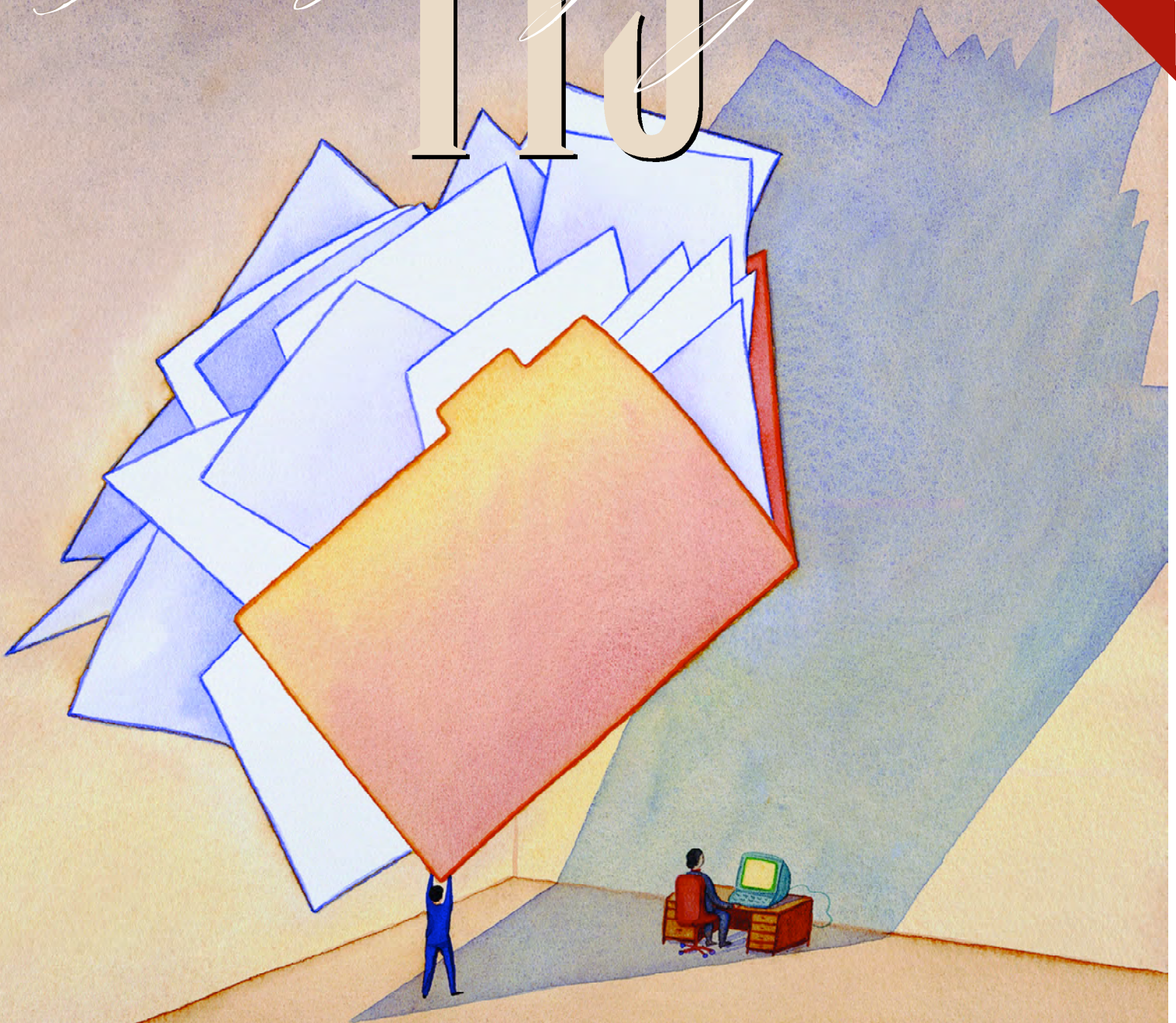


SUMMER 2007 VOL. 13 NO. 1

Texas Advanced Paralegal  
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# TPIJ

## *Texas Paralegal Journal*



## Fair Labor Standards Act Litigation



# PRESIDENT'S *Message*

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

**I**t is hard to believe that we are at the end of another Paralegal Division fiscal year, with a new slate of officers and directors about to be sworn in, membership renewals in full swing, another annual meeting upon us in San Antonio, and of course, TAPS planning in the works for another great seminar in October in Dallas.

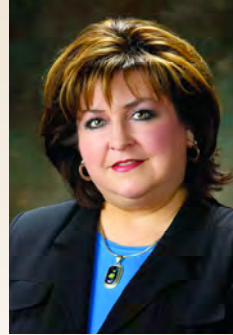
We are putting the final touches on another great milestone for the Division to bring you yet another benefit of membership. We are adding to the "Members Only" area of the website a place where each of you will be able to access your MCLE records from the State Bar, as well as add your other CLE events to your record. Please see the announcement on page 5 of this issue of the TPJ for more information, as well as watch the website and your email box for more information. I am really excited we were able to get this kicked off.

We have seen many other new milestones come to fruition this year, and those would never have happened without the dedication of fellow paralegals. When I left you as President six years ago, a new joint task force had been appointed to continue our quest for some definition for paralegals in our state. That quest finally culminated in our new Texas Paralegal Standards which have set a new path for paralegals in Texas to have a more definitive place in the legal profession. However, the mere approval of these standards does not for a "new standard make" without our continual education of the attorneys, the educators, the administrators, and the judiciary. This road must continue forward for our profession to continue to grow. It is up to each and every one of us to make these new standards visible to those with whom we

work. Use every chance given you to talk about these standards.

The *Paralegal Ethics Handbook* which is being authored by Division members, will be published this Fall and available for sale. This is a very exciting project, and a first for a paralegal organization to be involved in writing. We have just launched a new look for the PD website to make it easier to navigate, and to allow us more room for additional information for our members and the public. We just returned from Florence, Italy for the third PD overseas trip, and it was phenomenal. One of the travelers will be writing an article to share with you, and photos will be added to the website for you to view. Our Online CLE program continues to grow, and many new additions have recently been made. This is very affordable and easy CLE for you to obtain, so jump online and check it out if you have not already done so. And remember, if you are not on the PD E-Group, you really should consider joining. It is a very effective way of communicating with your fellow paralegals.

We have also seen the Texas Board of Legal Specialization adopt the term "paralegal" this year. And, of course, the celebration of our 25<sup>th</sup> anniversary was phenomenal. There were events held all over the state, many in conjunction with local associations throughout Texas, as we also celebrated Texas Paralegal Day. Our Ambassador program has really grown this past year, and we have had our former Presidents traveling all over Texas speaking at CLE events. There has been much, much



more happening this past year.

The Division volunteers continue to work hard to keep PD and its members on the cutting edge of this profession. Many, many thanks to every member, committee volunteer, board member, and our PD Coordinator,

Norma Hackler for working so hard to keep our Division at the top of its game. This is an awesome organization for which you need to feel proud to be a member.

It has once again been such an honor to lead the Division this past year. So many people have asked me why I would choose to come back for a second term as President, and the answer is simple—I am dedicated to this paralegal profession we have all chosen, and I seek opportunities to serve others in this profession and have some small part of the growth of not only the individual paralegals that I have met, but the profession as a whole. I encourage each of you to do the same, and reap the rewards of getting to know your colleagues across this great state.

Our goal this year has been to "advance the profession." It is our continual goal to see our members advancing in their career, and we hope that being a Division member enhances that for each of you. Continue to remain strong in your beliefs for this profession and your career, and encourage others to do the same. I wish the very best to each and every one of you. Thank you for the opportunity to be of service to you and this fine profession.

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# TPJ

## Texas Paralegal Journal

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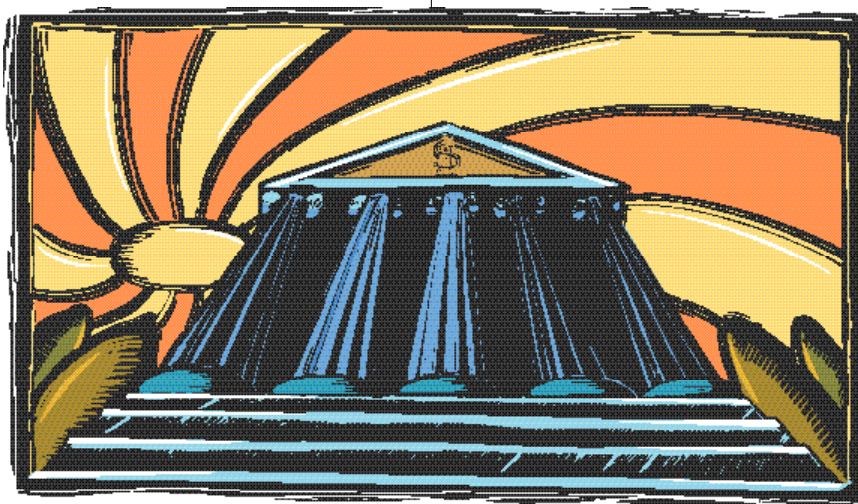
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# EDITOR'S *Note*

by Rhonda J. Brashears

**H**ello Division Members. In this issue, we have a great assortment of wonderful articles, including one on FLSA Litigation, another on electronic discovery, and President Javan Johnson's article on how to advance the profession with ethical conduct. Also included are a couple of announcements about events that took place in District 5. Remember that we would like to hear about paralegal events in your district, too. We have, again, included a list of sustaining members on page 2; please try to use these businesses every time the opportunity arises because they help support our wonderful association.

As you can see, you will find the TAPS 2007 brochure with this issue. Be sure to look this over and get registered early. This event promises to be a great time with friends and colleagues, oh, and some fabulous CLE to boot.

Ladies and gentlemen, this will be my last "Note" to you as I will be giving up the post of Chair of the Publications Committee and Editor of the *Texas Paralegal Journal*. My replacement will be the very competent Heidi Beginski of El Paso, Texas. I have really enjoyed my time on the Publications Committee and as Editor of the *TPJ*. I always had great committee members over the years and want to thank each and every person who served on this committee; I could not have done it without you. I would also like to thank David Timmons, the *TPJ* designer, and, of course, Norma Hackler, Paralegal Division Coordinator. I REALLY could not have done my job on this committee without them.

As always, I wish you the best.

## EXCITING NEWS AND NEW MEMBER BENEFIT AFFECTING PARALEGAL DIVISION MEMBERS' STATE BAR OF TEXAS MCLE CREDITS AND OTHER CLE ATTENDANCE RECORDS

For the first time in Division history, you will be able to view and print your MCLE credit hours directly from the Paralegal Division website that are recorded by the MCLE Department of the State Bar of Texas, AND you will be able to input to your personal record additional CLE that you have attended! The Paralegal Division has set up a CLE attendance form for each member on the website at [www.txpd.org](http://www.txpd.org) under the Members-Only area. To access, go to [www.txpd.org](http://www.txpd.org), click on Members-Only, sign in as instructed, choose **DIRECTORY**, and then choose "Edit My Profile".

**Additional information regarding this new feature will be distributed to the Members of the Paralegal Division via email by District Directors, PD E-Group, and Division website eblast beginning July 1, 2007.**

**NOTE:** The Paralegal Division does NOT track CLE for members of the Paralegal Division; this is a benefit provided to the members of the Paralegal Division to create a place for each member to be able to track their own CLE attendance by entering it themselves in one location. The Paralegal Division **does not** have records of members' attendance to CLE seminars. You are responsible for keeping your own record complete.

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### PUBLICATIONS:

Rhonda Brashears, CP, Editor  
Javan Johnson, ACP, President  
Norma Hackler, CMP, Coordinator  
Stephanie Hawkes, RP, Board Advisor

### ART DIRECTION:

David Timmons Design, 4703 Placid Place, Austin, Texas 78731. Phone 512-451-4845, Fax 512-451-1087. E-mail: [dtimmonso@gmail.com](mailto:dtimmonso@gmail.com)

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### DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS AUGUST 15, 2007.

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TEXAS PARALEGAL JOURNAL 5









# FLSA Litigation— A Primer for Paralegals

David L. Kern

## I. INTRODUCTION

To be an effective paralegal on a Fair Labor Standards Act (“FLSA”) case, a paralegal first must understand how fundamentally different the FLSA is from other labor and employment laws. The FLSA begins with the words: “The Congress hereby finds... the existence... of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers...” 29 USC 6202(a). Thus, the basic American belief: “A fair day’s pay for a fair day’s work” is at the very core of the FLSA’s overtime pay provisions. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting from a speech by President Franklin D. Roosevelt to Congress, May 24, 1934). This principle is so engrained in the American consciousness that it cuts across philosophical lines. For this reason, even the most management-oriented of jurors may find in favor of employees when the facts demonstrate that workers have been deprived of “a fair day’s pay” under the FLSA. Moreover, because of the FLSA’s historical origins, and the basic principles of economic fairness that it embodies, the Act’s statutory scheme is far different than other employment laws. Therefore, the paralegal must put on a very different thinking cap when working on FLSA cases.

Congress first adopted the FLSA in 1938 and has amended it numerous times since. With one notable exception (the Portal to Portal Act), each of the amendments resulted in an expansion of FLSA’s scope. FLSA litigation combines the application of a statute, 29 USC 66 201 *et seq.*, and a comprehensive set of implementing regulations. 29 CFR 66 510 *et seq.* FLSA claims can be enforced either by the Department of Labor (DOL) (29 USC 6216(c)) or by individual employees acting through private attorneys. 29 USC 6216(b). To add to the complexity, a dizzying array of judicial interpretations exists of FLSA’s provisions and regulations. In some respects, these interpretations differ from Circuit to Circuit and even within the same Circuit. Indeed, one of FLSA’s unique aspects is that a very similar set of facts may produce a very different result in two different courts for reasons that are not always readily apparent. Nevertheless, it remains true that there are certain core principles embodied within FLSA that enable it to serve by design as a powerful tool against economic injustice in the workplace.

