

SUMMER 2008 VOL. 14 NO. 1

TPIJ

Texas Paralegal Journal

Surviving the Last 90 Days before Trial

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In This Issue



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PRESIDENT'S *Message*

Patricia J. Giuliano

I've never realized it before, but it seems that springtime could be one of the busiest times of the year! So many people are busy planning, going places, and making the transition to new roles in their lives. Some people are busy planning their annual vacation, some are planning summer weddings, some are planning graduation parties, and still others are just plain busy with their careers and taking care of all the things that fill up our days and make our lives interesting. No matter what it is that keeps us busy, our activities eventually lead us all to transition either personally or professionally—or both.

If you are actively involved in the Paralegal Division you know that we are busy finalizing our plans for Annual Meeting, that TAPS planning is in full swing, and that we are busy preparing for the transition to a new Board year and fresh leadership.

This year's Annual Meeting should be another great event for the Division. The Annual Meeting Committee has been very busy putting together a great group of speakers which should attract attorneys and paralegals alike. In addition, we are very pleased to announce the return of our Annual Meeting luncheon. We hope you will consider attending to get reacquainted with your colleagues from around the state, and to get an update on the state of the Division. This is also an opportunity to thank the outgoing Board of Directors for their service and congratulate the incoming officers and directors. In addition to our business meeting, we

are very pleased to welcome our luncheon speaker, Rusty Hardin, a well known Houston attorney who will talk about how to manage high profile cases. For more information on our CLE line-up, please see the advertisement located in this edition of the TPJ.

The TAPS planning committee is actively engaged in planning the September event. Our theme this year is "Celebrating Paralegals Across the Lone Star State...TAPS Turns Ten in 2008!" TAPS has become so popular that we are limited to where we can hold the events because of our space requirements. Paralegals and their employers are finding the TAPS event is a great way to maximize their CLE budget. Where else can you get up to 14 hours of advanced CLE covering a variety of legal topics in just three days, and do it while networking with paralegals, attorneys, and vendors from around the state? If you have never attended TAPS, you should definitely put it on your list of things to do. Once you attend I'm sure you will want to pencil it in on your calendar every year.

If all this planning wasn't enough, Rhonda Brashears has been very busy appointing committee chairs and planning for the transition to her second term as president of the Division. Her



officers and directors are very committed and I'm sure they will all bring many fresh ideas and provide leadership, direction, and continued growth for our profession.

Back to my original point, the "busy-ness" of these professional

and personal activities and responsibilities are among the things that help us grow and move forward through the transitions in our lives. I have appreciated the opportunity for personal and professional growth while serving as your president. I want to extend my sincerest thanks and appreciation to all those who served the Division during this past year. I have a great deal of admiration and respect for those who step up year after year to serve the paralegals of this state. I now look forward to transitioning into my role as past-president of the Division and transitioning back into my roles as a fully engaged wife, mother, and trademark paralegal.

Patti

PARALEGAL DIVISION

ANNOUNCES

TAPS 2008 SCHOLARSHIP

For the upcoming 2008 TAPS seminar (Texas Advanced Paralegal Seminar, a three day CLE seminar), the Paralegal Division of the State Bar of Texas will award up to two (2) scholarships for the registration fee to attend the TAPS 2008 seminar. Below please find the guidelines and application for applying for this scholarship.

1. The Recipient must apply for or be a member of the Paralegal Division of the State Bar of Texas.
2. To apply for a TAPS scholarship, the applicant is required to give a written essay regarding the paralegal profession. The essay should be two (2) pages and double-spaced.
3. To apply for a TAPS scholarship, the applicant is required to provide two (2) personal references, which describe the applicant's involvement in the paralegal profession.
4. Financial need shall be a contributing factor, but not a requirement. However, if two or more applicants are tied in meeting the criteria for the scholarship, financial need shall be the determining factor.

Other

1. No money will be sent directly to the recipient.
2. The scholarship for TAPS shall cover the cost of registration only.
3. The scholarship selection committee for reviewing scholarship applications for TAPS shall be composed of the Chair of the TAPS Planning Committee, one Planning Committee Sub-Committee Chair, and the Board Advisor to the TAPS Planning Committee.

The Paralegal Division of the State Bar of Texas will award scholarships for TAPS 2008 which will cover the cost of registration in accordance with the TAPS scholarship guidelines.

TAPS 2008 SCHOLARSHIP APPLICATION

IMPORTANT: ALL APPLICATIONS FOR A SCHOLARSHIP FOR TAPS 2008 MUST BE RECEIVED BY Tuesday, July 15, 2008. DATE OF TAPS 2008: September 17 – 19, 2008, San Antonio, TX

Name _____ PD Membership No. _____
Home Address _____
Home Telephone _____ E-mail Address _____
Work Address _____
Work Telephone _____ Fax Number _____
Employer _____

Are you a member of a local paralegal organization that offers a scholarship award? _____
Give a detailed description of your reason for seeking a scholarship to TAPS 2008: _____

Give a detailed description, if any, for your reasons for financial need: _____

Attach your two (2) personal references and your written essay to this application. Applications should be mailed to: Patricia Giuliano, President of the Paralegal Division and Chair of the TAPS Planning Committee, Cox, Smith, Matthews Incorporated, 112 East Pecan Street, Ste. 1800, San Antonio, TX 78205. *Scholarship recipients will be notified by letter by July 31, 2008.*

Applicant's Signature

Attach any additional explanations



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TPIJ

Texas Paralegal Journal

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EDITOR'S *Clate*

By Heidi Beginski, Board Certified Paralegal, Personal Injury Trial Law, Texas Board of Legal Specialization

Ever wonder how (or even, why) the people whose names you see appear in the pages of this magazine and in the publications of your local paralegal associations do all the things they do? Ever wonder how they juggle careers, family, professional association commitments and—heaven forbid—hobbies? Of course, some people are better at scheduling or organizing things, and some people just have boundless energy, but I think the essential key characteristic is ...professionalism. I know, saying that is going to ruffle more than a few feathers, but stick with me for a moment on this issue.

Face it, if ever there was a service industry, paralegalism is it. Our work is by the people, of the people and for the people. The definition of “the people” may change from project to project or office to office, but we are still in the business of serving others, sometimes along a long chain of “people.”

But taking pride in what we do, in challenging ourselves to do better for the benefit of our employers and their clients, and striving to reach out to others who are interested in our field of work almost becomes a calling. You don't do it because you have to, or because it pays monetary rewards (even if it does), but because it answers a calling within ourselves to give something back to our colleagues, neighbors and communities. Paralegals have unique talents that can be of benefit to many endeavors, and certain things are just easier for us than for other people. (This is true for any profession in the world, but let's stay on point.)

Aren't you proud of what you do at work? Don't you enjoy using your talents and knowledge to assist and benefit others? Aren't you glad everyday you have something of worth to contribute? The answer to all of these questions is, “Of course!”

And that is all that is ever asked of a volunteer for any of the various projects of the PD (or any other organization): just give what you can. Please take some time to look at the PD website, and the pages of this magazine, and see what opportunities there are for you to get involved. You will never regret it.

This quarter's Op/Ed column has been deleted due to the question presented no longer being timely. The TPJ thanks all who responded, and encourages members to continue to contribute to this interesting section of the TPJ.

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DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS JULY 15, 2008.

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Surviving the Last 90 Days before Trial

Or, Getting Motions, Discovery, and Orders Ready for Trial Without Letting Anything Slip

By David A. Chaumette

I. SCOPE OF ARTICLE

This paper addresses preparing for trial, with a particular focus on the preparations needed during the last ninety days before the trial begins. As with so many things in litigation, it is sometimes convenient to think of the components needed as persons, papers, and other things. That's the structure of this paper. Please keep in mind that this paper is just an overview. Each case is different and the facts and posture of the specific case will change how some of the tips contained in this article.

II. THE TRIAL TEAM

Having the right team in place is probably not something to be fixed in that last ninety days. That said, it is also important that your team's utility be maximized. What follows are some suggested roles for each member of the team.

A. The office manager or secretary

If the trial is out of town, this person has several critical roles. For example, an out-of-town trial will need some kind of out of town office close to courthouse. That office—and it may just be your hotel room—will need a fax machine, a computer, high-speed printer and scanner, copy machine and high-speed internet connections. It is also helpful to have similar setups in each attorney's hotel room so that the trial team can communicate instantly with each other and opposing counsel. It also allows you to do legal research without going to a law library.