## II. UNIQUE FEATURES OF FLSA MATTERS

Many FLSA cases settle and relatively few proceed to trial. There are many reasons for this. One is that the damages in an FLSA case are often far more quantifiable than in





other types of employment matters. Another is the significant and unusual risks that FLSA cases pose for employers. The following are some of the factors in FLSA cases that often militate in favor of a negotiated resolution.

#### **A. Allocation of Burdens of Proof.**

One fundamental difference between FLSA and other employment laws is the manner in which the burden of proof is allocated. Employment law practitioners are accustomed and conditioned to the idea that employees bear the burden of proof to show that discrimination, or retaliation, has occurred. However, in FLSA overtime pay litigation, it is often the employer, rather than the employee, who bears the burden of proof. For example, wage and hour cases often turn on the issue of whether an employer is entitled to claim an exemption from overtime pay requirements. The burden of proof to establish entitlement to FLSA exemptions falls squarely on the shoulders of the employer, not the employee. *See, e.g., Walling v. General Industries, Co.*, 330 U.S. 545 (1947); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1137 (5th Cir.1988); *Singer v. City of Waco*, 324 F.3d 813, 820 (5th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004); *followed in Billings v. Rolling Frito-Lay Sales, LP*, 413 F. Supp. 2d 817, 820 (S.D. Tex. 2006). *See also Bondy v. City of Dallas*, 77 Fed. Appx. 731, 732 (5th Cir. Oct. 9, 2003). This is a significant issue during the pre-trial and trial of FLSA matters and imposes evidentiary burdens and obligations on employers that they are not generally accustomed to bearing.

#### **B. Affirmative Obligations Imposed by FLSA.**

The FLSA also imposes affirmative obligations on employers to pay overtime to all eligible employees. Absent an exemption, the FLSA requires employers to pay employees "not less than one and one-half times [the employee's] regular rate" of pay for every hour worked in excess of forty hours in a workweek. 29 U.S.C. 6207(a)(1).

*Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742, 749 (5th Cir. 2003). Moreover, an employer with actual or constructive knowledge that a non-exempt employee is working overtime must pay that employee overtime whether a claim for it is made or not. *See Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995) ("An employer who is armed with [knowledge an employee is working overtime] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation."); *quoted in Harvill v. Westward Communs., L.L.C.*, 433 F.3d 428, 441 (5th Cir. 2005). The employer's affirmative obligation to pay correctly under FLSA raises important issues concerning the management of discovery and trials in FLSA matters.

#### **C. Narrow Construction of FLSA Exemptions.**

Similarly, FLSA exemptions are narrowly construed against employers and only apply to those employees who fit "plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). *See also Auer v. Robbins*, 519 U.S. 452, 462-63 (1997). Therefore, when a claimed exemption is at issue and the employer is unable to meet the burden of proving entitlement to that exemption, the employer loses the liability portion of the case. For this reason, as radical as it may seem, it is not uncommon for summary judgment to be granted against the employer as to liability when the employer fails to meet its burden of showing entitlement to a claimed exemption. *See, e.g., Albanese v. Bergen County Sheriff's Dept.*, 991 F. Supp. 410, 426-27 (D.N.J. 1997). Moreover, even if an employer survives summary judgment on the issue of an exemption, the employer still has the burden of proof at trial on that exemption. As noted, this can be a very difficult burden to meet.

#### **D. Recordkeeping Requirements.**

FLSA's recordkeeping requirements pro-

vide another good example of how different this area of the law is from other employment laws and how these differences impact upon discovery and trials in FLSA matters. Employers are required by FLSA to maintain certain records of hours worked and wages paid. 29 CFR 6 516. If an employer fails to maintain these required records, the employees are then entitled to use their best good faith estimates of hours worked to compute damages. The burden of proof then falls upon the employer to rebut these estimates. *See, e.g., Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). If the employer is unable to rebut the estimates (which can be a very difficult task in the absence of the required records), the employees' good faith estimates are used to calculate the damages. *See discussion infra.*

Thus, in this area of the law (unlike other areas of employment law) employees may gain a distinct advantage in pre-trial litigation and at trial when an employer fails to maintain proper records of hours worked. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988). For example, in an off-the-clock violation case the employees can put on testimony of their hours worked while off the clock, even if those hours are only approximate. *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). It then falls to the employer to attempt to show that the employees' estimates are overstated, or not in good faith. Clearly, this can be a very daunting task. Courts continue to hold that an employer cannot complain about the speculative nature of employees' damages estimates when the imprecision arises precisely because of the employer's failure to maintain the required records. *See, e.g., Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997).

In addition, failure to comply with the recordkeeping requirements of FLSA is a violation of the Act in and of itself which can subject the employer to various penalties. *See Castillo v. Givens*, 704 F.2d 181, 194 (5th Cir. 1982), *cert. denied*, 464 U.S.

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850 (1983); *Marshall v. Partida*, 613 F.2d 1360, 1362 (5<sup>th</sup> Cir. 1980); *Hopkins v. Texas Mast Climbers, LLC*, 152 Lab. Cas. (CCH) 735,100 (S.D. Tex. Dec. 14, 2005). For this reason, testimony by plaintiffs that they are entitled to overtime pay for working while off-the-clock puts the employer in a double-bind situation at trial. First, the employer has difficulty defending the damages allegations without records of the hours worked. Second, the absence of the records is itself problematic from a liability perspective.



#### E. Representative Testimony.

In addition to the foregoing unique aspects of FLSA litigation, the class action aspects of FLSA collective actions also have a direct and sometimes dramatic effect on discovery and trial in FLSA cases. The FLSA provides specifically for claims to be brought collectively by groups of employees. See 29 USC 6 216(b). These FLSA “collective actions” are an opt-in form of representative class action in which each plaintiff must affirmatively file a “Consent Form” with the court to join the class. (By comparison, in a Rule 23 “opt-out” class action, the plaintiffs are automatically included if they fit the definition of the class and do not opt out.) In FLSA collective actions, because all of the class members are known, a lenient “similarly situated” standard is applied to determine whether the class will be certified. See *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5<sup>th</sup> Cir. 1995). Whereas, in Rule 23 class actions where large numbers of unknown plaintiffs are included a more difficult four prong standard (numerosity, commonality, typicality, and adequacy) is used to assess the propriety of class certification. But see *Shushan v. Univ. of Colorado*, 132 F.R.D. 263 (D. Colo. 1990) (applying Rule 23 standards to FLSA collective action).

FLSA collective actions often involve hundreds and even thousands of employ-

ees, who in the aggregate are seeking very substantial dollars in unpaid overtime compensation. Because courts cannot spend months and months hearing testimony from all of the plaintiffs in a collective action, the cases are typically tried by hearing the testimony of class representatives. See, e.g., *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5<sup>th</sup> Cir. 1973). This practice has been widely accepted as an efficient and effective means by which representative plaintiffs can create the necessary inferences that violations of the FLSA have taken place against a class of employees. Courts sometimes allow the plaintiffs to designate their trial representatives. On other occasions, judges allow plaintiffs to pick some of the trial representatives and defendant to pick some. Regardless of the method employed, the object is to hear testimony from a group that is representative of the class so that the results of the trial can be applied across the class as a matter of just and reasonable inference. See, e.g., *Secretary of Labor v. DeSisto*, 929 F.2d 789, 792 (1<sup>st</sup> Cir. 1991)

A good example of how this works in an “off the clock” claim is *Bull v. U.S.*, 68 Fed. Cl. 212 (Fed. Cl. Sept. 27, 2005); Clarified by: *Bull v. U.S.*, 68 Fed. Cl. 276 (Fed. Cl. Oct. 14, 2005). *Bull* concerned “off the clock” claims of a nationwide group of federal employees at the

Department of Homeland Security. *Bull* was tried with representative testimony from six plaintiffs – three chosen by plaintiffs and three selected by defendant. The trial produced a judgment in favor of the six representatives on some, but not all, of the issues. *Id.* The plaintiffs were awarded back pay and liquidated damages under FLSA for two years on some theories and (based on a finding that certain violations were “willful”) for a full three year period on other theories. *Id.* The judgment was appealed to the Federal Circuit which heard oral argument in

December 2006 and issued a decision on March 15, 2007, affirming the trial court in full. *Bull v. U.S.*, 479 F.3d 1325 (C.A. Fed. 2007). That ruling paves the way for the results of the trial to be projected across the class.

Thus, the trial of FLSA collective actions with representative testimony, like the trial of other forms of class actions, can create mass liability and class-wide damages recoveries on the strength of the testimony of a fairly small number of class representatives.

### III. BURDENS OF PROOF

#### A. Plaintiffs’ Liability Burdens

As a general rule, plaintiffs have the burden at trial of proving that there has been a violation of the FLSA. “The party asserting a wage claim bears the burden of proving by a preponderance of the evidence all elements necessary to establish a violation of the FLSA.” *McMillian v. Foodbrands Supply Chain Servs., Inc.*, 272 F. Supp. 2d 1211, 1217 (D. Kan. 2003) (denying defendant’s motion for summary judgment because plaintiff created fact issue as to elements of prima facie case). Plaintiffs suing more than one defendant also have the burden of proving joint employment. *Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200, 1209 (11<sup>th</sup> Cir. 2003).

In an “off-the-clock” case, Plaintiffs also have the burden at trial of proving



their employer actually, or constructively, knew that the plaintiffs were working unrecorded overtime hours. *Bailey v. County of Georgetown*, 94 F.3d 152, 157 (4<sup>th</sup> Cir. 1996). As a practical matter, however, this is often not difficult for plaintiffs to do because there is often corroborating testimony, or physical evidence, or both, of the work that is performed while “off-the-clock.” For example, in the *Bull* case cited above, the federal employees, canine enforcement officers, were required to take home dirty training towels and launder them on their own time without pay while “off-the-clock.” Given the absence of washers and dryers at the workplace, the employer was unable to explain how clean training towels were available at the workplace if the officers were not performing this work while “off-the-clock.” In addition, at trial there was corroborating testimony from supervisors who themselves laundered training towels “off-the-clock” and without pay when they were canine enforcement officers.

“Off-the-clock” work practices are often so engrained in the workplace and in the culture of the employer that there is ample corroborating testimony from a wide variety of co-workers and supervisors that the illegal pay practices are in effect. Examples of supporting evidence also can be found in the paperwork that employees work on at home and then bring to work. In addition, evidence of unpaid hours worked often is available from other sources such as daily logs, vehicle logs, expense accounts, project reports and the like. See, e.g., *AFSCME v. State of Louisiana Dep’t of Health & Hospitals*, 2001 WL 29999 (E.D.La. 2001)(holding that in the absence of employer time records an employee’s work records were sufficient to support his claims for unpaid overtime). See also *Chao v. Vidtape, Inc.*, 196 F.Supp. 2d 281 (E.D.N.Y. 2002)(holding that the testimony of 21 employees concerning their unpaid hours worked was sufficient to create a “just and reasonable inference” to support the overtime claims of 66 employees in the plaintiff class.

Plaintiffs also have the burden of proof on triggering the three year statute of limitations by showing that an employer’s violations of the FLSA were willful, i.e., that the employer either knew or showed reckless disregard for whether its conduct was in violation of the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). See, e.g., *Karr v. City of Beaumont*,

950 F.Supp. 1317, 1325 (E.D. Tex. 1997). See also *Singer v. City of Waco*, 324 F.3d 813, 822 (5<sup>th</sup> Cir. 2003) (holding that plaintiffs’ evidence was sufficient to support a finding of willfulness); *Bull v. U.S.*, 68 Fed. Cl. 212 (Fed. Cl. Sept. 27, 2005) (same).

#### B. Defendant’s Burdens

As noted above, employers have the bur-

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den of proof at trial on exemptions. Moreover, exemptions are affirmative defenses which must be properly pled or they are waived. *See, e.g., Magana v. Commonwealth of the Northern Mariana Islands*, 107 F.3d 1436 (9<sup>th</sup> Cir. 1997) (holding that an exemption from overtime requirements was unavailable to defendant because it was not properly pled as an affirmative defense). *See also Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (stating the general rule that exemptions under the FLSA are affirmative defenses for which the employer has the burden of proof). *See also Marshall v. Mammis Fried Chicken*, 590 F.2d 598, 599 (5<sup>th</sup> Cir. 1979) (restaurant claiming executive exemption for chef had burden of proof); *Donovan v. Hamm's Drive-Inn*, 661 F.2d 316, 317-18 (5<sup>th</sup> Cir. 1981) (exemption waived by failure of employer to plead it).

Employers also have the burden of proof on deductions and credits. *See, e.g., Brennan v. Veterans Cleaning Serv.*, 482 F.2d 1362, 1370 (5<sup>th</sup> Cir. 1973). Some of these have also been held to be affirmative defenses which must be pled or they are waived. For example, an employer's claim it is entitled to exclude bonuses from the regular rate of pay is an affirmative defense which must be pled or it is waived. *See, e.g., McLaughlin v. McGee Bros. Co.*, 681 F. Supp. 1117, 1133 (W.D.N.Y. 1988). Similarly, claims of entitlement to the sleep time and meal time exceptions provided in the DOL regulations for public fire and law enforcement employees are affirmative defenses. *See, e.g., Johnson v. City of Columbia*, 949 F.2d 127, 129-30 (4<sup>th</sup> Cir. 1991); *Rotondo v. City of Georgetown*, 869 F. Supp. 369, 373 (D.S.C. 1994).

#### IV. DAMAGES EVIDENCE

The damages evidence during discovery and at trial will vary greatly depending on whether the overtime claims arise from a misclassification, or are for "off-the-clock" violations. In either case, this is a time and document-intensive area in FLSA matters

and an area where a skilled paralegal can make a tremendous contribution to the success of the case.