B. The paralegal

The paralegal has several important duties as well. Among them are:

1. Review (and if necessary update) Case Information Sheet to include names and phone numbers of all court-

- room personnel and of opposing counsel's trial offices;
2. Visit the courtroom before the trial begins, review the judge's webpage on the internet (noting all specific procedures and rules outlined there), prepare sketch of courtroom, obtain necessary audio-visual equipment;
3. Determine whether other cases or hearings are set for trial at same time or immediately preceding our case which could cause trial to be postponed or delayed;
4. Supervise the marking of deposition excerpts and the editing of video.
5. Know what the mles about which counsel gets which table and be prepared to arrive early the first day of trial to stake claim to best counsel table.
6. Find out about availability of real time reporting from the court reporter and, if not, determine from the rest of the trial team if there are portions of the trial (voir dire, opening statements, or other trial excerpts) that will need to be transcribed during the course of the trial;
7. Determine how the court conducts voir dire and what the role of the attorneys is in jury selection;
8. Makes sure the deposition corrections are marked on all copies;
9. Forget detailed deposition summaries; 2-pagers should have been done within 24 hours of the completion of each deposition;
10. Prepare witness files, including:
 - a. Deposition transcript
 - b. All prior sworn statements, including interrogatories and Requests For Admissions
 - c. Documents the witness authored
 - d. For experts, their reports and any prior writings, studies or testimony.
11. Make sure jury trial demanded and jury fee paid, unless we have decided not to request a jury trial.
12. File any business records affidavits proving up trial exhibits (Tex. R. Evid. 902(10)) at least 14 days prior to trial.
13. Supplement all discovery requests, particularly those

Focus on...

seeking the identity of persons with knowledge or experts.

- a. Specifically verify with each witness identified that interrogatory answers correctly show the person's name, address, and phone number.
 - b. Confirm with attorneys and experts that interrogatory answers correctly describe each expert's opinions and bases of those opinions.
 - c. If you are late with your supplementation, consider your best arguments on good cause, including inadvertence of counsel, lack of surprise, uniqueness of the excluded evidence. Tex. R. Civ. P. 193.6(a), 195.6(b). However, these factors do not guarantee that late supplementation will be overlooked.
14. Incorporate all deposition exhibits in the hot chronology set.
- a. Once lead counsel has selected your trial exhibits, non-exhibits may be removed from chronology.
 - i. All trial exhibits, yours and theirs, should be put in chronological order.
 - ii. Use color coding scheme, circling exhibit number, to indicate which are not objected to, which you or the other side have objected to, and, eventually, which have been admitted.
 - b. Hopefully, by this time, all deposition exhibits will

have been marked only once, simply as Exhibit _____. Get that agreement from the other side before the first deposition. See list of Pretrial Agreements.

15. Contact all trial witnesses.
- a. Provide each his deposition and tell him to read and highlight, in
 - i. different colors, troublesome answers and erroneous ones. As to the former, they will be discussed with lead counsel during witness prep.
 - ii. As to the latter, they should be corrected immediately and a letter sent the other side, although videotaped depositions limit the ability to deny saying something you said.
 - b. Schedule trial prep and notify witness of probable appearance date.
 - c. Keep future witnesses updated on probable appearance date.
16. Subpoena witnesses that will not attend voluntarily.

C. The Trial Lawyers

The trial lawyers will have many things to consider once trial begins. Therefore, it is critical to eliminate as many issues as possible before trial to simplify the trial itself. Among the items that should (or must) be handled ahead of time are:



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1. Develop a Trial Plan.
 - a. You will need a plan on how you will utilize your time for opening, closing, direct and video depositions before you begin.
 - b. And at the end of each day, you should update your plan based on how much time you have used.
2. Review ABA's *Civil Trial Practice Standards* (1998) so you can make intelligent decisions on issues like note-taking, interim arguments, juror questions, preliminary instructions and then have some authority to use with the trial judge.
3. Prepare for voir dire, either with questions to ask the jury or, in some cases, the juror questionnaire itself.
4. Prepare the witness list, and decide on order.
 - a. The first cross is often the most exhaustive, and best, so try to serve up a non-controversial witness to begin with.
 - b. If you represent the plaintiff, however, consider having your first witness respond to statements made by defense counsel in opening.
 - c. Never underestimate the power of calling an adverse witness early in your case, before he is educated and when you can make early speeches during cross.
 - d. End with a strong witness.
5. Select courtroom representative, usually the person who knows the most and has the most to gain by watching and learning.
6. Decide which attorneys will have speaking roles at trial and divide up the witnesses to prepare Q&As and cross (in the latter case, guessing in the first instance who the other side will call).
7. Select Trial Exhibits.
 - a. Decide which exhibit to use with each witness.
 - b. Make sure you can authenticate and prove up each disputed exhibit.
8. Decide on demonstrative aids and in-court equipment, including juror notebook contents, potentially key documents, witness profiles and photos if available, agreed-upon glossary and agreed-upon simplified timeline.
9. Update chronology.
10. Prepare short bench memos on anticipated evidentiary problems.
11. Prepare pretrial order.
 - a. The most important part is the statement of the case to be read to the jury before voir dire.
 - b. Don't waste time with stipulations/admissions.
12. Designate deposition testimony.
 - a. Limit video deposition designations as much as possible.
 - b. Pick your designations from the videos rather than reading transcripts.
 - c. Color-code yours, theirs and any responses.

IV. WORKING WITH WITNESSES

A. Your Witnesses

1. Basic Instructions to All Witnesses:
 - a. If the witness will testify about facts and records, he or she should be familiar with those facts and records.
 - b. The witness should dress in normal business attire for court (neat, but not overdressed).
 - c. The witness should bring the trial subpoena to court (if applicable).
 - d. In most cases, non-party witnesses will be instructed to remain outside of the courtroom until ready to testify under "the rule."
 - e. The witness should speak clearly and loudly and look at the jury when testifying.
 - f. The witness should listen to each question asked and be sure that he or she fully understands it before testifying.
 - g. If the witness does not understand a question, the witness should be instructed to say so. Never guess about the meaning of a question.
 - h. The witness should be instructed to answer only the question asked—then stop. However, if an explanation to a "yes" or "no" question is required, then the witness should say so.
 - i. In most cases, the witness should not testify about what someone else told him or her (hearsay).
 - j. The witness should avoid equivocal answers ("I think so"); instead, the witness should provide definite answers ("yes").
 - k. The witness should be instructed to ask for a break if he or she feels tired or fatigued during testimony.
 - l. The witness should answer all questions honestly and truthfully.
2. For Direct
 - a. Witness preparation will vary depending on the circumstances of the case and the witness.
 - i. Prepare a short outline of what you want to cover.
 - ii. Select exhibits you wish to cover with the witness.
 - b. Consider the use of demonstratives to avoid leading. If you must agree to exchange demonstratives with the other side, limit it to providing the other side with demonstratives used in opening and cross 24-hours in advance. Do not agree to exchange demonstratives used for cross.
 - c. Then prepare Q&A.
 - i. Incorporate the bad documents and hardest questions.
 - ii. Give your witness plenty of opportunity to re-write.
 - iii. Tell story in chronological order.

(Continued on page 10)

SUSTAINING MEMBER PROFILE

NewLine Legal Practice Support

Translated literally, “New Line” means “a new course of conduct, action, or thought.” That definition is the cornerstone of our business. We strive to distinguish ourselves from the large “staffing agencies.” NewLine Legal Practice Support is a Texas based recruiting firm, drawing upon years of local knowledge and connections to provide law firms and corporate legal departments uncompromising service and on-point quality candidates to fill permanent and temporary legal staffing needs.

We understand the concerns of employers and candidates alike. Our founders and management team have years of experience in the legal and staffing industries. We founded this firm on several promises:

UNDERSTANDING. Our experience allows us to understand the needs and

preferences of our clients and candidates. **INTEGRITY.** Recruiters earn bad reputations for trying to force a fit where a candidate’s experience and preferences don’t match those of the employer and vice-versa. It is our top priority to only match the right people to the right job.

CANDOR. If we can’t help you, we’ll tell you. Many staffing firms impose strict internal quotas for sales activity. That approach often results in recruiters taking on assignments they know they can’t fill and candidates being presented for positions where they simply do not fit the professional or interpersonal criteria. We have no quotas; only one objective: work hard to present the best possible candidates for the open position.