##### A. Damages in a Misclassification Matter

In a misclassification case, the defendant's own time and pay records may be all that is required for the plaintiffs to put on evidence of damages. For example, an employer could classify a group of assistant managers as exempt, pay them a salary and not pay overtime to those employees for hours worked over 40 in a week. In keeping with the exempt classification, an employer who genuinely believes the employees are exempt from overtime pay requirements may require the employees to work more than 40 hours in a week, but not pay them any additional pay for the hours worked over 40. However, if the DOL or a court later finds that the employees were misclassified, then the employer becomes obligated to pay overtime for those hours worked in excess of 40 in a work week. In that event, presuming the employer has maintained records of hours worked, the employer's own time records may be introduced in evidence to show the hours for which overtime pay is due. It then becomes a simple matter to calculate the overtime pay rate and determine the overtime pay that is due.

##### B. Damages in an "Off-The-Clock" Matter

In contrast to the foregoing, damages evidence in "off-the-clock" cases (and in misclassification cases where no records of hours worked have been maintained by the employer) must be created by the plaintiffs. As noted above, when an employer fails to maintain records of hours worked, the employees are entitled to use their best good faith estimates of hours worked to compute damages. *See, e.g., Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). One effective way for plaintiffs to do this is to prepare spreadsheets which itemize and summarize the damages which the plaintiffs are

claiming. Expert testimony can support this methodology and the spreadsheets themselves can be supported by the testimony of the plaintiffs concerning the amount of time they generally or approximately spent each week in the unpaid "off-the-clock" activities. The total of all such time per week can then be multiplied by the overtime pay rate for that week to produce a weekly subtotal of the amount due for that week. The weekly subtotals can then be summed to produce the total amount of claimed damages for that employee.

A sample spreadsheet itemizing "off-the-clock" damages is attached to this paper as Attachment "A". It is a recreation of an actual damages spreadsheet of a representative trial plaintiff which was admitted into evidence at the trial of an "off-the-clock" FLSA matter and illustrates how the damages may be calculated and submitted into evidence in this type of FLSA case.

#### V. EXPERT TESTIMONY

Two types of experts are generally useful in the trial of FLSA collective action matters: 1) Wage and Hour Experts; and 2) Economists (particularly statisticians).

##### A. Wage and Hour Experts

The typical wage and hour expert is an individual who has retired from many years as a wage and hour investigator with the DOL. One such expert who is well known to the author retired from a 30 year career as a wage and hour investigator with the DOL and started a consulting practice. This expert works on both the defense and the plaintiff side in fairly equal measure. There is virtually no type of wage and hour matter he did not investigate while with the DOL.

In a recent FLSA trial, this expert was certified by the court as an expert in DOL wage and hour practices and the court accepted his testimony on many liability and damages matters framed in the context of: "This is how the DOL investigated



## Attachment A — Sample Damages Exhibit

such matters during my 30 years as a wage and hour investigator”, or “This would be considered a violation of the FLSA by the DOL for the following reasons”, or “At the DOL, this is how we calculated damages on violations of this type.” *Etc.*

Such testimony obviously cannot supplant the court’s own powers to make the ultimate determinations concerning matters of law in an FLSA trial. However, such testimony can provide a court with useful and beneficial guidance on many matters in an FLSA action and courts generally will accept such expert testimony if it is properly framed and presented.

### B. Statisticians

In the trial of a large FLSA representative class action it is also useful to have expert testimony from a statistician that the information obtained from the “sample” of plaintiffs who testify is statistically representative of the larger group of plaintiffs. This is useful because the object of an FLSA trial, at least from the plaintiffs’ perspective, is to win the case and create evidence of damages for ALL the plaintiffs, not just for the plaintiffs testifying as trial representatives.

### VI. ATTORNEYS’ FEES

A large potential downside for employers taking FLSA actions to trial is that the statute expressly provides for recovery of “reasonable” attorneys’ fees, “in addition to any judgment awarded” to the plaintiffs. 29 U.S.C. 6 216(b). In *Singer v. City of Waco*, 324 F.3d 813, 823 (5<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), the Fifth Circuit approved the trial court’s calculation of FLSA attorney’s fees using a lodestar method and the factors identified in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974). See also *Camargo v. Trammell Crow Interest Co.*, 318 F. Supp. 2d 448 (E.D. Tex. 2004), *Lewis v. Hurst Orthodontics, PA*, 292 F. Supp. 2d 908 (W.D. Tex. 2003), and *Hopkins v. Texas Mast Climbers, LLC*, 152 Lab. Cas. (CCH) 735,100 (S.D. Tex. Dec. 14, 2005).

Ex. ____	Joe Plaintiff		Uncompensated Hours Worked					Total Unpaid Hour	Total \$ at OT Rate
Wk Ending	Hourly Rate	Laundry	Gun Clean	Training Aids	Academy	Other			
	Window of recovery begins 6/28/97 Complaint filed 6/28/00								
09/06/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
09/13/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
09/20/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
09/27/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
10/04/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
10/11/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
10/18/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
10/25/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
11/01/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
11/08/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
11/15/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
11/22/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
11/29/97	Annual Leave and Other Paid Absence						0.00	\$ -	
12/06/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
12/13/97	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
12/20/97	Sick Leave						0.00	\$ -	
12/27/97	Other Paid Absence						0.00	\$ -	
01/03/98	\$ 12.14	2.00		1.80			3.80	\$ 63.75	
01/10/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
01/17/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
01/24/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
01/31/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
02/07/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
02/14/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
02/21/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
02/28/98	\$ 12.49	2.00		1.80			3.80	\$ 65.59	
03/07/98	Annual Leave						0.00	\$ -	
03/14/98	Annual Leave						0.00	\$ -	
03/21/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
03/28/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
04/04/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
04/11/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
04/18/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
04/25/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
05/02/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
05/09/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
05/16/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
05/23/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
05/30/98	Annual Leave and Other Paid Absence						0.00	\$ -	
06/06/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
06/13/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
06/20/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
06/27/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
07/04/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
07/11/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
07/18/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
07/25/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
08/01/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
08/08/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
08/15/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
08/22/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
08/29/98	\$ 15.28	2.00		1.80			3.80	\$ 80.24	
09/05/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
09/12/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
09/19/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
09/26/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
10/03/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
10/10/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
10/17/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
10/24/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
10/31/98	\$ 15.28	2.00	*	1.80			3.80	\$ 80.24	
11/07/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
11/14/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
11/21/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
11/28/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
12/05/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
12/12/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
12/19/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
12/26/98	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	
01/02/99	\$ 15.28	2.00	0.80	1.80			4.00	\$ 91.70	

(Continued on page 14)





Ex. ____	Joe Plaintiff	Uncompensated Hours Worked					Total Unpaid Hour	Total \$ at OT Rate
Wk Ending	Hourly Rate	Laundry	Gun Clean	Training Aids	Academy	Other		
	Window of recovery begins 6/28/99 Consent filed 6/28/00							
01/09/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
01/16/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
01/23/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
01/30/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
02/06/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
02/13/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
02/20/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
02/27/99	\$ 15.62	2.00	*	1.50			3.50	\$ 83.08
03/06/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
03/13/99	\$ 15.62	2.00	0.50	1.50			4.00	\$ 94.95
03/20/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
03/27/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
04/03/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
04/10/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
04/17/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
04/24/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
05/01/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
05/08/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
05/15/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
05/22/99	Annual Leave						0.00	\$ -
05/29/99	Annual Leave						0.00	\$ -
06/05/99	Annual Leave and Other Paid Absence						0.00	\$ -
06/12/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
06/19/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
06/26/99	\$ 16.35	2.00	*	1.50			3.50	\$ 85.65
07/03/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
07/10/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
07/17/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
07/24/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
07/31/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
08/07/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
08/14/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
08/21/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
08/28/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
09/04/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
09/11/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
09/18/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
09/25/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
10/02/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
10/09/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
10/16/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
10/23/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
10/30/99	\$ 16.35	2.00	*	1.50			3.50	\$ 85.65
11/06/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
11/13/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
11/20/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
11/27/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
12/04/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
12/11/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
12/18/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
12/25/99	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
01/01/00	\$ 16.35	2.00	0.50	1.50			4.00	\$ 96.11
01/08/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
01/15/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
01/22/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
01/29/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
02/05/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
02/12/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
02/19/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
02/26/00	\$ 17.12	2.00	*	1.50			3.50	\$ 89.66
03/04/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
03/11/00	\$ 17.12	2.00	0.50	1.50			4.00	\$ 102.72
03/18/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
03/25/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
04/01/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
04/08/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
04/15/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
04/22/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
04/29/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
05/06/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
05/13/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
05/20/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
05/27/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
06/03/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
06/10/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
06/17/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
06/24/00	\$ 17.67	2.00	*	1.50			3.50	\$ 92.77
07/01/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
07/08/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
07/15/00	Annual Leave						0.00	\$ -

Approval of attorneys' fees is an inherent part of a court's fairness review when FLSA collective actions are settled and is a necessary part of a court's award in the event a case is tried and results in a favorable outcome for plaintiffs. *See, e.g., Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399 (7<sup>th</sup> Cir. 1999) (upholding a district court's decision to reduce the plaintiffs' attorney's fee award). For this reason, both counsel and paralegals should assure that they keep detailed, accurate and contemporaneous records of all time spent working on FLSA collective actions.

Attorneys' fees also may be awarded as a proportion of the class recovery. In that event, 25% of the total amount of a class recovery has been found to be a reasonable amount for class counsels' attorneys' fees. *See, e.g., Toreros v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9<sup>th</sup> Cir. 1993) (finding 25% of the recovery to be a presumptively reasonable "benchmark" for the attorneys' fee award). Fees awarded on a percentage basis are subject to adjustment either upward or downward when a court reviews the work performed and the fees sought. *See, e.g., Wing v. Asarco, Inc.*, 114 F.3d 986 (9<sup>th</sup> Cir. 1997).

Due to the important public policy concerns addressed by the FLSA, courts have sometimes found that attorneys are entitled to fee awards greatly in excess of the damages recovered. *See, e.g., Perrin v. John B. Webb & Associates, Inc.*, 2005 WL 2465022 (M.D. Fla. Oct. 6, 2005) (awarding \$7,446.00 in fees in a case where the plaintiff recovered only \$270 and recognizing that "in order for plaintiffs with minimal claims to obtain counsel, those counsel must be able to recover a reasonable fee for their time."). In addition, courts have recognized that even when only a small part of the damages are recovered in an FLSA matter, attorneys may still be entitled to a full fee award. *See, e.g., Singer v. City of Waco*, 324 F.3d 813, 829-30 (5<sup>th</sup> Cir. 2003) (awarding full fees where fire fighters sought \$5 million in FLSA matter, but only recovered \$180,000).



David L. Kern graduated from the University of Texas at El Paso with honors in 1979 and subsequently received his J.D. degree from the University of Texas, School of Law ("U.T.") in Austin, Texas in 1983. While at U.T., he served as a Note Editor on the Texas Law Review. Mr. Kern is licensed to practice law in Texas and D.C. and has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 1993. Mr. Kern's fellow lawyers have recognized him as one of The Best Lawyer's In America (2005, 2006 and 2007 Editions) and as a Texas Super Lawyer (2006, 2007). He is admitted in numerous courts including: the United States District Courts for the Western and Northern Districts of Texas, the U.S. Court of Federal Claims, and the United States Courts of Appeals for the Fourth, Fifth, D.C., and Federal Circuits.

Mr. Kern's law practice is concentrated in labor and employment law matters including wage/hour, Title VII, ADEA, ADA, sexual harassment, workplace safety, retaliation, and whistleblower cases. He has worked actively with numerous unions including AFSCME, El Paso Municipal Police Officer's Association, Corpus Christi Police Officer's Association, Texas State Teacher's Association and the Federation of Teachers. Mr. Kern is a frequent author and speaker on labor and employment law topics and has spoken at numerous local, regional, and national seminars and internationally at seminars in both Canada and Mexico.

Mr. Kern's civic service includes: President of the Board, STARS (El Paso's Rape Crisis Center) (1998–2000); President of the Board, El Paso Tennis Club (2001); Co-Chair, Border Interfaith (a community alliance of churches, synagogues and other community organizations working to foster positive social, political and economic change in El Paso) (2003–2006); President Elect (2007 – ), Vice President

Ex. ____	Joe Plaintiff		Uncompensated Hours Worked				Total Unpaid Hour	Total \$ at OT Rate
Wk Ending	Hourly Rate	Laundry	Gun Clean	Training Aids	Academy	Other		
	Window of recovery begins 6/26/97 Consent filed 6/26/00							
07/22/00	Annual Leave and Other Paid Absence						0.00	\$ -
07/29/00	Annual Leave						0.00	\$ -
08/05/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
08/12/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
08/19/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
08/26/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
09/02/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
09/09/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
09/16/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
09/23/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
09/30/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
10/07/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
10/14/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
10/21/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
10/28/00	\$ 17.67	2.00	*	1.50			3.50	\$ 92.77
11/04/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
11/11/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
11/18/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
11/25/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
12/02/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
12/09/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
12/16/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
12/23/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
12/30/00	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
01/06/01	\$ 17.67	2.00	0.50	1.50			4.00	\$ 106.03
01/13/01	Annual Leave and Other Paid Absence						0.00	\$ -
01/20/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
01/27/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
02/03/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
02/10/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
02/17/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
02/24/01	\$ 16.30	2.00	*	1.50			3.50	\$ 96.06
03/03/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
03/10/01	\$ 16.30	2.00	0.50	1.50			4.00	\$ 109.41
03/17/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
03/24/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
03/31/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
04/07/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
04/14/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
05/05/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
05/12/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
05/19/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
05/26/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
06/02/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
06/09/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
06/16/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
06/23/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
06/30/01	\$ 16.37	2.00	*	1.50			3.50	\$ 99.06
07/07/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
07/14/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
07/21/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
07/28/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
08/04/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
08/11/01	Annual Leave						0.00	\$ -
08/18/01	Annual Leave						0.00	\$ -
08/25/01	Annual Leave						0.00	\$ -
09/01/01	Annual Leave						0.00	\$ -
09/08/01	Annual Leave and Other Paid Absence						0.00	\$ -
09/15/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
09/22/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
09/29/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
10/06/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
10/13/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
10/20/01	\$ 16.37	2.00	0.50	1.50			4.00	\$ 113.24
10/20/01	Ceased working with Employer							
	Claim ends						0.00	\$ -
	Damages						764.50	\$16,641.96
	Liquidated Damages							\$16,641.96
	Total Damages							37,683.92

\* Allowed to clean weapon while on duty during gun qualification sessions three times per year.



# Electronic Discovery and the Paralegal

Julie Wade

**T**he workflow for the litigation paralegal has dramatically changed with the discovery of electronically stored information (“ESI”) as authorized by the federal rules and TRCP 196.4. The impact is profound and requires today’s paralegal to master new processes and procedures.

In the mid to late 1990’s, the role of litigation paralegals began synthesizing with litigation support technologies. In addition to mastering the issues relating to the law, litigation paralegals were beginning to master a host of new word processing, database and other various legal software programs to assist them in the identification, collection, sorting, organization, reviewing, redacting, bates numbering and preparation of documents for production. Today we live in a post- Sarbanes-Oxley defined world. Records management is no longer defined as calling up a shredding truck to come on over. SOX and other SEC requirements, coupled with the federal rules changes, require companies to employ a defensible system of identifying, maintaining, preserving, collecting, and producing information from their systems. Courts are going online daily throughout the country.

Paralegals must keep on top of all the technologies employed by their clients and the courts—in addition to the plethora of vendor software and web repositories available to house all the data. As corporations deal with increasingly complex, massive cases, in-house departments and law firms are looking to a new position to tackle the problem. More case managers

are being hired in the hopes of saving money. Ideal attributes for a case manager include: 1) Exceptional organizational skills; 2) Ability to work effectively with professionals at all levels within and outside the organization, including inside and outside counsel, corporate executives, support staff and vendors; 3) Ability to both see the big picture *and* pay attention to details; and 4) Sensitivity to cost control issues. (*Esquire Group Survey, 2007*)

The proliferation of large-scale, document-intensive cases and the explosion of e-discovery show no sign of slowing down. Here are some staggering, and sobering figures:

*Discovery now accounts for 50% of the litigation costs of the average case, and up to 90% of the litigation costs in cases in which it is actively pursued. (www.uscourts.gov)*  
*90% of all communications now take place electronically, and more than 90% of all potentially discoverable information is generated and stored electronically. (Trial magazine).*

*A typical Fortune 500 company has 125 ongoing legal matters at any given time, with at least 75% of those requiring e-discovery. (Corporate Counsel magazine)*  
*U.S. companies spend an estimated \$4.6 billion annually to conduct internal analyses of email alone; e-mail analysis in a single, high profile case can reach \$5 million. (www.law.com)* Electronic data is

*obtained in 3 out of every 4 lawsuits involving Fortune 500 companies. (The National Law Journal)*

What do all these numbers add up to? \$2.8 billion. That’s what discovery costs in the U.S. are estimated to be during the year 2007. (*The 2005 Socha-Gelbmann Electronic Discovery Survey Results, Socha Consulting, 2005*) I’d like to see the real numbers when they come out, they will no doubt be higher.

Paralegals must learn what ESI is all about. Read the rules. Read the white papers. Invest your lunch hours attending webinars. They are given weekly and they are free. A good starting point would be to study the Electronic Discovery Reference Model found at <http://www.edrm.net>. Read also The Sedona Guidelines found at <http://www.thesedonaconference.org>.

*ESI will require diligent investigation and analytical thinking by individuals whose minds are also needed to mission other critical activities in the process. (EDRM)*

*Julie Wade is a Paralegal for the law firm of Harrison, Bettis, Staff, McFarland & Weems, LLP. She has over 25 years of legal experience and recently obtained her certification and advanced certification in electronic discovery from Kroll OnTrack. Julie received her paralegal certificate from the University of North Texas, Professional Development Institute. She is a member of Paralegal Division State Bar of Texas, and the Houston Paralegal Association. She*



# How Bankruptcy Affects Landlords, Part 3 of 3

By Thomas Rice and Patrick Huffstickler

HOT  
"CITIES"

## J. Assignments

In certain instances, the bankrupt may determine that it is economically beneficial for the lease to be assumed and assigned to a third party. While landlords often oppose such proposed assignments as they lose control over the identity of their tenants, the Bankruptcy Code favors assignment of leases and contracts. Section 365(f) of the Bankruptcy Code provides that an unexpired lease can be assumed and assigned to a third party even if the lease has a specific prohibition against assignment or subletting. The lease must be assumed pursuant to the provision of section 365 (requiring curing of defaults, adequate assurance of future performance, and compensation for actual pecuniary loss) by the debtor and/or proposed assignee. Section 365(l) also authorizes the court to require a security deposit in the event of proposed assignment of debtor's interest in the lease and the deposit can qualify as adequate assurance of future performance, which is required for assignment of the lease.

Section 365(f)(1) renders unenforceable any lease provision which prohibits or conditions the assignability of a lease. See *In re Standor Jewelers West, Inc.*, 129 B.R. 200 (B.A.P. 9th Cir. 1991). However, if applicable law excuses a landlord from rendering performance to an entity other than the debtor and the landlord does not consent to the assignment, then the debtor may not assume and assign the lease. *In re Lile*, 103 B.R. 830 (Bankr. S.D. Tex. 1989), *aff'd* 161 B.R. 788 (S.D. Tex. 1993), *aff'd in part*, 43 F.3d 668 (5th Cir. 1994). Note, however, that one bankruptcy court, construing Texas state law that contains a statutory provision prohibiting assignment of a lease without the landlord's consent,

found that the Texas law is not applicable law excusing the landlord from accepting performance from another party other than the debtor so that this provision of Texas state law does not operate to prohibit an assumption and assignment of a lease. *In re Federated Dep't Stores, Inc.*, 126 B.R. 516 (Bankr. S.D. Ohio 1990).

In connection with the assumption, or the assumption and assignment, of a lease in a "shopping center," Congress has provided special protections to landlords. *Trak Auto Corp. v. West Town Ctr. LLC* (*In re Trak Auto Corp.*), 367 F.3d 237 (4th Cir. 2004). See also, *In re Compuadd Corp.*, 166 B.R. 862 (Bankr. W.D. Tex.

1994) (recognizing that Congress enacted special interest legislation benefiting shopping center landlords and encouraging shopping center landlords to take their lobbyists "out to dinner" as a result). In order to assume a lease of real property in a shopping center, certain requirements must be met. The financial standing of the proposed assignee must be similar to that of the original tenant on the date the lease was originally executed. 11 U.S.C. 6365(b)(3)(A) Percentage rent must not decline substantially. 11 U.S.C. 6365(b)(3)(B). The assumption or assignment of the lease is subject to all of the provisions of the lease including (but not limited to) provisions such as radius, location, use or exclusivity provisions and the assignment will not breach any such provision contained in any other lease, financing agreement or master agreement relating to the shopping center. 11 U.S.C. 6365(b)(3)(C). Also, the assumption or assignment of the lease will not disrupt any tenant mix or balance in the shopping center. 11 U.S.C. 6365(b)(3)(D). See also *In re Rickel Home Ctrs., Inc.*, 209 F.3d 291 (3d Cir. 2000); *In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990); *In re*

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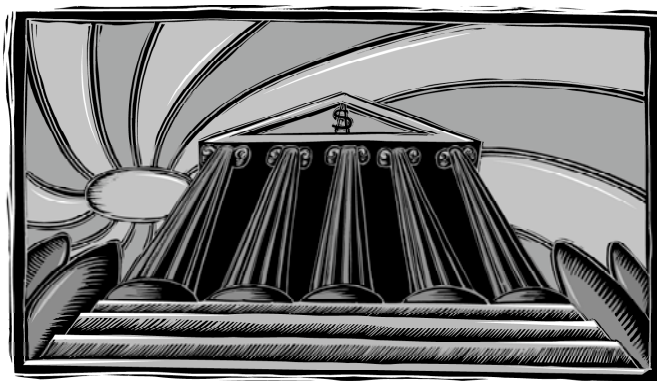
*Federated Dep't Stores, Inc.*, 135 B.R. 941 (Bankr. S.D. Ohio 1991).

To determine if the lease is a shopping center lease, as "shopping center" is not defined in the Bankruptcy Code, the bankruptcy courts review a number of factors to determine if a "shopping center" lease exists including:

- (1) a combination of leases;
- (2) all leases held by a single landlord;
- (3) all tenants engaged in the commercial retail distribution of goods;
- (4) the presence of a common parking area;
- (5) the purposeful development of the premises as a shopping center;
- (6) the existence of a master lease;
- (7) the existence of fixed hours during which all stores are open;
- (8) the existence of joint advertising;
- (9) [sic] contractual interdependence of the tenants as evidenced by restrictive use provisions in their leases;
- (10) the existence of percentage rent provisions in the lease;
- (11) joint participation by tenants in trash removal and other maintenance;
- (12) the existence of a tenant mix; and
- (13) the contiguity of the stores.

*In re Sun TV & Appliances, Inc.*, 234 B.R. 356, 360 (Bankr. D. Del. 1999).

The Bankruptcy Code also provides that if there has been a default in an unexpired lease of the debtor, other than a default arising from the fact that the bankruptcy case was filed, the trustee or DIP may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services or supplies provided under such lease before assumption of the lease. 11 U.S.C. 6 365(b)(4). Further, section 365(c)(3) provides that a lease may not be assumed, or assumed and assigned, if the lease is of non-residential real property and it has been terminated under applicable non-bankruptcy law prior to the entry of the order for relief in the bankruptcy case.



#### K. Nature of Post-Petition Obligations Under §365(d)(3)

As previously stated, pending the decision to assume or reject the lease, the bankrupt is required to timely perform its obligations under the lease, including paying rent. There is a split of authority as to whether the landlord can compel immediate payment of rent if the tenant fails to make the rent as required by the lease. One line of cases finds that landlords, based primarily on the language of section 365(d)(3), have been granted a superpriority administrative expense which must be paid immediately upon request if the debtor fails to make the payments as required by the lease. *In re Brennick*, 178 B.R. 305 (Bankr. D. Mass. 1995); *In re Telesphere Communications*, 148 B.R. 525 (Bankr. N.D. Ill. 1992). This right to payment is without regard to the trustee or debtor's use of the leased premises through the date of rejection (*i.e.*, the payment is owed regardless of whether debtor is actually operating in the premises). *In re CompuAdd*, 166 B.R. 862 (Bankr. W.D. Tex. 1994). See also *In re Pacific-Atlantic Trading Co.*, 27 F.3d 401 (9th Cir. 1994); *In re Worths Stores Corp.*, 135 B.R. 112 (Bankr. E.D. Mo. 1991). On the other hand, certain courts have determined that there must be some benefit to the bankruptcy estate for the recovery of the lease obligations. See *In re Mr. Gatti's*, 164 B.R. 929 (Bankr. W.D. Tex. 1994). Certain courts also have determined that immediate payment of unpaid rent is not required, especially if the debtor's bankruptcy estate may potentially be administratively insolvent. See, *e.g.*, *In re Four Star Pizza, Inc.*, 135 B.R. 498 (Bankr. W.D. Pa.

1992); *In re Joseph C. Spiess Co.*, 145 B.R. 597 (Bankr. N.D. Ill. 1992).

#### L. Rejection

Rejection of a lease can occur under two circumstances. One is by operation of law upon the expiration of the deadline to assume or reject leases. 11 U.S.C. 6 365(d)(4) (providing that the lease is deemed rejected at

the expiration of the period to assume or reject and that the lessee should surrender the premises immediately). On the other hand, the debtor can file a motion for entry of an order approving rejection of the lease. Debtors often file emergency motions at the very beginning of the case to reject undesirable leases to prevent the accrual of administrative rent. The effective date of rejection is important as it will determine when the administrative rent stops accruing. The majority rule appears to be that rejection is effective on the date that the bankruptcy court enters an order rejecting the lease. *Thinking Machs. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1025 (1st Cir. 1995). Conversely, debtors often ask that the effective rejection date be the date of the bankruptcy filing so that administrative rent claims can be avoided. *Constant Ltd. Partnership v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 39 (S.D.N.Y. 1995). The Ninth Circuit has found that a court may only order that the effective date of rejection be retroactive under exceptional circumstances. *Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1072 (9th Cir. 2004). In *Pacific Shores*, the Ninth Court discussed the four factors identified by the bankruptcy court in determining the definition of "exceptional circumstances" justifying retroactive rejection:

whether the debtor delayed in filing the motion to reject;

whether the debtor delayed in seeking a hearing on the motion to reject;

whether the debtor continued to occupy the premises; and

the motivation of the landlord in opposing the motion to reject.

*Id.* at 1072-75. However, not all courts recognize the retroactive rejection theory, particularly if the estate has received some benefit from the unexpired lease. See *In re Chateaugay Corp.*, 10 F.3d 944 (2d Cir. 1993).

In the event retroactive rejection to the date of filing is not authorized, the debtor bears the cost of any unpaid administrative rent claim during the post-petition, pre-rejection period. See *In re Revco D.S., Inc.*, 109 B.R. 264 (Bankr. N.D. Ohio 1989); *In re Federated Dep't Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991). These courts point out that retroactive rejection would leave the landlord in an inequitable position because it would not be able to relet the premises even though the debtor may have already vacated the premises and stopped paying rent. *In re Federated Dep't Stores, Inc.*, 131 B.R. at 815.