RESPONSIVENESS. The legal profession

is dynamic and different problems require different solutions. Some projects require a finite, temporary staffing solution. Others may require a permanent hire, while others may warrant a temp-to-perm scenario. We are here to discuss your options and preferences and serve you accordingly.

For more information on NewLine Legal Practice Support, visit our website at www.newlinelegal.com or contact John Patterson, Managing Director, at 214.295.3350 or jpatterson@newlinelegal.com.

NewLine Legal Practice Support is the proud sponsor of the 2007 and 2008 Texas Advanced Paralegal Seminar (TAPS) Grand Prize!

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State Bar of Texas, Paralegal Division—Sustaining Membership Roster

(as of June 20, 2008)

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- iv. Keep questions short so the witness, rather than you, tells the story.
- v. Use enough questions to avoid requiring your witness to make speeches and requiring you to lead.

3. Cross-Examination

- a. Provide witness your idea of the trial testimony — particularly the hardest questions.
- b. Review that witness's deposition, first without and then with the witness.
- c. Practice cross on video, if possible.

B. Adverse witnesses

- 1. Prepare short list of what you really hope to establish.
- 2. Index witness deposition, with highlights.
- 3. Select and highlight exhibits to impeach with.
- 4. Write questions.
 - a. Do not fear open-ended ones.
 - b. Use cross to argue your case.
 - c. Remember that to impeach you must ask the question in the same wording.

C. Expert Witnesses

- 1. Deadline for Designating an Expert — Federal Court
 - a. FRCP 26(a)(2) — establishes a schedule for making initial disclosures about testifying experts.
 - i. The deadlines for disclosure may be directed by court order. FRCP 26(a)(2)(C).
 - ii. If not addressed by the scheduling order, a party must designate experts and supply the information required by FRCP 26(a)(2)(A):
 - (a) Initial expert disclosures under FRCP 26(a)(2) must be made by the date set by the court or stipulated to by the parties, which must be at least 90 days before trial.
 - (b) Parties must disclose the testimony of rebuttal experts within 30 days of disclosure of the other party's witnesses on the same issue.
- 2. Challenging an Expert Witness—Federal Standard
 - a. FRE 702—If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
 - b. FRE 703
 - i. The facts or data in the particular case upon which an expert bases an opinion may be those perceived or

- made known to the expert at or before the hearing.
- ii. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.
- iii. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

c. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

- i. Established the trial judge as the “gatekeeper” for expert testimony
- ii. Expert testimony must be both reliable and relevant
- iii. *Daubert's Checklist for Determining Reliability*:
 - (a) Whether the theory or technique has been tested
 - (b) Whether it has been subject to peer review
 - (c) Its known or potential rate of error
 - (d) The existence of standards controlling its operation
 - (e) The degree to which it has been accepted in the relevant scientific community
- iv. Non-judicial uses made of the theory or technique (addressed by Ninth Circuit and later by the Texas Supreme Court)

d. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—expanded *Daubert* to encompass all types of expert testimony.

e. *Weisgram v. Marley Co.*, 528 U.S. 440 (2000)—reversal—not remand—is appropriate remedy when expert testimony admitted at trial is found inadmissible on appeal.

3. Deadlines for Designating an Expert—Texas Courts

- a. TRCP 195.2 governs the designation of testifying experts.
 - i. Establishes a schedule for responding to requests for disclosure about testifying experts.
 - ii. A party seeking affirmative relief must identify its testifying experts within 30 days of the services of the request for disclosure or 90 days before the end of discovery period, whichever is later.
 - iii. A party not seeking affirmative relief must identify its testifying experts within 30 days after the service of the request for disclosure or 60 days before the end of the discovery period, whichever is later.

4. Challenging an Expert Witness—Texas Standard



a. Texas Rule of Evidence 702—If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

b. TRE 703

i. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing.

ii. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

c. The *Robinson* Standard

i. The Texas Supreme Court adopted and applied *Daubert* in Texas. *El. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

ii. Robinson analysis applies to all expert testimony, not just scientific testimony. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998).

d. The gatekeeper function requires an inquiry into whether the expert's qualifications actually extend to the precise issue at hand. *Broders v. Heise*, 924 S.W.2d 148

(Tex. 1996).

e. Courts emphasize "flexibility" in the *Daubert/Robinson* analysis you may add your own factors to expose strengths or weaknesses in a particular expert's testimony.

5. Procedural Issues

a. Case law and rules of evidence do not mandate that a *Daubert* challenge be made before trial.

i. The Texas Supreme Court has held:

(a) A party must object before trial when the evidence is offered

(b) An objection made after the jury verdict is too late

(c) An objection made when the witness begins his testimony is timely

(d) An objection to an expert's testimony immediately after cross examination is timely.

ii. You should always consider local rules, pretrial scheduling orders, and strategic issues in determining when to make the challenge.

b. When a party challenges an opponent's expert witness, the burden shifts to the opponent to prove that the expert is qualified.

c. The movant must insist on a hearing outside the presence of the jury and preserve error if the trial

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court refuses.

d. The movant must preserve error when the expert is allowed to testify and at all appropriate times thereafter, including a motion for new trial.

6. Parties should always anticipate issues that may be raised by testimony at trial that are not within an expert's area of expertise.

V. THE DOCUMENTS

A. A Quick Overview.

1. Review your pleadings.
 - a. Are all necessary parties joined and before the court?
 - b. Are the actual issues in the case included in the pleadings?
 - c. If parties or issues need to be added, the pleadings may require amendment.
 - d. This would also be a good time to review your opponent's pleadings as well.
2. Review the status of pretrial preparation.
 - a. Written Discovery.
 - i. Depositions
 - ii. Interrogatories
 - iii. Document Requests
 - iv. Requests for Admissions
 - b. All Exhibits (including demonstratives)
 - c. Other Pretrial Filings
 - i. Trial briefs
 - ii. Proposed jury instructions and questions
 - iii. Is the jury charge in order?
 - d. Other Evidential Documents
 - i. Summaries of voluminous documents.
 - ii. Business records affidavits (Texas).

B. The Jury Charge

1. The jury charge shows where the issues really are.
 - a. Use pattern instructions where available.
 - b. Annotate to instructions given in other cases, not to language of opinions.
 - c. Consider preliminary instructions.
2. The jury charge issues are reviewed *de novo* on appeal and these issues still present the best appellate points.
 - a. *Sterling Trust Co. v. Roderick Adderley*, No. 03—1001 (Tex. Sup. Ct. June 17, 2005)—Court charged jury with an instruction that tracked the Texas Securities Act ("TSA"). Supreme Court held that the instruction failed to inform the jury that aiding and abetting liability under the TSA requires that the aider must be subjectively aware of the primary violator's improper activity.
 - b. *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129, 2135—36 (2005)—U.S. Supreme Court reverses conviction based upon faulty definition of knowing contained in the jury instructions.

C. Pretrial Motions

1. Be sure that pretrial motions have been timely made and ruled upon if applicable.
2. There may be several outstanding, including motions related to:
 - a. Personal jurisdiction
 - b. Subject matter jurisdiction
 - c. Motions to strike or modify the pleadings
 - d. Joinder of parties and/or claims
 - e. Provisional remedies such as injunctions
 - f. Motions to dismiss (federal)
 - g. Motions for summary judgment

D. Motions in Limine

1. Motions in limine permit a party to identify, before trial, certain evidentiary rulings that the court may be asked to make.
2. Motions in limine *nominally* prevent opposing counsel from introducing prejudicial evidence in front of the jury. Can be overused and formulaic.
3. No federal or Texas rule govern motions in limine.
 - a. Check local rules and court's scheduling order for deadline to file.
Generally, motions in limine should be filed and ruled upon at the pretrial conference and before voir dire.
 - b. Motions in limine should be in writing and served on all parties.
4. Remember that the trial court's ruling on a motion in limine is *not a ruling that admits or excludes evidence*—it merely prevents a party from raising an issue or offering evidence without first approaching the bench for a ruling. If you want a pretrial ruling that actually excludes evidence, you should file a motion to exclude.
5. Common topics for motions in limine:
 - a. The fact that settlement discussions have or have not taken place or that settlement offers have or have not been made.
 - b. The fact that the motion in limine has been filed or that the parties have sought to exclude evidence offered.
 - c. The fact that the plaintiff's attorneys have a contingency fee agreement.
 - d. The size or geographic location of the parties' law firms.
 - e. Any attempts to elicit privileged testimony.
 - f. Any attempts in the presence of the jury to ask a party's attorney to produce documents, stipulate to any fact, or make any argument.
 - g. Any testimony by a party's expert concerning his or her discussions with another expert.
 - h. Any evidence that a party's expert was represented by the party's counsel in a post lawsuit.
 - i. Any mention of a witness's financial status when not relevant to the case.