Some courts have even held that rejection is effective upon the filing of a motion to reject, or upon the debtor giving notice to the landlord that the lease was rejected, even though the bankruptcy court did not enter an order of rejection. See *In re 1 Potato 2, Inc.*, 58 B.R. 752 (Bankr. D. Minn. 1986). Once the lease is rejected, the tenant should immediately surrender the premises to the lessor and if the bankrupt fails to vacate the premises, the landlord can seek an order from the bankruptcy court to obtain immediate possession of the premises. See *In re Elm Inn, Inc.*, 942 F.2d 630 (9th Cir. 1991). See also, *In re Sok Jun Kong*, 162 B.R. 86 (Bankr. E.D.N.Y. 1993). However, it should be noted that rejection of a lease does not equal termination of the lease. *Fed. Realty Inv. Trust v. Park (In re Park)*, 275 B.R. 253, 256 (Bankr. E.D. Va. 2002). The Bankruptcy Code provides that rejection of an unexpired lease acts as a breach of the lease as of the day of the bankruptcy filing. 11 U.S.C. 6365(g). This distinction is important in the context of cases where a third party, other than the bankrupt, has an interest in the lease, such as the leasehold mortgagee. For example, in *Eastover Bank for Sav. V. Sowashee Venture (In re Austin Dev. Co.)*, 19 F.3d 1077 (5th Cir. 1994),

*cert. denied*, 513 U.S. 874 (1994), the Fifth Circuit considered whether deemed rejection of a lease under section 365(d)(4) constituted termination of the lease such that the rights of a leasehold mortgagee would have been likewise terminated. The Fifth Circuit found that the language of the Bankruptcy Code was clear in that rejection and termination are distinct concepts and that rejection does not equate to termination, rejecting a line of cases that held that the statutory breach under section 365(d)(4) arising from rejection plus surrender of the premises resulted in termination of the lease. *Id.* at 1080-84.

#### IV. LIMITATIONS ON DAMAGES FOR REJECTION OF LEASES

##### A. Statutory Cap

Once the lease is rejected, the landlord can file a rejection damage claim. Claims arising out of rejection of a lease are treated as general unsecured claims (*i.e.*, the claims are treated as arising immediately prior to the bankruptcy filing). 11 U.S.C. 6502(g). See *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib.*

*Corp.*), 330 F.3d 36, 42 (1st Cir. 2003).

The Bankruptcy Code, at section 502(b)(6), sets out a "statutory cap" governing the allowance of unsecured claims held by lessors for rejection damages incurred by the landlord upon lease rejection/termination. Section 502(b)(6) imposes a cap on the amount of damages a landlord can assert from rejection of a lease. While section 502(b)(6) is often believed to replace the state law calculation of damages arising from termination of a lease, it is more accurate to view section 502(b)(6) as a limitation on the damages recoverable by the landlord, as the statutory cap is applied after the amount of actual damages under state law is determined. See, *e.g.*, *Smith v. Sprayberry Square Holdings, Inc. (In re Smith)*, 249 B.R. 328 (Bankr. S.D. Ga. 2000). Further, section 502(b)(6) addresses all damages due to non-performance including breaches of lease covenants. *In re McSheridan*, 184 B.R. 91 (B.A.P. 9th Cir. 1995); *In re Crown Books Corp.*, 291 B.R. 623 (Bankr. D. Del. 2003). The rationale behind section 502(b)(6) is that it provides a limitation on



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potentially large claims of lessors, which would otherwise arise upon rejection of long-term leases. See *EOP-Colonnade of Dallas Ltd. P'ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260, 268-69 (5th Cir. 2005). It is often stated that this section is designed to compensate the landlord for its loss while not permitting a claim so large (based on the long-term lease) as to prevent other general unsecured creditors from recovering a dividend in the bankruptcy. See *Leslie Fay Cos. V. Corporate Property Assocs. 3 (In re Leslie Fay Cos.)*, 166 B.R. 802 (Bankr. S.D.N.Y. 1994). Moreover, the statutory cap is often times strictly applied and equitable arguments to disregard the cap are not generally respected. See *In re Federated Dep't Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991).

Section 502(b)(6) limits the landlord's claim for damages arising out of termination of the lease to the following:

(1) the rent reserved in a lease without acceleration for the greater of one year or 15% (not to exceed 3 years) of the remaining term of the lease calculated from the earlier of either the petition date or the date upon which the lessor repossessed or the lessee surrendered the premises;

(2) any unpaid rent due under the lease on the earlier of either the petition date or the date upon which the lessor repossessed or the lessee surrendered the lease premises.

11 U.S.C. 6 502(b)(6). Again, the courts have stated that the proper mechanism for determining the appropriate rejection damage claim is to determine the landlord's actual damages under state law and to the extent that those actual damages would be higher than the statutory cap of section 502(b)(6) to impose the cap to limit the claim. *In re Henderson*, 297 B.R. 875, 886 (Bankr. M.D. Fla. 2003). Of course, if actual damages are lower than the statutory cap, the landlord would only have a claim for its actual damages. This circumstance might arise where there are only a few months remaining on the lease from the time it's rejected or the landlord

is able to immediately relet the premises.

It is also important to note that the courts have recognized that various lease obligations such as utility charges, taxes, professional fees, maintenance and insurance can be included as rent and are addressed by the cap. See, e.g. *In re Clements*, 185 B.R. 895 (Bankr. M.D. Fla. 1995); *In re Rose's Stores*, 179 B.R. 789 (Bankr. E.D.N.C. 1995). Further, in *In re Mr. Gatti's, Inc.*, 162 B.R. 1004 (Bankr. W.D. Tex. 1994), the court found that the debtor's covenant to repair and maintain the premises was also subject to the statutory cap on rejection damages. The *In re Rose's Stores* case came to the opposite conclusion. *In re Rose's Stores*, 179 B.R. at 789. In *In re McSheridan*, the Ninth Circuit Bankruptcy Appellate Panel set out a three-part test to determine whether an additional charge under a lease was rent for the purposes of the application of section 502(b)(6). The factors were:

(1) The charge must be designated as rent or additional rent in the lease or be provided as the tenant/lessee's obligation under the lease;

(2) The charge must be related to the value of the property or the lease of the property; and

(3) The charge must be properly classifiable as rent because it is a fixed, regular, or periodic charge.

*In re McSheridan* 184 B.R. at 99-100. The *McSheridan* test was applied in the case of *In re Edwards Theatres Circuit, Inc.*, 281 B.R. 675, 684 (Bankr. C.D. Cal. 2002), to determine that construction obligation was not rent under the rejected lease. In *In re Pacific Arts Publ.*, 198 B.R. 319 (Bankr. C.D. Cal. 1996), the bankruptcy court found that attorney's fees could not be collected in connection with the rejection of a lease and were not allowable as a portion of rent reserved under the lease for rejection damage purposes.

The concern relating to the statutory cap may also affect the landlord's ability to assert claims against letters of credit that were provided by the debtor as additional security for payment of rent. Recently, the Fifth Circuit exposed a loophole for

lessors in *EOP-Colonnade of Dallas Ltd. Partnership v. Faulkner (In re Stonebridge Technologies, Inc.)*, 430 F.3d 260 (5th Cir. 2005). In *Stonebridge*, the lessor obtained, among other things, an irrevocable letter of credit to secure the payment of amounts owing by the debtor under the lease. Following the debtor's bankruptcy filing the lessor and debtor submitted an agreed order for the debtor's rejection of the lease. Since the rejection constituted a breach of the lease under section 365, the lessor could assert a claim for damages based upon the breach. Instead of filing a claim in the bankruptcy case, the lessor submitted a draw request to the letter of credit issuer to recover the damages, ultimately receiving proceeds in excess of the amount that would be calculated under the rejection damage cap of section 502. Based upon the rejection damage cap, the liquidating plan trustee filed suit against the lessor to recover the difference between the amount of the proceeds received by the lessor and the amount of the rejection damage cap. The Bankruptcy Court agreed with the trustee awarding the difference, and the District Court affirmed. On further appeal, however, the Fifth Circuit reversed.

The Fifth Circuit explained that while the rejection of a lease constitutes a breach of the lease, the Bankruptcy Code does not automatically recognize a claim in favor of the lessor for the damages caused by the breach. *Id.* at 269. Instead, the lessor must file a claim for such damages in order for the claim to be included in the bankruptcy case for distribution purposes. *Id.* Where such a claim is filed, the claim is deemed allowed unless and until an objection to its allowance is lodged under section 502(b). *Id.* at 268. Pursuant to section 502(b)(6), a lease rejection damage claim must be disallowed to the extent that it exceeds the rejection damage cap. *Id.* According to the Fifth Circuit, such liability is not limited automatically. *Id.* at 269. Based upon such analysis, the Fifth Circuit concluded that "the damages cap of 6 502(b)(6) does not apply to limit the beneficiary's entitlement to the proceeds of the letter of credit unless and until the lessor makes a claim against the estate." *Id.* at 270.

Thus, applying the holding of

*Stonebridge*, a lessor should carefully analyze whether or not to file a claim in the bankruptcy case following the rejection of its lease. In particular, if (a) the damages caused by the rejection are in excess of the rejection damage cap, and (b) the amount of available letter of credit proceeds is greater than the rejection damage cap, then the lessor should not file a rejection damages claim in the case since the landlord could realize a greater recovery by asserting its claim solely against the letter of credit.

### B. Mitigation Issues

Once a lease is rejected, the landlord is entitled to file a rejection damage claim capped by section 502(b)(6). An issue that often arises, however, is the argument by the debtor that the landlord is required to mitigate its damages under applicable state law and certain bankruptcy courts have analyzed whether the creditor properly mitigated its damages so as to further limit its claim (outside the context of section 502(b)(6)). See, *Heck's, Inc. v. Cowron & Co.*, 123 B.R. 544 (Bankr. S.D. W. Va. 1991); *In re Atlantic Container Corp.*, 133 B.R. 980, 990 (Bankr. N.D. Ill. 1991). Also, certain courts have stated that, if mitigation has taken place through reletting the premises to a new tenant, the amount of rent received from the new tenant is deducted from the overall damage claim prior to application of the statutory cap. *In re Bob's Sea Ray Boats, Inc.*, 143 B.R. 229 (Bankr. D.N.D. 1992). In Texas, landlords are now required to mitigate damages (although this was not always the case). Tex. Prop. Code Ann. § 6.91.006 (Vernon 1984 and 2001 Supp.). See also, *Austin Hill Country Realty v. Palisades Plaza*, 948 S.W.2d 293 (Tex. 1997) (Texas Supreme Court determines that a landlord has a duty to make a reasonable attempt to mitigate its damages upon default by commercial tenant).

### C. Pre or Post-Petition Obligation—Billing Date v. Proration Approach

An issue related to determining the amount of the rejection damage claim is a determination as to whether or not a claim is treated as a pre-petition or post-petition obligation (payable under section

365(d)(3)). In many instances, the courts have found that the filing of a bankruptcy case in the middle of a month requires proration of the various lease obligations. See *In re Swanton Corp.*, 58 B.R. 474 (Bankr. S.D.N.Y. 1986). On the other hand, certain courts have found that when the payment is due under the lease determines whether it is a pre or post-petition obligation. See *In re Appletree Markets*, 139 B.R. 417 (Bankr. S.D. Tex. 1992) (payment due on January 1st under lease, where bankruptcy filed January 2nd, was a pre-petition obligation and proration was not appropriate, even in connection with leases that provided for quarterly and yearly payments).

The issue of whether a lease obligation is pre-petition or post-petition (payable under 365(b)(3)) turns on whether the court adopts the billing date or proration approach. Representative billing date cases are *Centerpoint Props. v. Montgomery Ward Holding Corp.* (*In re Montgomery Ward Holding Corp.*), 268 F.3d 205 (3d Cir. 2001); *In re Comdisco, Inc.*, 272 B.R. 671 (Bankr. N.D. Ill. 2002); *Koenig Sporting Goods, Inc. v. Morse Road Co.* (*In re Koenig Sporting Goods*), 203 F.3d 986 (6th Cir. 2000); *In re R.H. Macy & Co.*, 152 B.R. 869 (Bankr. S.D.N.Y. 1993); *In re Duckwall-Alco Stores, Inc.*, 150 B.R. 965 (D. Kan. 1993). Conversely, many courts have followed the proration approach, including *In re Handy Andy Home Improvement Ctrs.*, 144 F.3d 1125 (7th Cir. 1998); *In re Ames Dep't Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004); *In re Child World*, 161 B.R. 571 (S.D.N.Y. 1993); *In re McCrory Corp.*, 210 B.R. 934 (S.D.N.Y. 1997); *In re Victory Mkts.*, 196 B.R. 6 (Bankr. N.D.N.Y. 1996); *In re All for a Dollar*, 174 B.R. 358 (Bankr. D. Mass. 1994).

### D. Damages that arise following Rejection of an Assumed Lease

If the trustee or DIP assumes a lease under section 365, then all liability under the lease is transformed into an administrative expense. *In re Monica Scott, Inc.*, 123 B.R. 990, 993 (Bankr. D. Minn. 1991). In the event the trustee or DIP is later required to reject the previously assumed

lease, then all liabilities stemming from the rejection are entitled to priority as an administrative expense of the estate. *In re Frontier Properties, Inc.*, 979 F.2d 1358, 1367 (9th Cir. 1992). Additionally, prior to the enactment of BAPCPA, the claims for future rent due under such lease were administrative expenses not subject to the cap on damages under section 502(b)(6). *Nostas Assocs. v. Costich (In re Klein Sleep Prods.)*, 78 F.3d 18, 30 (2d Cir. 1996).

Under BAPCPA, Congress created a statutory cap on the administrative expense damages that an estate will incur upon rejection of a previously assumed lease. Section 503(b)(7) provides:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6).

11 U.S.C. § 503(b)(7). This provision limits the administrative claim to two years from the later of the rejection of the lease or turnover of the premises. Furthermore, it grants the estate credit for any mitigation of damages that the creditor is able to achieve. Additionally, any anticipated damages beyond two years becomes a general unsecured claim subject to the cap under section 502(b)(6). These provisions ease some of the burden that the trustee and DIP will face in trying to determine whether to assume or reject

under the shortened time periods provided for in the newly established section 365(d)(4).

## V. CONCLUSION

As can be readily discerned by the foregoing, there are a number of issues to address in the context of leases and contracts involved in a bankruptcy case. For leases, as a practical matter, the landlord should focus on two issues. The first issue is whether the landlord needs quick certainty as to the status of the lease. If the answer to that question is yes, the landlord should pursue a motion in the bankruptcy court to require the debtor to immediately assume or reject the unexpired lease, or, at a minimum, oppose any potential extension of the initial one hundred twenty (120) day time period to assume or reject the lease. Obviously, economic factors, and the landlord's business plan are paramount in this determination.