- j. Any comment by the adverse party's attorney that informs the jury of its effects of its answers to the questions in the charge.
- k. Any mention that the party is/was involved in other lawsuits or legal disputes.
- l. Any mention from the adverse party's attorney regarding his or her personal opinion about the credibility of a witness.
- m. Any comment that attempts to impose liability upon or arouse prejudice against a party simply because the party is a corporation.
- n. Any comment or reference to a defendant corporation as "foreign" or "alien" or any similar comment that may draw upon the prejudices of the jury toward defendant corporation's home country.
- o. Any comment to the jury that the court can reduce the amount of the jury's award.
- p. Any comment regarding who pays the damages, or whether defendant will pay the damages.
- q. Any mention that the defendant is covered by liability insurance.

6. Before filing a motion in limine, be sure to review the rules of evidence that govern exclusion of evidence. Any evidence that the rules classify as inadmissible may be made the subject of a motion *in limine*.

E. Trial Briefs

- 1. Permitted by most courts, but not overly utilized.
- 2. Brevity and clarity are important, so the issues discussed in each brief should be narrowly tailored.
- 3. On smaller trial teams, it might be helpful to outline these issues before the trial begins.
- 4. Reviewing any motion for summary judgment filed in the case (or the related response) could provide good fodder for trial briefs.
- 5. Statement of Facts may be included but not necessary.
- 6. Arguments should be supported by authorities and subdivided into logical headings if possible.

F. Opening Statement

- 1. Keep it chronological, if possible.
- 2. Keep it simple and relatively high level, except for the crucial facts (and not every fact is crucial). The jury doesn't have the background to understand extensive detail.
- 3. Develop around three themes that you will return to throughout trial.
- 4. Write it out, so you can solicit input from your client, and other trial team members.
- 5. Find out how much time you have, and time yourself.
- 6. Prepare to use a PowerPoint presentation that includes simple diagrams, charts and bullet points you wish to make. If you have great documents that speak for themselves, and that have already been admitted, use them.

G. Stipulations Before Trial

- I. Any fact may be stipulated between the parties.
 - a. Can be used to avoid cumbersome and/or boring testimony during trial.
 - b. Can be used to focus and streamline the testimony of witnesses.
- 2. Other stipulations may be made between the parties.
 - a. Authentication of evidence
 - b. Accuracy and/or admissibility of exhibits
 - c. Claims that have been dropped following discovery
 - d. Amount of special damages
 - e. Others
- 3. Stipulations may be read into the record or may be written.
- 4. Stipulations may be incorporated into the pretrial order signed by the judge.

H. The Pretrial Order

I. Federal Court

- a. It may also be helpful to contact the judge's chambers to determine if he or she has a preferred format for the pretrial order. Be sure to ask if the Court wants the document on a disk—and in what format on that disk.
- b. Common elements in a pretrial order are:
 - i. A succinct statement of the basis of jurisdiction and venue and whether these issues are in dispute.
 - ii. Whether a jury trial has been demanded.
 - iii. Whether there are any requested amendments to pleadings, dismissals of the case as to unserved parties, additions or substitutions of parties, or disposition as to defaulting parties. (Proposals should be included)
 - iv. The elements of monetary damages claimed by each party and the kind and general terms of any other type of relief requested by any party.
 - v. A plain concise statement of the undisputed facts (separately numbered)
 - vi. Plaintiff's assertion of disputed facts
 - vii. Defendant's assertion of disputed facts
 - viii. Issues of law that are expected to be in controversy
 - ix. A listing of previous substantive motions
 - x. Witness list
 - a) Include experts
 - (b) Include deposition witnesses
 - (c) Does not necessarily include impeachment or rebuttal witnesses on the list
 - xi. Any stipulations relating to the nature or number of experts to be called by either side
 - xii. Exhibit list
 - (a) List all exhibits stipulated to be admissible/joint exhibits
 - b) List plaintiffs proposed additional exhibits



- (c) List defendant's proposed additional exhibits
 - xiii. Trial date, estimate of trial time
 - xiv. Proposed voir dire examination questions
 - xv. Requests for jury instructions
 - xvi. Any other appropriate matters that will aid in the disposition of the action
- c. Generally, a pretrial order will not be changed except upon further order of the court.
 - i. Courts can regard the information in the pretrial order as replacing the allegations—and the claims—in the pleadings. If you forget something, it may be gone.
 - ii. The legal standard generally applied to applications to modify the pretrial order is whether the change is needed to prevent “manifest injustice.” *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92,93 (5th Cir. 1973).
 - iii. Several factors should be considered for modification:
 - (a) the degree of prejudice that will occur if the order is not modified
 - (b) the prejudice to the opponent if modified
 - (c) the extent of the delay
 - (d) the effect of the amendment on the schedule for the trial or continuation of the proceedings
 - (e) availability of other remedial measures to lessen the impact of the change.
 - d. The pretrial order is not binding until it is signed by the court.
 - e. Courts want this filing to be joint, and typically the plaintiff has the responsibility to assemble the document and get it on file in a timely fashion. If a party does not meet with its obligations, the other parties should document this and note that failure in the pretrial order that does end up on file. That said, the parties should really strive to make this work.
- 2. State Court
 - a. In state court, these orders may not be required.
 - b. The pretrial order must recite the actions taken and the rulings made at the pretrial conference.
 - c. In most cases, the pretrial order includes:
 - i. the actions taken at the pretrial conference
 - ii. the pleadings that can be amended and the deadline to amend
 - iii. any agreements made by the parties
 - iv. whether the case will be tried to the court or to a jury.
 - d. The pretrial order controls the procedure for the case. Neither the court nor the parties can disregard the pretrial order.
 - e. The court may modify the pretrial order to prevent “manifest injustice.” *Trevino v. Trevino*, 64 S.W.3d 166, 170 (Tex. App. San Antonio 2001, no pet.).
 - f. Modification must be done in writing or on the record. *Susanoil, Inc. v. Continental Oil Co.*, 516 S.W.2d 260,264 (Tex. App.—San Antonio 1973, writ ref d n.r.e.).
- I. Authentication of Business Records (Texas)
 - a. The rules of evidence allow for self—authentication of certain evidence.
 - b. Business Records may be self—authenticated by the filing of an affidavit pursuant to TRE 902(10).
 - c. Other documents may be authenticated through witness testimony.
- J. Voluminous Records pursuant to TRE 1006 and FRE 1006
 - 1. The contents of voluminous writing, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.
 - 2. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place.
 - 3. The records must be available to the opponent for a reasonable opportunity to afford inspection and cross—examination. *Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812—13 (Tex. 1982).
 - 4. The supporting documents must themselves be admissible in evidence. *Id.*
 - 5. The court may order that they be produced.
- K. Trial Subpoenas
 - 1. Directs person to attend proceedings as a witness
 - 2. Governed by FRCP 45:
 - a. Required contents of a subpoena
 - b. Service requirements
 - c. Protection of persons subject to subpoenas
 - d. Duties in responding
 - e. Contempt if disobeyed without adequate excuse
 - 3. FRCP 45(a)(2)—“A subpoena commanding attendance at trial or hearing shall issue from the court for the district in which the hearing or trial is to be held.”
 - 4. FRCP 45(b)(2)—“a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.”
 - 5. FRCP 45(b)(2) also indicates that a subpoena directed to a witness in a foreign country should be issued pursuant to the manner prescribed in 28 U.S.C. § 1783.



a. Check Local Rules—Some courts provide forms for trial subpoenas and subpoenas for documents. Always check the local rules and forms.

VI. PRETRIAL CONFERENCES

A. There may be one or more pretrial or status conferences before trial (depends largely on court and judge). Pretrial conferences are used by courts to monitor discovery, progress being made in the case, and other activities. The majority of these conferences will be very brief, particularly early on in the case. A final pretrial conference is usually held shortly before trial (or on the eve of trial). The items discussed at that conference may include:

1. Substance of the pretrial order may be discussed,
2. Court will usually review the mechanics of the trial,
3. Time for the start of the trial,
4. Estimates concerning the duration of the trial and other timing issues,
5. Stipulations as to facts and issues,
6. Witness issues, particularly the availability of third party witnesses,
7. Evidentiary dispute, and
8. Jury instructions/questions.