On the other hand, should the landlord determine that time is not of the essence with respect to certainty regarding the status of the lease, the landlord should focus on ensuring that its claims are properly presented to the bankruptcy court. Foremost, the landlord should ensure that the debtor pays its post-petition lease obligations (which are a requirement of the Bankruptcy Code pending the decision to

assume or reject). Additionally, to the extent applicable, the landlord should file a claim for any unpaid pre-petition lease obligations and for its rejection damages, should the lease be rejected.

Finally, while the landlord should recognize that delay is inevitable in connection with any bankruptcy case, the landlord should also recognize that the Bankruptcy Code provides certain protections to landlords that other creditors do not receive such that the landlord should insist on those protections during the pendency of the bankruptcy case and in connection with any assumption of the lease by the bankrupt. As a practical and last point, however, it should be noted that the protections provided by the Bankruptcy Court for landlords are often disregarded by trustees and DIPs unless the landlord is diligent in protecting its interests under the Bankruptcy Code.

<sup>2</sup> Previously, section 365(d)(4) of the Bankruptcy Code provided that the trustee or DIP had sixty (60) days to decide whether to assume or reject an unexpired lease of non-residential real property.

<sup>3</sup> The "Ride-Through" Doctrine is inapplicable to nonresidential real property leases, *since* section 365(d)(4) requires automatic rejection, if such lease is not timely assumed.

*Thomas Rice is a shareholder with the law firm of Cox Smith Matthews Incorporated specializing in bankruptcy matters. He has practiced law for 6 years and has extensive experience in representing debtors, creditors, and chapter 11 Trustees in numerous national, regional, and local bankruptcy cases. Mr. Rice graduated from the University of California, Los Angeles in 1995 and from the Pepperdine University School of Law in 1999 (cum laude).*

*Patrick L. Huffstickler is a shareholder with the law firm of Cox Smith Matthews Incorporated specializing in bankruptcy matters. He has practiced law for 20 years and has extensive experience in representing landlords and tenants in numerous national, regional, and local bankruptcy cases. Mr. Huffstickler also handles uniform commercial code and other commercial litigation matters. Mr. Huffstickler represents commercial landlords, including retail malls and shopping centers, with respect to numerous issues involving real property leases, including negotiating and drafting termination and modification agreements, in both bankruptcy and non-bankruptcy matters. Mr. Huffstickler graduated from Trinity University in 1983 (cum laude) and from the University of Texas School of Law in 1986 (with honors).*



## PARALEGAL STANDARDS

The Active Members of the Paralegal Division adopted the following bylaw amendment during the Spring, 2007 Bylaws Election:

### ARTICLE I

#### NAME, PURPOSE AND DEFINITION

##### Section 4. Standards of a Paralegal

The Division adopts those certain Paralegal Standards, as adopted and set forth by the State Bar of Texas on April 21, 2006, or as amended thereafter.

To view the **Paralegal Standards**, please go to [www.txpd.org](http://www.txpd.org) under About PD.



# The Pillars of Education Planning

Craig Hackler, Financial Advisor, Raymond James Financial Services

An ever-stressful topic among parents is how to accumulate sufficient resources to meet their children's education funding needs. Ideally, the accumulation of resources for education costs should be based on an investment strategy that incorporates fundamental investment planning principles. Before an investment strategy is formulated a parent may wish to address four basic issues that may be critical to successful planning:

1. control of investment assets,
2. investment flexibility,
3. investment taxation,
4. financial aid concerns.

A sound first step is to address the question of who wants control of the assets. If the parent is not comfortable with giving up control of the investment assets that are going to be put aside for their child's education, investments where the parent retains ownership should be explored. A 529 college savings plan may be a consideration since the account owner of a 529 plan, which is usually a parent, is in control for the life of the account. While the child benefits from the account, the child never gets control of the account, even at age of majority. A regular investment account owned by the parents could also be used to save for education. The parent keeps control of the assets and this may be what is most important.

If, on the other hand, the parent has no reservations transferring assets into their child's name, then this can be easily accomplished by utilizing an UGMA/UTMA account. This, of course, comes with the understanding that if their child fails to go to college and instead wishes to become an avid European back-packer, it is the child's money and he/she can do with it as he/she wishes upon reaching the age of majority. Remember that all transfers (gifts) to a child via an UGMA/UTMA account are irrevocable

While control may be an important factor, other aspects such as investment flexibility and the taxation of those investments should also be considered.

and the parent needs to be aware that this really does mean non-changeable.

While control may be an important factor, other aspects such as investment flexibility and the taxation of those investments should also be considered. For example, in a regular investment account which the parent completely controls, there is great flexibility in what the account can be invested in, but those investments will be taxed at the parent's higher tax rate. Like the regular investment account, a 529 plan offers control but also offers additional tax advantages, such as tax-deferred earnings within the account with the possibility of federally tax-free\* withdrawals for qualified higher education expenses. However, there aren't as many choices when it comes to selecting investments.

With UTMAs/UGMAs, the child may obtain control of the account at age of majority, unlike a regular investment account. However, the way the account is taxed is more advantageous.

UTMAs/UGMAs are taxed according to the kiddie tax rules. For children under age 18, the first \$850 of unearned income is tax-free, and the next \$850 is taxed at the child's rate which is most often 10%. All investment income over \$1,700 is taxed at the parent's tax rate which could be as high as 35%.

Beginning in the year the child turns 18, however, the child's unearned income is taxed at the child's rate. Thus, UTMAs/UGMAs can be used as part of a strategy to shift unearned income to the

child beginning in the year the child turns 18 in order to take advantage of what might be as much as a 25% tax bracket differential (35% vs. 10%). From a practical standpoint, with the child reaching the age of 18, the parents may start to get a good indication of what type of child they have, studious or European back-packer, and may be more comfortable in making the decision to transfer assets at this point.

Finally, weighing education savings options is beneficial to determine whether a parent with a college bound child intends to apply for financial aid, and if so, how assets owned by the child will be treated by colleges and universities during the financial aid needs review. Typically, 35% of assets held in the child's name may be deemed available to meet education expenses while 5% to 6% of the same assets may be deemed available if owned by the parent. The net effect may be potentially less financial aid for the child if assets are held in the child's name. While UTMAs/UGMAs are considered assets of the child for financial aid purposes, 529 college savings plans and regular investment accounts are more advantageously counted as an asset of the parent if the parent is named as owner on the account.

Having an understanding of the "pillars of education planning" provides for a solid foundation from which to analyze education-funding decisions. Of course, this brief article is no substitute for a careful consideration of all of the advantages and disadvantages of this goal in light of your unique personal circumstance. Before implementing an education planning strategy, contact and consult with your financial advisor.

\* Withdrawals for qualified education expenses became federally tax-free effective January 1, 2002.

*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*

# Advancing the Profession Through Ethical Conduct

Javan Johnson, ACP, President, Paralegal Division, State Bar of Texas

**P**aralegals must work under the supervision of an attorney, and therefore the paralegal and the attorney become team members. They work together on behalf of clients and share in the ethical and legal responsibilities arising as a result of the attorney-client relationship. Paralegals must know what their responsibilities are, why they exist, and how they affect them. Attorneys must also understand these same ethical responsibilities.

A paralegal must also have full knowledge of the ethical rules that govern attorneys, in that those same rules govern paralegals, a violation of such rules by a paralegal may result in serious consequences for the client, for the attorney, and for the paralegal. Attorneys are governed by the American Bar Association - *Model Rules of Professional Conduct*, and by the State of Texas through the *Texas Disciplinary Rules of Professional Conduct* which sets forth the rules attorneys must abide by to practice law in the State of Texas. In that paralegals are not regulated, there are no informal rules paralegals must follow, but the rules that regulate the attorneys, spill over to their paralegals. Also, if a paralegal is a member of the Paralegal Division of the State Bar of Texas, they must agree to abide by the *Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas*, hereinafter referred to as the "Code," and which will be referenced herein.

A paralegal with a clear understanding of the rules of ethics is an invaluable asset to any law practice. Ethical behavior in the workplace increases client satisfaction, reduces the risk of liability for the employer, and perhaps even more important, fosters a sense of respect and pride for the profession. The following tips offer some

suggestions on how you can incorporate the rules of ethics and professional responsibility into your daily life as a practicing paralegal.

## Set a High Standard for Competence as a Paralegal.

There is a duty of competence set forth by the rules for attorneys, and therefore, the same is true for paralegals, i.e. Canon 9 of the Code.

Keep abreast of changes in the law, in technology and in ethics. Attend continuing legal education seminars in your area of practice, as well as in ethics.

CLE is not required in order to work as a paralegal in Texas, but it is imperative to keep up-to-date on legal knowledge and skills.

CLE is only required for those paralegals who are certified by NALA, NFPA, TBLS, and other organizations. CLE is also now required for membership in many paralegal organizations, such as the Paralegal Division of the State Bar of Texas, and local associations.

CLE is very easy to obtain with the Division, as well as the State Bar, offering online CLE, live webcasts, in addition to live seminars, such as the Texas Advanced Paralegal Seminar (TAPS) held each Fall, and other live presentations held throughout the state. Most organizations and associations also accept self-study hours, so reading the *Texas Paralegal Journal*, *Texas Bar Journal*, advance sheets, legal periodicals, and other materials constitute self-study.

Also, consult , and hundreds of other websites that continue to post updated laws.

Subscribe to e-groups that will be effective for your work and profession, such as .

You will be able to send and receive valuable information and questions to assist you on a daily basis.

Take advantage of educational opportunities offered by paralegal associations and bar associations.

Understand that your paralegal education and experience provide a foundation on which you are expected to build throughout your career.

Common breaches of the duty of competence may be missed deadlines and errors in documents. Strive to be detailed and thorough in your work so these breaches do not happen.

If you have an attorney that is not adequately supervising you, improve your communications with the attorney to bring this to their attention, i.e. force them to be your supervisor.

Keep up with new software and updated versions of programs you already use. Evaluate whether the programs you are using are being used to their fullest. Get the appropriate training if the programs are not being properly used. If there are better programs for your office to use that would be more efficient, be sure and research and share that information.

Do these things at a minimum, and always strive for the highest possible standard with respect to competence and skills.

## Recognize the Pitfalls of the Unauthorized Practice of Law.

A paralegal may not do what only an attorney is allowed to do. If you do, this is committing the unauthorized practice of law, and can lead to serious consequences which may include the loss of your job, civil or criminal charges being brought against you, and a potential of spending time in prison or paying monetary damages to someone. Those matters include:

- You may not give legal opinions or legal advice of any nature.
- You may not represent a client in court. The only exceptions that are allowed are by statute, i.e. Social Security Administration allows some types of hearings to be attended by a paralegal. The United States Bankruptcy Courts are establishing the same type of situation in certain hearings. Other adminis-

trative agencies may also be doing so.

- You may not establish an attorney-client relationship. Your attorney has to establish the attorney-client relationship and agree to represent the client.
- You may not set the fees to be charged for an attorney's services.
- You must always disclose your paralegal status and leave no doubt that you are not an attorney.
- You may not sign pleadings yourself, nor can you sign your attorney's name to pleadings. You may not sign a certificate of service since that is part of a pleading. Only an attorney can sign pleadings. *TRCP* 57.

Giving legal advice or opinions, in any manner is not allowed, and is considered the unauthorized practice of law. You may not:

- Interpret the law for anyone or tell someone what the law says.
- Sign a letter or any other documents that contain legal advice without clearly stating the attorney told you to provide the information to them.
- Fill out legal forms for anyone, tell them how to fill out legal forms, or even help them fill out legal forms without an attorney's supervision.
- Recommend what someone should do in any legal situation, other than recommending that they seek the advice of an attorney.
- Tell a client what to do in a situation because you just know the attorney will tell them the same thing.
- Interpret the law for someone's situation.

How do you know what is giving legal advice?

- Never advise someone of any matter that could alter their rights or legal position of the person whom you are giving advice.
- This does not just include clients - this includes family members, friends, co-workers and others.
- Even a friendly "Well, you should do this...." can be construed as legal advice.
- "If I were you, I would...." can be construed as legal advice.

## Ethical behavior in the workplace increases client satisfaction, reduces the risk of liability for the employer, and perhaps even more important, fosters a sense of respect and pride for the profession.

strued as legal advice.

- There is a very fine line between just talking with someone about what they should do, and that being considered legal advice, when there is any type of legal matter or potential legal matter involved.
- Just because you may have heard an attorney tell someone the exact same thing you are telling someone, if YOU tell it, then it's legal advice. It can only come from the attorney.
- Always refer the person to an attorney, or tell them you will find out the information for them, then make it clear to them that the answer came from the attorney.
- And most of all, make sure you keep your attorney apprised of the fact that you cannot give legal advice. Attorneys come to rely upon us heavily, and want us to take the work load off of them, and may unknowingly place you into a situation that would require you to advise someone of what they should do. Remind the attorney you are the paralegal, and the advice needs to come from the attorney.

Always identify your self as a paralegal—in all correspondence, in all conversations, faxes, e-mails and any other form of communication with the public. Do not presume someone will just know you are a paralegal.

- You may have your name on letterhead and business cards, but your identification as a paralegal should be clear.
- Examples:  
Jane Smith  
Paralegal for Jason Jones  
  
Jane Smith, ACP

Advanced Certified Paralegal  
National Association of Legal Assistants, Inc.

Jane Doe, Paralegal  
Board Certified Legal Assistant—Civil Trial Law  
Texas Board of Legal Specialization  
You may not solicit business for your attorney or firm.

Develop strategies for handling these situations with tact and empathy.

If a client as a problem calling for immediate attention, it is not sufficient to tell him or her that as a paralegal you are not permitted to give legal advice. Inform the client you will find an attorney who can assist the client and either you or the attorney will get right back to the client. Then be sure you follow up.

When in doubt if you are being faced with a situation involving UPL, consult the rules for guidance and speak with your supervising attorney.

The best rule of thumb is to ask yourself whether what you are about to say to a person will directly affect that person's decision and actions, which in turn may affect that person's legal rights or position.

### Demonstrate Respect for Others and for the Profession.

Canon 8 of the Code places a high standard of ethical conduct and integrity on paralegals and reads: "A paralegal shall maintain a high standard of ethical conduct and shall contribute to the integrity of the paralegal profession."

We are constantly struggling for this profession to maintain a more professional image, given the media attacks and other bad information that is spread. Our personal ethical principles are key to our maintaining the professionalism that is necessary to be an effective paralegal.

Do your part to promote an atmos-



phere of mutual respect and well-mannered behavior in your workplace by behaving professionally at all times.

Understand that clients and members of the public hold us to a higher standard of ethical conduct. We are expected to conduct ourselves with dignity and to show respect for the law and for each other.

Avoid even the appearance of impropriety. Given that, you must from time to time put your sense of professionalism and dignity before your own emotions when faced with unprofessional conduct on the part of others.

Maintain ethical billing practices: do not over bill time, do not bill double bill time; do not bill time that is clerical in nature and not substantive in nature.

Always give credit to the person who deserves the credit for the work performed. Do not take credit when it is not your work.

If you make a mistake, do not cover it up. Be truthful and honest and take any consequences that might be associated with it.

Do this for the good of your clients and for the profession as a whole.

### **Understand and Observe the Rules of Confidentiality.**

The ethical rules on confidentiality create the underpinnings of the attorney-client relationship. Canon 4 of the Code places this responsibility on paralegals.

Paralegals ability to provide the best possible legal services for our clients hinges on the trust and confidence that the clients placed in them. Do nothing that could jeopardize this.

Recognize common danger zones for paralegals in preserving confidentiality, such as discussing clients and cases with family and friends, discussing a client's matter in public or a common area when a conversation might be overheard, interviewing clients in your office when other clients' files and documents are in plain view, and discussing a client's case with a witness during an investigation.

Watch what is up on your computer screen or what files are able to be observed when others are in your office.

Be mindful of other persons nearby

when you are discussing matters out in public. You never know who is sitting at the next table—they may have some connection with the matter you are discussing.

Be careful what is discussed of a confidential nature while on a cellular phone, and be cautious when sending e-mail messages - watch the content of your message, and be overly cautious in double-checking exactly who is going to be receiving the message.

### **Demonstrate Loyalty to the Client by Recognizing Potential Conflicts of Interest.**

Canon 7 of the Code imposes the duties regarding conflicts of interest.

Be diligent in following your firm's practices for conflict checking.

If you believe a conflict may arise in a case you are handling, speak to your supervising attorney immediately.

It is better to address conflict issues at the earliest possible opportunity; waiting until later may result in unnecessary cost and embarrassment for you and for your employer.

If changing jobs, if there is any chance of a conflict of interest for cases and clients that you may have been representing at your former job, create an ethical wall by immediately advising members of the new firm, and your attorneys, and follow or create procedures to wall off any chance of working on those matters at your new firm. No one should discuss the conflicting case in your presence; you should not be allowed any access to documents, even if it means keeping that file locked up; and above all, no one at the new firm should ever request you to discuss your work on the case at your prior firm.

### **Demonstrate Loyalty to Your Employer through Your Professionalism.**

You are a representative of your firm or company.

Paralegals interact with clients, witnesses, other firms, and court personnel on a regular basis.

Refraining from gossip or negative remarks about your firm or employer.

Attorneys and paralegals work together as integral members of a team on behalf of the clients.

If difficulties or conflicts arise with your supervisor, speak to that person directly in an effort to resolve them.

### **Practice Diligence in Completing Your Work Promptly and Efficiently.**

Prioritize your work to avoid neglecting important projects.

Be scrupulous in maintaining your calendar and tickler system.

Understand your own limits, and speak to your supervisor if the volume of work becomes so overwhelming that you run the risk of neglecting projects or missing deadlines.

It is better to ask for assistance from your paralegal co-workers or from your supervisor than to ignore the problem until it is too late.

### **Recognize Your Role as the Client's Contact, and Promote Responsiveness to the Client's Questions and Concerns.**

Common complaints by clients about attorneys and some of their staff members is that they are unresponsive.

Make it a point to return your clients' phone calls in a prompt and courteous manner.

When a client has a question calling for legal advice, bring it to the attorney's attention quickly, and encourage the attorney to respond to the client promptly.

If the attorney is busy, offer to pass along the message the message, being careful to avoid giving legal advice yourself.

### **Know When to Ask for Help and Where to Get It.**

Every paralegal should have a copy of the ethical rules for attorneys and paralegals.

Regularly review ethics opinions, disciplinary proceedings, and cases interpreting the rules of professional conduct.

When questions or concerns about ethics arise, know where to turn for help.

Some firms may have a designated person within the firm as the contact person for ethical inquiries.

Many state and local attorney licensing and regulatory agencies, bar associations, and paralegal associations provide services to legal professionals who have ethical questions.

Inquire about your firm's policies regarding ethical questions and take advantage of all available resources.

#### **Become Active in Local, State and National Professional Associations.**

Collaborate with and learn from your colleagues as a member of a paralegal professional association, such as your local associations, the Paralegal Division, or even one of the national associations, NALA or NFPA.

These organizations take pride in raising awareness about the paralegal profession, and provide excellent sources of information for their members and for the public.

These associations also have promulgated ethical guidelines for paralegals and publish ethics opinions and cases on ethics to guide their members.

Consider becoming certified. The Texas Board of Legal Specialization offers specialty exams in Civil Trial, Personal Injury, Family, Estate Planning and Probate, Real Estate and Criminal. NALA offers the Certified Legal Assistant/Certified Paralegal exam, and the Advanced

Certified Paralegal exams; NFPA offers the PACE exam; and other associations also offer exams.

Remember, the paralegal profession is an unregulated profession. We now have the Paralegal Standards which were approved by the State Bar of Texas in April 2006, however these are not "required guidelines" for paralegals or attorneys. However, attorneys and paralegals are encouraged to follow these standards, and individually meet those standards. If we are expected to be treated as professionals, then we have to be professional in every respect. Raise the bar, and advance the profession by raising your own standards!

*Javan Johnson, ACP, is a freelance paralegal who began her own business in Longview in February 1999, specializing in civil trial litigation, after working 20 years for a sole practitioner. She has a bachelor's degree in Business Administration and Business Education from Baylor University. Javan obtained her CLA in 1990, earned the NALA Advanced Certified Paralegal designation in 1993, and became certified in Civil Trial Law by the*

*Texas Board of Legal Specialization in 1996. Javan has served the Paralegal Division of the State Bar of Texas (PD) for many years as subchair and chair on various committees, served on the Board of Directors as District 14 Director, served as President in 2000-2001, and now serves as President for 2006-2007. She was the recipient of the Award of Excellence in 2004. In addition to being a charter member of PD, Javan is also a charter member of the Northeast Texas Association of Paralegals, Inc. (NTAP), in Longview, and has served that organization since its inception in 1988 in a number of different offices, including President. Javan participated in the start-up of the legal assistant program at Kilgore College in 1988, and has been an instructor in that program since that time. Javan has been married to her husband, Brett, for 20 years, and has one son, Cameron, age 18.*

#### **Additional References:**

*Paralegal Division, State Bar of Texas Code of Ethics and Professional Responsibility  
Paralegal Division, State Bar of Texas;  
Ethics FAQs as posted on [www.txpd.com](http://www.txpd.com)*



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## Celebrating Law Day with Fox Tech

By Jodye Kasher, CP, TBLS Board Certified Paralegal

**D**istrict 5 Division members recently had an opportunity to participate in a wonderful program involving Fox Tech students. The San Antonio Chapter of the Federal Bar Association, the Bexar County Women's Bar Association, and District 5 of the Paralegal Division of the State Bar of Texas, were invited to a program on March 2, 2007, hosting girls participating in the Law Magnate Program at Fox Tech High School for a pizza mentoring luncheon.

Louis W. Fox Technical High School was the lowest-ranking school in Texas in 1995. At that time, the school became re-established with a new administration and many new staff members, and was nicknamed "Fox Tech." Within 5 years of the new administration's plan to eliminate the high dropout rate, and increase enrollment, the school completely turned around, became recognized in the 1999-2000 school year, and was eventually elevated to National Blue Ribbon status.

The pizza mentoring luncheon program was developed to help encourage the students to stay in school and succeed, despite peer pressure. Many of the stu-

dents at Fox Tech rely on public transportation to get to school, and many come from backgrounds where they may not have a lot of guidance, or where financial support may not be available for education. Mentors provide encouragement to the students.

While pizza and beverages were purchased and supplied to students and mentors by the San Antonio Chapter of the Federal Bar Association, mentors got to sit at tables with the students, and visit with them. Mentors talked about their own educational or career struggles, and encouraged the students to stay in school and be successful. U.S. Magistrate Judge Pamela Mathy, U.S. District Court, Western District, spoke to the entire group about her background and career choices, as did several of the members of the San Antonio Federal Bar Association and Bexar County Women's Bar Association.

One of the mentors that spoke to the group, both this year and the previous year, was a former Fox Tech student who had a successful career at the U.S. Marshal's Office. The impact of the program was clear when several students

coming back to the Law Day program this year revealed they also wanted to be a U.S. Marshal after they heard her talk last year about the difficulties she faced in getting her education, and the payoff later with a rewarding career.

Some of the District 5 Division members who attended this event as mentors were: Kristy Ritchie, Jodye Kasher, Susan Wilen, Rachel Salinas, Melanie Langford, and Linda Rumsey.

*Jodye Kasher is a Certified Paralegal through NALA, and a Board Certified Paralegal through the Texas Board of Legal Specialization in Personal Injury Law. She has 19 years of experience as a litigation paralegal, and has worked in a variety of areas, including mass toxic torts, antitrust, class actions, environmental law, franchise & distribution, discrimination cases, products liability, professional liability, premises liability, and complex litigation matters. She has published articles in the TPJ, and has been a past paralegal seminar speaker for the Division, as well as the Institute of Paralegal Education. She has twice been the joint recipient of the Pro Bono Partners Team Award from the Paralegal Division for pro bono work. Mrs. Kasher currently works in the Litigation Department of Fulbright & Jaworski L.L.P.'s San Antonio office. She is a member of AAPA, STOP, the Bexar County Women's Bar Association, the Paralegal Division, and currently serves as the Public Relations Chair for the Division.*





## District 5 Panel Presentation at San Antonio College

**O**n the evening of March 19, 2007, District 5 held a panel presentation at San Antonio College to discuss what it is like working as a paralegal, and to talk about the Division. The presentation was held in the Visual Arts Technology Center of San Antonio College. San Antonio College opened up the presentation to all current and former students, and three of the faculty of the Paralegal Program made attendance to the presentation mandatory for their classes.

Kristy Ritchie, District 5 Director, served as moderator, asking various questions to the panel members. Kristy is employed by Bracewell & Giuliani, and works in water law, real estate, and telecommunications law. The six panel members consisted of the Division's President-Elect, Patti Giuliano, of Cox Smith Matthews Incorporated, who works in intellectual property; Susi Boss of Higdon, Hardy & Zuflacht, who works in family law, and is a Division member; Melanie Langford, CP, of Akin Gump Strauss Hauer & Feld, who works in litigation, and currently serves as the Elections Subcommittee Chair of District 5; Jodye

Kasher, NALA CP, TBLS Board Certified Paralegal, of Fulbright & Jaworski L.L.P., who works in litigation, and currently serves as Public Relations Committee Chair of the Division; Susan Wilen, Senior Nurse Paralegal of Fulbright & Jaworski L.L.P., who serves as the San Antonio Joint Paralegal Day Celebration Chair; and Charlene B. Carroll, NALA CP, and President of South Texas Organization of Paralegals, Inc., who currently serves as both Professional Development Subcommittee Chair of District 5, and Co-Chair of the Annual Meeting for the Paralegal Division. Charlene specializes in criminal law, and also works with civil litigation and appellate cases, and has been employed by attorney Samnuel H. Bayless for the past 18 years.

Our President-Elect, Patti Giuliano, began the presentation by talking about the Division, and the benefits and opportunities for joining the Division. The panelists each provided their viewpoints of what it is like working as a paralegal in their practice areas; explained some of the benefits and drawbacks of different job paths; and discussed some non-traditional jobs for paralegals. They also covered basic questions, from explaining about the general process of timekeeping, to general advice regarding interviews and various things entry-level paralegals can do to be

successful in their careers, and everything in-between. After concluding an hour of questions and viewpoints, the panel then opened up the floor to answer individual questions from the students.

Tandy Schoolcraft, the San Antonio College Paralegal Studies Program Coordinator, stated, "The students and faculty members who attended the presentation really enjoyed it, and found the information to be very practical." She also stated, "The students were paying close attention and taking the panel's words to heart."

One piece of advice echoed by many of the panelists had to do with mentors. Many of the panel members had a mentor when they were starting out in their careers. If you are new in the field, it is often helpful to find someone professional, with experience, to be a mentor to you. Likewise, for those that have given many years to their careers, it is good to always remember what it is like to start out new in the field as a paralegal, somewhat unsure of yourself or your surroundings, and give back. Be active in the Division, so that you can be a part of the movement to work hard for our profession to continue to move forward. And, if you can, try to remember to make time to reach out to new or struggling paralegals, and offer to be a mentor for them.