B. Particular Rules/Procedures in Federal Courts

1. The Pretrial Conference — FRCP 16

- a. “Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.” FRCP 16(d).
- b. “After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.” FRCP 16(e).
- c. The court will usually schedule the pretrial conference on its own.
 - i. A party can request a pretrial conference by filing a motion stating its reasons for requesting the conference.
 - ii. A conference cannot be waived by consent of the parties.
- d. The court can require the parties and/or their lawyers to attend a pretrial conference. FRCP 16(a); *Lucien v. Breweur*, 9 F.3d 26, 28 (7th Cir. 1993).
 - i. Lawyers who attend must have the authority to enter into stipulations and make admissions regard-

ing all matters in the case. FRCP 16(c); *Ergo ScL, Inc. v. Martin*, 73 F.3d 595 598 n.4 (5th Cir. 1996).

ii. The conference may be held by telephone, by mail, in the judge’s chambers, or in the courtroom. *Lucien*, 9 F.3d at 28.

e. Scope of the Pretrial Conference—FRCP 16(c) lists matters the district court can consider during the course of the pretrial conference. Issues commonly considered are:

- i. Simplification of issues—attorneys must make a full and fair disclosure of their views on what the real issues of the trial will be. Some local rules require the parties to provide a statement of issues.
- ii. Pleading amendments
- iii. Stipulation and admissions
- iv. Limitations on evidence and expert testimony
- v. Non trial disposition—settlement/summary judgment. If your client is not interested in settlement, inform the court before the entry of a court order on pretrial settlement conferences—the district court cannot coerce an offer or settlement. However, sanctions may be awarded against the attorney or party who violates a court order regarding mediation and/or settlement.
- vi. Discovery
- vii. Witness list—court may order the parties to exchange a list of witnesses or potential witnesses
- viii. Exhibits and objections
- ix. Pretrial briefs
- x. Trial date and schedule
- xi. Advisability of referring certain issues to a magistrate
- xii. Resolve pending motions
- xiii. Special rules for complex trials
- xiv. Separate trials
- xv. Resolution of limited issues
- xvi. Order of interrogation and length of trial
- xvii. Any other matters that will facilitate the just, speedy and inexpensive disposition of the action

2. District courts vary widely in how they use FR.CP 16/pretrial conferences.

a. Many districts and individual judges within districts have adopted local rules, instructions, or informal practices with respect to how they handle pretrial conferences.

b. Counsel must comply with FRCP 16 and the court’s local rules and practices.

3. Final Pretrial Disclosures are due at least 30 days before trial, unless the evidence is to be used only for impeachment purposes. FRCP 26(a)(3).

a. The parties must disclose:

- i. the name, address, and telephone number of each person the party expects to call as a witness, separately from those the party may call as a witness if the



need arises.

- ii. the designation of witnesses whose testimony is expected to be provided by deposition and deposition excerpts.
- iii. An appropriate identification of each document or exhibit, including summaries.
- iv. Always check local rules to see if any additional documents or items are required to be disclosed.
- v. Objections to the opposing party's pretrial disclosures must be filed within 14 days after the disclosures are made, unless otherwise directed by the court. FRCP 26(a)(3).
- vi. Failure to file pre-trial disclosures:
 - (a) Opposing party may move to compel disclosure and seek sanctions for nondisclosure.
 - (b) Nondisclosure of expert witnesses may result in their exclusion from testimony at trial.

C. Particular Rules/Procedures in Texas Courts

- 1. TRCP 166—gives trial judges the power to control pretrial matters and assist in settling cases.
- 2. Purpose of pretrial conference in state court roughly same as that in federal court—*i.e.*, to narrow the issues and aid in the final disposition of the case.
- 3. Texas courts may establish a pretrial calendar “by rule.” TRCP 166.
- 4. Always check the local rules for automatic deadlines for motions, pleadings, discovery, etc.
- 5. A pretrial conference may be scheduled by the court or by motion of the parties.
 - a. To request a pretrial conference, the party should file a motion stating the reasons for the request.
 - b. A party cannot force the trial court to conduct a conference—it is purely discretionary. *Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev.*, 915 S.W.2d 61, 69 (Tex. App.—Corpus Christi 1996, writ denied).
- 6. Scope of the Conference
 - a. TRCP 166 — court may consider any matter that may aid in the disposition of the action
 - b. The trial setting is commonly made in the pretrial order.
 - c. The court may set deadlines for pleadings that supersede the deadlines in TRCP 63.
 - d. The court may set discovery deadlines.
 - e. The court may require the parties to argue pending motions.
 - f. The court may require the parties to confer and file a joint pretrial status report.
 - g. The court may require the parties to attempt to narrow issues of fact and law.
 - h. The court may require the parties to exchange information about experts, witnesses, and exhibits.
 - i. The court may require the parties to prepare proposed jury questions and instructions.

- j. The court may encourage the parties to settle.
- 7. The pretrial conference may be held by telephone, by mail, in the judge's chambers, or in the courtroom. *Koslow's v. Mackie*, 796 S.W.2d 700, 703 (Tex. 1990). The court can compel attendance at the pretrial hearing.
- 8. Objections made at the pretrial conference usually do not preserve error at trial. *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 648 n.2 (Tex. 1989). A party should always renew the objection at trial.
- 9. Unless modified at the pretrial conference, pretrial disclosure obligations are governed by TRCP 194.
 - a. TRCP 194.2—Lists categories of information which must be disclosed:
 - a. correct name of the parties
 - b. contact information for potential parties
 - c. legal theories and factual bases of claims/defenses
 - d. economic damages information
 - e. persons with knowledge of relevant facts, and a brief statement of theft connection with the case
 - f. expert disclosures
 - g. medical records and bills (if applicable)
 - h. A party may supplement its discovery responses as late as 30 days before trial TRCP 193.5(b).
 - i. A witness not timely identified in the disclosures may be excluded from testifying at trial. TRCP 193.6(a).

VII. THE FINAL BENCH CONFERENCE BEFORE TRIAL

- A. Usually occurs just before the prospective jurors are brought in and the case begins.
- B. Good time to remind the court of any particularly important or sensitive issues previously discussed or ruled upon.
- C. Also a good time to alert the court of any last minute scheduling changes or problems.
- D. Motions may be renewed at the bench one final time.
 - B. Many judges will ask for a preview of the expected course of the day of trial at this time.

VIII. CONCLUSION

This paper has focused on the preparations for the last ninety days before the trial begins. It is a truly hectic time, but some preparation and guidance, you will be successful. Good luck.

Author's Note:

This paper is based in very large part on two prior works: one by Charles Schwartz of Skadden, Arps, Slate, Meagher & Flom LLP, and one by Steve Susman of Susman Godfrey. Using their papers as a guide, putting this one together was a snap. My thanks to both for that guidance and assistance.

Mr. Chaumette is an attorney with the Houston firm of Shook, Hardy & Bacon LLP.



Enabling Judges with Technology

By Julie Wade, ACED

As of September 1, 2007, there were 3,266 elected or appointed judicial positions in Texas. Additionally, there are more than 127 associate judges appointed to serve in district, county-level, child protection, and child support (Title IV-D) courts, as well as numerous magistrates, masters, referees and other officers supporting the judiciary. More than 300 retired and former judges are also eligible to serve for assignment on any given day. (Source: OCA'S 2007 Annual Statistical Report, <http://www.courts.state.tx.us/pubs/AR2007/toc.htm>.)

This article finalizes our series on Technology in the Texas Judiciary, and will hopefully introduce you to The Texas Office of Court Administration ("OCA"), and Carl Reynolds, its Administrative Director. Mr. Reynolds was gracious enough to talk with me concerning the challenges ahead for the OCA in developing a model for a statewide judicial case information system.

The overriding theme of the OCA is in providing our judges with the ability to make better decisions. "When they have better information, and that's what all these things boil down to—giving judges the best information possible we can—then they can perform appropriately."