---

## 2007-2008 District Director Election Results

**C**ongratulations to the following individuals elected from the odd number districts.

### District 1 Director

Charlotte "Charie" Turner, CP  
Beck, Redden & Secrest, LLP  
1221 McKinney, Suite 4500  
Houston, Texas 77010  
(Harris County)

### District 3 Director

Michele E. Rayburn, CLA  
Wallach, Andrews, & Stouffer PC  
550 Bailey Avenue, Suite 500  
Fort Worth, Texas 76107  
(Tarrant County)

### District 5 Director

Kristy Ritchie  
Bracewell & Giuliani, LLP  
106 S. St. Mary's Street #800  
San Antonio, Texas 78205  
(Bexar County)

### District 7 Director

Misti Janes  
Underwood, Wilson, Berry, Stein &  
Johnson, PC

P.O. Box 9158  
Amarillo, Texas 79105  
(Potter County)

### District 11 Director

Kim Hennessy, CLA  
Stubbeman, McRae, Sealy, Laughlin &  
Brow  
P.O. Box 1540  
Midland, Texas 79702  
(Midland County)

### District 13 Director

No votes included a candidate name.

### District 15 Director

No votes cast.

# Scruples

## The Ethics of Confidentiality

Ellen Lockwood, ACP, RP



**C**anon 4 of the Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas states:

"A paralegal shall preserve and protect the confidences and secrets of a client."

Many of us have worked on high-profile matters. In those situations, everyone involved is often given strict instructions on how to maintain confidential information about the case and who may answer questions from outside the firm. However, when working on regular matters for regular clients, we should be equally cautious.

**Confidential Means Confidential.** Of course, virtually all information provided by your client is confidential. That means you should not discuss it with family or friends. You must also assume that in a restaurant, everyone at the next table can hear what you say. You should not discuss client information in elevators. You should even be careful in your office if there is the possibility of a visitor being in the office. Although we often give vendors highly confidential information such as documents, you should be careful not to tell vendors anything that is confidential. People will sometimes assume that if you told them something, it must be okay to tell someone else. Care should also be taken in discussions with contract employees, particularly those who aren't working directly on your client's file. Some contract employees may not appreciate that infor-

mation is confidential.

In some instances, witnesses should not be told everything about a case. Some witnesses cannot always be trusted to appreciate the confidentiality of information, even though they often think they are entitled to know everything. Witnesses and even clients should be reminded often about discussing the case with outsiders. A paralegal friend worked with an attorney who had a client who would talk to anyone, anywhere, about his case, especially if she was an attractive woman. The attorney had to remind the client that the attractive woman in the hotel lobby who was so eager to speak with him the morning of trial could be working for opposing counsel. It turned out she was a member of a shadow jury hired by opposing counsel! Care should be taken not to discuss confidential matters within earshot of others. This means paralegals should not discuss matters in elevators, common areas, and restaurants. If confidential matters must be discussed on a cell phone, move to an area where the conversation cannot be overheard.

Often confidential matters are overheard by visitors to a law office. Paralegals should be aware that other clients, vendors, and visitors may be in the office. Sometimes, even discussing a matter using abbreviations or other shorthand is not enough. Others may overhear such a discussion and still be able to determine which matter is being discussed.

Paralegals should take care not to discuss these matters with others in the legal department, law firm, or even other employees of the client unless directed to do so by the client or supervising attorney. Paralegals should not misinterpret casualness of work environment or the friendly nature of a professional relationship as relaxing the need for confidentiality. Paralegals should work closely with their supervising attorneys to be clear regarding who may have access to what information at what time.

Paralegals should also be aware that attorney ethics rules prohibit even acknowledging that a client is represented by a particular firm or attorney. There may be public information, such as pleadings or filings, that indicates representation, but law firms

and attorneys may not discuss their representation unless given permission to do so by the client. This rule applies to paralegals as well.

**Settlement Agreements.** Settlement agreements are often confidential and may be voided if the terms are revealed to anyone. Even if the settlement isn't confidential, it is probably inappropriate for you to discuss it with anyone. I was involved in a very high-profile case and the settlement agreement was confidential. Another attorney in the firm asked me the terms of the settlement assuming that because he was a member of the firm I would tell him. I was uncomfortable doing so and directed him to the attorney who worked on the case. Better to have the attorney determine whether it was appropriate to provide the information to another attor-

ney in the firm not involved in the case.

**Corporations.** For those of us who work in corporations it can sometimes be more difficult to determine what is confidential. Of course, terms of mergers, sales, and acquisitions are often confidential. New products or areas of business, plans for expansion, potential layoffs, clients of the company, and much of other information about a company could be considered confidential. Even if information is public, you should not discuss details with anyone outside the company.

**Confidential Means Forever.** Regardless of whether a matter has been concluded for days or decades, it must always remain confidential. There is no time period after which it is permissible to discuss client confidences, details of a settlement agreement, or other information.

**Keeping Up Appearances.** In addition to avoiding disclosing confidential information, we should work to avoid even the appearance of impropriety. If your behavior is consistently above reproach, then when confidential information gets out (and it sometimes will), your past conduct will assure others that the information could not have come from you.

*Ellen Lockwood, ACP, RP, is a past president of the Paralegal Division and served as Chair of the Professional Ethics Committee of the Paralegal Division from 1997-2004. She is a frequent writer and speaker regarding paralegal ethics. You may contact her at 210.832.3382 or ellen-lockwood@clearchannel.com.*

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## Opinions TO THE EDITOR

**T**he 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:**  
*Should the US government regulate the price of oil and gas?*

RESPONSE 1: Yes!

—*Marsha Smith, CLA, TSC, San Antonio*

RESPONSE 2: No. Oil and gas are a commodity, the consummation of any product should regulate its price, the government should not be regulating how we produce, how much we produce, and how much to pay for an item; because of the regulations the government has already set in place, the cost of a gallon of gasoline goes mostly to the government rather than the oil company. Getting the government out of the oil business would enable us to pay less for the production of oil and gas. If we as consumers want to keep the prices in check, then we should encourage our government to open more drilling sites (coastal and parks) so that oil and gas

would not have to be purchased from foreign countries.

—*Name Withheld*

RESPONSE 3: Dear TPJ, Yes, I have always been in favor of regulations in regards to gasoline pricing. I believe as long as the big oil and gas companies set their own pricing, they will continue to gouge the American public. Many countries have the right to impose a price freeze if the price of gasoline gets too high. There is no reason why we should not be able to do the same thing. I have a hard time believing the oil and gas companies when they tell us they are spending the record profits into exploration. After Enron, the oil companies do not have any credibility. It is apparent they have plenty of political influence to keep the government from passing any kind of regulation. They spend millions for lobbyists who can wine and dine politicians. I just hope somebody will

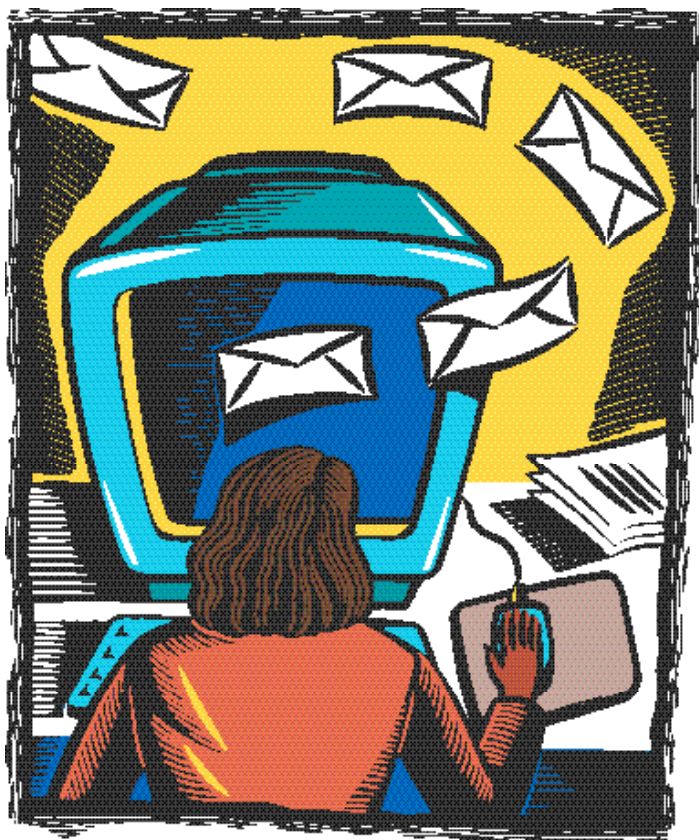
do something before it is too late.

—Stephen Blanchard,  
Grand Prairie

RESPONSE 4: The US government should stay out of the commodity pricing business and let the free market set prices. Our economy is based upon demand setting prices, not the government regulating them. If prices get too high, demand decreases and prices drop. If too much is produced, prices drop and demand increases.

The government regulates prices for certain commodities already, and those industries are facing problems with their price supports. Many small dairy and family farm operators have been forced out of business by government “price programs” which only served to benefit large companies. A similar effect has occurred in industries where the government has interfered with bidding for contracts and creating regulations relating to awarding contracts for goods or services. Remember the over-priced toilet seats and tools used for military contracts? Not only have prices soared for certain common goods, but pricing controls and bidding regulations have helped create an atmosphere where fraud is prevalent. The same thing happened when state governments entered into licensing arrangements for casinos and other forms of legal gambling.

Keeping the US government out of pricing for oil and gas will allow consumers (individuals and companies) to determine their own price points where they will no longer purchase oil or gas in the same quantities. Of course we need these commodities to operate our vehicles and heat our homes. Utilities need natural gas to convert into electricity, or sell for home heating and cooking. However, when buyers decide that prices are too



high, they find ways to cut back on consumption until prices fall to more reasonable levels. Look at supply, demand and prices for gasoline over the period of a year, or several years. Prices rise and fall with demand.

Sure, we would all like to see gasoline prices fall below current levels, but many of us don't consider that taxes on gasoline have risen steadily for the past several years, further pushing up prices. The profit margin is being squeezed and most oil companies are realizing their profits from volume sales and sales of crude products, instead of profits on sales to end-users. The US government gets a large part of the taxes on the gas we purchase, and state and local governments also have their fingers in the price-pie. Those costs are always passed on to the end-users and are not likely to be reduced any time soon. Most local gas and sales taxes were approved by local voters - all of us!

It is too late to prevent the US government from getting involved in the pricing of oil and gas taxes, but it is never too late to vote with our wallets and our feet to control further interference by any gov-

ernment entity in pricing of these or any other commodities. Vote against tax increases. Contact your representatives in Congress and urge them to support less federal regulation of commodities and price supports. Let the free market economy work the way it was designed, and keep looking for creative ways to cut back on consumption of expensive commodities. Prices will naturally begin to fall as demand decreases, then will rise when demand increases again.

—April May, Dallas

RESPONSE 5: Should the US government regulate the price of oil and gas? In of itself, no. There are many factors that play into the pricing of gas that we need to take into consideration

and that the US government should be addressing. We can talk about potential mis-management or fraud. We can talk about changes in the speed limit laws or changes in the fees charged to individuals who still see fit to purchase oversized vehicles or vehicles that use an excessive amount of fuel. We can talk about the vehicle industry taking responsibility in the kinds of vehicles they produce. All these things come up in the media time and again. I would like to think our government is smart enough to get in there and do what needs to be done for the benefit of the people.

But, let's face it. We can take personal responsibility. We can choose to purchase vehicles that are fuel efficient. We can choose to slow down our speed and to be more mindful of our driving. Decision makers within the oil, gas, and automobile industries can choose to take responsibility for what goes on within their respective industries.

It will take all of us working together to see us through this period of our history.

—TM, San Antonio





## **PARALEGALS FLY TO IRELAND**

**April 26 – May 3, 2008**  
**(Seven Days and Six Nights in**  
**Killarney and Dublin, Ireland)**



Saturday, April 26	Departure from the United States	Wednesday, April 30	Depart Killarney and journey to Dublin. Acquire Ireland's famous eloquence as you visit the Blarney Castle, where those that wish to gain the "gift of gab" can kiss the Blarney Stone. Travel to Waterford to visit the Waterford Crystal Factory. Continue to Dublin. Dinner on your own.
Sunday, April 27	Arrival in Shannon, Ireland. Travel through the Irish Country; visit Bunratty Castle and St. John's Castle in Limerick en route to Killarney. Take in your first views of the majestic countryside before checking into hotel. Welcome reception and Dinner at local restaurant.	Thursday, May 01	Morning sightseeing tour of Dublin with a local guide, including entrances to St. Patrick's Cathedral and Trinity College, home to the Book of Kells. Dinner on your own.
Monday, April 28	See Irish scenery at its most stunning, including the Ring of Kerry with its rugged coastline, heather and beautiful Lough Leane. Dinner on your own.	Friday, May 02	Free day in Dublin for shopping or additional museum visits. Group leader will provide travelers with information on "what to do in Dublin." Say farewell to the Emerald Isle with a special Irish Night including a group dinner and entertainment this evening.
Tuesday, April 29	Today hop on board a Jaunting Tour to Muckross House, a stately Victorian home with magnificent gardens and breathtaking views of surrounding lakes. Return to Killarney for Dinner and an evening of traditional Irish Storytelling.	Saturday, May 03	Transfer to airport for return flight to the United States

**Note: Airfare and Hotel (double room) with daily breakfast is included in this price as well as all of the tours above.**

**Fees:** Departure from DFW and Houston is \$3,164.00 (includes Departure tax and non-refundable Registration Fee of \$300). The above is the cost to travel roundtrip from DFW and Houston. Departure from Austin and San Antonio is \$3,264.00 (includes Departure tax and non-refundable Registration Fee of \$300). Upgraded insurance can be purchased: Comprehensive - \$120 and Ultimate - \$200; Over 66 – Comprehensive - \$220 and Ultimate - \$300 (insurance covers the entire eight days of travel). Tips for tour guide (\$4 per day) and bus driver (\$2 per day while using bus) is not included. Small contingency fee may be added in January 2008 for fuel surcharge. **Fees based on 20 persons.**

**Payment Schedule:** **Deadline for registration is October 1, 2007;** Initial deposit is \$300; second payment of \$300 is due 45 days following registration payment; balance due on January 27, 2008. **Sign up by July 31 and save \$100.**

Register at [www.ACIS.com](http://www.ACIS.com), by selecting the **ENROLL NOW** tab on the top left above the logo on the home page, choose participants, and sign in using: Group Leader ID: 91260 Group Leader Last Name: Hackler

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