This may shock you, but up until recently, our judges had no way of ascertaining criminal histories for defendants who lived outside their counties. This is partly due to the fact that Texas has a decentralized county-funded court system at the trial court level. This means that our state court trial judges must look to their local administrative judges to fund their IT infrastructure (computer hardware, case management software, juror displays, and the whatnot). In sparsely populated counties, budgets for big ticket technology and software systems are not high on the must-have list.

So, could you possibly imagine what it would be like if your job was to try to get each of the 254 counties in Texas to make the same technology purchases for use in our state courts? "There's no uniformity, of course, in the decentralized county-funded system we have in Texas," Reynolds said. So the OCA is trying to influence the development of any future state court case management systems that are going to be marketed in Texas to fulfill the capabilities that our Texas judges need.

"Although a few of our jurisdictions are gravitating towards obtaining the same case management systems which ties very well into our e-filing initiative," Mr. Reynolds says, the OCA is working with vendors to provide our counties with case management tools they can use to operate their courts with their existing case management software. "I must tell you I'm totally impressed with the work that I've seen so far out of the group of people that we brought on board, it's really awesome," Reynolds says.

The appellate justices are in a much better position than our state court judges. This is because the OCA becomes involved much more directly with technology purchases for the appellate courts than it can with our state trial courts.

To facilitate the integration of justice information across the state, the OCA and the Judicial Committee on Information Technology have worked in tandem in completing



comprehensive studies concerning the technology needs of our judiciary. Not surprisingly, our judges historically have been champions of bringing technology into the courtroom, realizing in the late 1990's the efficiency that would be gained through the removal of paper based systems.

Today, the OCA's Court Services Program assists our judges and their staff in evaluating their case management and other administrative needs. Examples of services offered by the OCA:

- Conduct on-site training and provide technical assistance to judges, court coordinators, and court administrators in case and calendar management and other administrative matters;
- Assist with the preparation of a court administration manual designed for a specific court that covers preparing the daily court calendar, daily court dockets, notice setting deadlines, dismissal dockets, and all day-to-day activities in the court office;
- Evaluate the dockets, practices, and procedures of a specific court and recommend improvements; and
- Assist with developing forms for case management, dismissal dockets, pre-trial scheduling orders, notices, mediation

orders, and any other forms that would be beneficial to you and your court.

A few of the current OCA projects not previously covered in this series on Technology in the Texas Judiciary are set out in the table below.

Path to NIEM \$35,000 Criminal justice system alignment with national data exchange standards. 28 selected data exchanges such as felony judgment form, defined using IEPD (Information Exchange Package Documentation) technique.

TAMES

Texas Appeals Management and E-Filing System

<http://www.courts.state.tx.us/oca/tamesasp>

The idea for TAMES ensued from the awareness that appellate courts will begin to effectively receive and use the large number of state court e-filings. TAMES goals encompass both the idea of accepting electronic documents and making the most of them once received. TAMES project goals are:

- Maintain and improve the current case management capabilities for clerks'

office operations and the public web access features

- Add features that facilitate the flow of information through and among the chambers staff, routing draft documents, collecting comments and approvals and maintaining document versions
- Create the ability to accept e-filed documents sent by attorneys through TexasOnline, and to accept electronic documents provided directly by trial courts and court reporters
- Improve supportability by OCA staff through the use of a browser-based interface and currently supported technology

"The OCA received a big chunk of additional new funding (\$2.3 million at the last session) to create a comprehensive electronic case management system for all the courts of appeal, including the Supreme Court and Court of Criminal Appeals," Reynolds says.

The appellate courts will be able to manage all of their work one day digitally with this system. They can receive cases e-filed or digitized at the trial court level, manage their dockets and internally share files and opinions.

CURRENT OCA TECHNOLOGY PROJECTS

Project	Budget	Objective	Components
TAMES	\$2.3 m	2 yrs	Appellate courts receiving and managing e-cases. An upload facility for trial court clerks and court reporters to send their respective records to the appellate court. TexasOnline to handle attorneys' original filings to appellate courts. Appellate court CMS facility to receive and store the e-docs. Appellate court in-chambers software for circulating the e-docs. Enhanced web features for public use of certain court e-documents.
TexDECK	\$2.8m	5 yrs	\$10+m/federal funds. Data enabled courts improving court performance in child protection cases. Judicial webpage allowing access to selected data on DFPS database IMPACT. Case management functional standards for child protection cases, published to vendors. Performance reports by county from AFCARS data. Weighted caseload study of child protection courts.
Automated Registry	\$3.0m	2 yrs	Connecting selected courts to state databases to demonstrate data-enabled courts. Criminal, family and juvenile judges with access to DPS, TDCJ, DFPS, DSHS and other state agency databases for evaluating defendants/litigants before them.



"It gives our appellate courts the technology tools that they need to access and share electronically filed case information and their briefs," Reynolds says. The OCA is trying to engineer the way that information will arrive at their desktops electronically and can be circulated to most of them electronically.

In terms of funding, Reynolds says, "This is a big-ticket item." The OCA is going to go back to the Legislature and ask for the rest of the funding to finish the TAMES project next session.

Texas Data-Enabled Courts for Kids TexDECK

<http://www.courts.state.tx.us/oca/txdeck-home.asp>

Another large project for the OCA is TexDECK, "a suite of projects that revolve around courts that hear cases involving child abuse and neglect," Reynolds says. TexDECK is comprised of programs to integrate XML-tagged information provided by the child protective agency, Texas Department of Family Protective Services, to the courts and related government entities computer systems in order to help everyone work quickly and correctly to protect children.

TexDECK is basically an overhaul of an existing program that the DFPS and the courts have operated for years but that has become obsolete because hardly any of our judges are using it. A "Judicial Web Page" has been available for judges to access CPS case-related information so they can collaborate better between the departments when handling an abuse or neglect case.

TexDECK establishes XML data interchange standards and enables software tools to facilitate the work of judges and TDFPS to collaborate to improve safety. DFPS has an enormous, fairly robust, data system called Impact. "This judicial web page, as we call it," Reynolds says, "basically pulls out selected fields of information and displays it for the judge so that the judge can see more about the children in court and can learn more about the case from the database that the DFPS operates."

So the first level of TexDECK is the re-platforming of the Judicial Web Page to

phase out the obsolescing and marginalized technologies and brings the program into more sustainable XML-based technology that will improve the efficiency of this child protective case management system.

In addition to the \$2+million allocated by the Texas Legislature, TexDECK receives federal funding that comes to the Supreme Court's court improvement program. The OCA has a grant from the Supreme Court to use \$10+ million of this federal money to do a whole series of things that are intended to improve the performance of courts that handle child abuse and neglect cases. "The OCA is regularly meeting with vendors who are working to create this massive judicial web page," Reynolds says.

A second level of TexDECK coming along is the Software Functional Requirement Study. The OCA hired a small team who have become immersed in the required functional requirements for a child protection case management system, how it works in the courtroom and what the statutes are. "These are fairly time-intensive cases that require multiple hearings and status reports. There are stringent timelines and the cases are governed by statutes, so they require a fair amount of case management and juggling," Reynolds says.

A third level of TexDECK is the Data Interchange Standards. This new and emerging technology centers on the flow of information immediately between process participants and requires additional data and technology standards that have been deployed in the past. Once the DIS is achieved, the disposition of a child protection case is greatly enhanced between all reviewing agencies.

The final prong of the TexDECK suite concerns a caseload study of district courts OCA is undertaking for the purpose of identifying a need for new district courts for the Texas Judicial Needs Assessment. TexDECK is assisting by contributing a proportional amount of funding to study child protection cases.

AR System Automated Registry Project

<http://www.courts.state.tx.us/oca/registry/reghome.asp>

<http://www.courts.state.tx.us/oca/registry/reghome.asp>

The OCA received manna from heaven during the last session. "Literally, a lobbyist basically got the Legislature to give the OCA \$3 million without our even asking for it," Reynolds says. This project has been titled the Automated Registry, and very little in the way of guidance for the project has been given to the OCA. The AR System will allow the OCA to enter into a contract for the creation and maintenance of an automated registry system to coordinate the sharing of information from various state agency databases and the judicial systems.

Mr. Reynolds concedes the idea is similar to the OCA's judicial web page, but where in that instance the only database they tap into is the DFPS Impact Data System, the AR System is intended to be able to tap into a variety of state data systems, including the ones that DPS runs. This would give the OCA access to a whole range of different data: sex offender registrations, criminal histories, all kinds of information.

"We are going to be able to work with TDCJ, and the judges will be able to find out the correctional history of a person, whether the person went to prison and/or is on probation, or is on parole, that kind of information, which could be really helpful," Reynolds says.

The AR System would also give trial judges access to certain databases that would be useful during events like sentencing and child protection hearings. "Those cases where judges act as gatekeepers for various sorts of systems that are run by state and local government, the criminal justice system and the child abuse and neglect system will be served by this Automated Registry," Reynolds says.

Texas Path to NIEM

http://www.tijis.org/assoc/cms/Texas_Path_to_NIEM_Project/

NIEM was designed for the criminal justice and Homeland Security arenas or domains. "But there is something new Texas is adding to the mix," Mr. Reynolds says, that we may be able to appreciate—



basically Texas is adopting its mini-Texas-NIEM type system to be used in the TexDECK child protection project discussed above.

Not much had been done prior to the TexDECK project using the concept of XML data tags in a local judicial context. Now we have that being done for our child protection courts for cases where children are being taken away from their parents because

they've abused them or neglected them, and then the children get put in foster care.

"The point behind this these types of cases is to ensure the system works as best it can so the children don't languish in foster care," Reynolds says. Using technology can only allow us to do a better job at every judicial intervention in our system on behalf of these children. So children will be able to get adopted more quickly,

or their families can be placed in a drug court model and monitored.

The OCA has turned out to be at the cutting edge of the national NIEM model and have served our state well by their participation in the Functional Requirement Study and the data exchange through DPS. It should be noted that the OCA has also worked with the National Center for State Courts and some other jurisdictions. Mr. Reynolds and his staff should be congratulated on their efforts to bring Texas to the forefront in defining how states are going to be able to incorporate the NIEM model on a statewide basis.

The OCA is also in the process of adopting some standards for their forms, an upgrade that hasn't been done in the last two decades. This will assist the courts with the data that they collect. Right now, the OCA has no way to look into the various case management systems that are out there in the state. "If we can just agree on the standards for the data itself—I think that's the path," Reynolds says.

Conclusion

The OCA has been instrumental in implementing best practices for the use of technology within our courts:

- SQL-compliant database engines using XML for inter-database data exchanges
- Avoiding a statewide CMS software mandate through the use of a common data-exchange methodologies
- Supporting our courts with internet access and Westlaw accounts,
- Document scanning/imaging procedures
- E-filing systems

For more information about the Office of Court Administration, you can visit their web page at: <http://www.courts.state.tx.us/oca/ocahome.asp>

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Tips and Tricks for Obtaining Government Employment

By Ann M. Skowronski



It's not very glamorous, your work equipment may be dusty and out-of-date, and the pay might not meet your expectations. However, there are many reasons why good paralegals make the move to government jobs. Some folks want to have a stable, forty-hour per week job that will rarely, if ever, require overtime. Others are drawn to the generous leave and health care benefits the government grants. For example, the State of Texas pays an employee's entire health insurance premium. Yes, you read that correctly. You will pay nothing for insurance coverage, and you will be covered no matter your health status upon hire. Therefore, while the wages can initially appear to be uncompetitive, the total benefits received from the employer may very well meet or out-pace the competition in your area, especially if you are a new paralegal with little experience. Did I mention the pension plan? When you combine the complete benefits package with the knowledge that your work will help the society run more safely and efficiently, government work doesn't look like such a bad deal after all. I hope the following tips help you in your job search.

I. HOW TO FIND JOB OPENINGS

State and federal jobs are posted online. You can search for state employment on the Texas Workforce Commission's "Work in Texas" website at <http://www.twc.state.tx.us/jobs/job.html>. Federal government job openings and applications are at www.usajobs.com. County and city employers often have websites that will provide job applications, as well. For example, Travis County advertises its postings at http://www.co.travis.tx.us/human_resources/jobs/default.asp. Just about every city and county posts its job openings online these days. During your job search, make a daily trip to all sites to search for new openings. The early bird gets the worm, as they say. Make your application stand out and show you interest by being one of the first people to apply for the position.

Tip: In addition to searching the job openings on your own, you should register as a job seeker, especially on the Work in Texas website. The website will perform job searches for you and then send you e-mails when a match for your skill set appears. You can then decide whether you would like to submit an application for the match.

Tip: Broaden your job search. Try searching for jobs using the keywords "legal assistant" or "office manager," in addition to "paralegal." If you are new to the profession and having a hard time nailing that first job, you might even try "legal secretary" or "clerk" as a keyword to get your foot in the door.

II. THE APPLICATION

After I quit my last government job, I asked my supervisor how many people had applied for my fifty-percent travel, \$46,000 per year attorney job. I was stunned by the answer: two hundred and fifty people had applied within a week of the posting. How do



you make your application stand out with that kind of competition?

A. Standard Procedures

Every governmental entity, from county to state government, has a procedure each job applicant must follow to receive consideration for a job interview. By standardizing the procedures, the government is trying to make the process more fair and open. The most important thing to think about when you fill out the application is that the person reviewing the application may be assigning points to your answers.

The applicants with the most points get the interviews. However, this does not mean you should vomit information on to the job application in the vain hope you will get points. Instead, you must be methodical, direct, and responsive.

B. Make the Application Work for You

Filling in the required fields on the online job applications is very time-consuming. Happily, once you have added the information, the state and federal websites save your application for later use. This makes it easier for you to cast a big net by simply changing a few details (job posting number, etc.) on each new application.

Tip: Don't be lulled into laziness by the website! Make sure your application matches the job posting number, job title, and department. Government human resources departments can be very large, and the employees may not have the time to figure out what job you were trying to apply for of the twenty openings they have that month.

Trick: Print off the job opening. Make sure you use the *exact* words from the job opening in your application, especially if the job position *requires* specific education or experience. These can also be called "minimum qualifications." You will not be selected for an interview if your application does not state how you meet the basic job requirements.

Example: The job requires, "Experience using WordPerfect." You should list

your experience with the program in the "Skills" portion of the application and maybe in the job descriptions, as well. It may sound silly to put in such basic information, but it is essential to your obtaining an interview.

Trick: Read the "preferred qualifications" section. How many do you meet? Most employers do not expect to find that perfectly qualified candidate. However, try to come as close as you can—without lying—to relate your experience to the qualifications.

C. Submitting the Application

You have heard this a thousand times over, but please review your application for typos and grammar. Remember, you are seeking a job which will require the use of your writing skills. What might be forgiven in other businesses may not be in the legal profession.

Tip: It is in your interest to *thoroughly* examine what the application procedures require. Applicants who fail to ensure their applications contain all necessary elements will rarely be offered an interview. So, if it says to include a transcript, then include a transcript. If the application must be electronically submitted, then follow that instruction. Creativity (pink paper, hand delivery) will generally not be rewarded.

Tip: Get it in on time! If there is a closing date for a position, make sure you have the application in the hands of the correct department of the agency by that deadline. Some agencies will even stamp applications with the time and date of arrivals. As you guessed, late arrivals are not considered for interviews.

III. THE INTERVIEW

For general advice on interviewing, you can check out any number of articles on demeanor, attire, and "tough" interview questions. Any of that advice surely applies to a government interview. However, there is some advice specific to the government interview that can help you land the job.

Tip: Be prepared for a formal, even

stiff, interview. Most times, government agencies have prepared a set of questions beforehand which must be asked of every applicant. Again, the point system returns. Agencies must be able to justify why certain applicants were hired over others, and the point-per-question method has become the easiest way to make the justification.

Tip: Check out the agency website. This will help you learn something about what the agency does. Also, try to find an organizational map—the who's who of the agency. This will give you insight about the type of work you can expect. For instance, you might have applied to an environmental protection agency. But, if the person interviewing you works in personnel, you should expect to be asked about your experience and interest in employment law.

Trick: The questions are no mystery to the prepared. Do you remember that copy of the job requirements you printed off when you applied for the position? Well, don't throw it away! When you receive a call for the interview, review the job posting and take notes. Take notes on how you meet the job requirements, especially the preferred qualifications. Try to have three examples of how you meet each requirement. Refer to your notes during the interview. You will look prepared, polished, and serious about the position if you bring notes.

Trick: Have questions for the interviewer. I did not used to follow this advice, as I felt strange asking the interviewer how he or she became interested in the area of law or what the turnover rate is. You should take the opportunity to find out if this is somewhere you actually want to work. Be confident in your abilities. You would not have received the interview if you were not qualified for the position. You are interviewing them as much as they are interviewing you.

Ann Skowronski is an Enforcement Attorney at the Department of Aging and Disability Services (DADS).

THE Ultimate Notary Public Primer

by Marilyn Simpson

Some time ago I was in federal district court waiting for the case in which I was involved to be called. On the witness stand was a notary who was being interrogated by the judge who repeatedly asked her how she happened to notarize a stamped signature. She kept saying that she did not know that Texas law prohibits such notarization. Years later, as part of my paralegal work, I tracked down a notary who not only had backdated her notarization but, much worse, had never met the signer. More recently, a notary responded to my question about why he did not have a notary book by saying that he would get a notary book when the law required it.

These Texas notaries probably did not intentionally violate the law. However, these incidences point to the fact that many Texas notaries are ill prepared when they begin their duties. Basically, to become commissioned as a Texas notary, a person who (1) is at least 18 years of age, (2) is a resident of the State of Texas and (3) has never been convicted of a felony or a crime involving moral turpitude is only required to complete an application, take an oath, obtain a bond, file the necessary documents with the Secretary of State and pay the required filing fee.¹

Texas does not require any pre or post-commissioning training or testing. Educational seminars can be costly and the Secretary of State provides a limited amount of educational material.² Unfortunately, this information does not adequately explain how to provide good, legal notarial services.

Improperly notarized documents have been questioned in lawsuits and notaries have been required to testify in trials involving their notarization of affidavits, oaths, deeds and other documents. A

notary can also be held personally liable for actions (including negligence or fraud) in the performance of the duties of the office. The bond required by law to be filed before a notary commission is granted is meant to insure that the injured person can recover at least \$10,000. However, notaries need to know that this bond does not protect them from personal liability for the remainder of the judgment damages caused by a breach of their official duty. As well, a notary may be subject to criminal prosecution.³ With so much at stake, it is imperative that notaries have the proper information to provide quality notary public services.

The primary duties of a notary are:⁴

1. Ensuring that the signer personally appeared before the notary face to face at the time of the notarization;
2. Determining positively that the signer is the person he/she claims to be;
3. Obtaining the acknowledgment of the signer that he/she has signed the document;
4. Taking the signer's oath that he/she is aware of the contents of the document and the oath he/she is taking, that the information is true and correct and that the oath was freely made;
5. Properly completing the notarial certificate and ensuring as much as possible that all blanks are filled in, that the original document cannot be altered later, and that pages are not added or eliminated after the document is notarized; and
6. Making a written record of the notarization in an official notary record book.

The signature and seal of a notary provide *prima facie* proof of the facts and allow

persons in trade and commerce to rely upon the truth and veracity of the notary as a third party who has no personal interest in the transaction.⁵

Notaries commissioned in Texas are authorized to notarize in all 254 counties.⁶ Notaries are required to use a seal of office prescribed by law to authenticate the notary's official acts.⁷ A fee prescribed by law may be charged for the notary's services.⁸ Notaries have the same authority as a county clerk to⁹:

1. take acknowledgments or proofs of written instruments,
2. protest instruments permitted by law to be protested,
3. administer oaths,
4. take depositions,
5. certify copies of documents not recordable in the public records, and
6. since 1997, under certain circumstances discussed later, sign the name of an individual who is physically unable to sign or make a mark on a document.⁵

Notaries should remember that they are not "employed" as a notary by their employer or anyone else. The Secretary of State commissions notaries and, as such, they are Commissioned Officers of the State of Texas. Every notary is a public servant so an employer cannot require that a notary who works in his/her place of business notarize documents only for patrons of that business. The public has the right to expect a notary to perform the duties of that office; however a notary can execute those duties at reasonable times consistent with the notary's other duties."

Refusal to Notarize. While notaries are expected to notarize for "the public" and not restrict the provision of their services, there is no legal requirement that a notary must notarize each and every document presented for notarization. Notaries are expected to exercise a reasonable degree of caution and personal judgment when notarizing documents. When a notary has reason to question the competence of the signer, or does not trust the identification of the signer, the introducer or the witness, or has any other creditable reason for refusing to notarize a document, the

notary should refuse to notarize the document.

Some notaries have reported being intimidated by their employers or fear being fired if they refuse to notarize a document as requested. It may sound simplistic but a notary should stand firm in refusing to notarize once the decision against notarization is made. Remember, it is the notary who has the ultimate responsibility for the notarization and who must explain his/her actions, possibly before a judge. It is the notary who is expected to uphold the oath previously taken and comply with State and Federal laws. The notary should not rely on a claim of intimidation as a defense for improperly notarizing a document. As well, employers are not exempt from obeying the law and can be held liable for such intimidation. The Secretary of State encourages notaries to report all such actions as soon as possible so that the notary can receive protection and support. For these and other reasons it is wise to document the notary book with information of such refusal to notarize in case questions arise in the future. If a notary has a legal question regarding whether to notarize a document, he/she should refuse to notarize the document and request a private letter ruling from the Secretary of State to resolve the issue.

JUST SAY NO

Since the notary's name appears on the notarized document, he/she may be held fully accountable for all of his/her notarial acts. Therefore notaries should be aware of actions that they may not legally take. Specifically, a notary may be subject to possible criminal prosecution, civil liability and the revocation or suspension of the notary's notary public commission if he/she does any of the following:

1. Perform acts which constitute the practice of law or state or imply that he/she is an attorney licensed to practice law in the State of Texas¹²
2. Prepare, draft, select or give advice regarding legal documents.¹³
3. Translate "Notary Public" into Spanish ("Notario Publico").¹⁴
4. Overcharge for his/her services¹⁵

5. Notarize a document without the signer being in his/her presence.¹⁶
6. Notarize his/her own signature.
7. Issue identification cards.¹⁷
8. Sign a document under any name other than the name under which he/she was commissioned.¹⁸
9. Fail to attach his/her seal to any document he/she notarizes.
10. Certify copies of documents recordable in the public records.¹⁹

There is an exception to items 1 and 2 above if the notary is a person licensed to practice law in the State of Texas and is in good standing with the State Bar of Texas.

The most requested notarial services are for acknowledgments and oaths.

How to notarize an acknowledgment. An acknowledgment is a statement given to a notary by the signer of the document confirming that he/she is the person who signed the document and that he/she signed for the purposes and considerations stated in the document. Suggested procedures:

1. Make sure that the proper notary certificate form is attached to the document. However, a notary may not suggest a notary certificate form if the document does not have one. If desired, a notary may show the signer sample notary certificate forms promulgated by the Secretary of State' the signer may then chose a certificate and the notary may attach the form to the document.²⁵
2. Make sure that the document is complete (i.e., all blanks are filled in). A notary should not notarize an essentially blank document.
3. The signer and witness or person who introduces the signer to the notary (if any) must personally appear before the notary and provide proper identification.
4. Documents with acknowledgments may be signed before they are presented to the notary. Whether or not the document was previously signed, the notary should ask the signer: "Are you signing (or did you sign) this document for the purposes and considerations expressed in the document?" The

signer should answer "Yes."

5. If the signer has not already signed the document, the notary should ask the person to sign the document.
6. The notary may then sign and seal the notary certificate and enter the required data in the notary book.

How to notarize a sworn statement or oath.

An oath is a solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise. The person making the oath implicitly invites punishment if the statement is untrue or the promise is broken. An affidavit is a statement in writing of certain facts signed by the party making the affidavit, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under the office's official seal of office. A jurat is a certification added to an affidavit or document stating when, where and before whom an affidavit was made.²² A jurat may be included within an acknowledgment.²³

The oath the signer takes before swearing to the truth of written statements recites "after being duly sworn" or similar wording. The sworn statement puts the signer on the highest order of truth and may subject the signer to perjury for knowingly making a false statement. While there is no statutorily prescribed process for administering the oath, nevertheless the oath **must be actually administered** by the notary. Suggested procedures:

1. Follow steps 1 through 3 above.
2. Administer the oath as follows:
 - a. Ask the signer to raise his/her right hand or tell the signer that you are putting him/her under oath.
 - b. Ask the signer questions based on the type of document and notary certificate for which he/she will have to answer "I do" or "I will" or make some sort of affirmative response.

For example, you may ask, "Do you swear that the statements, facts and representations in the document you are signing are true and correct, so help you God." In the alternative, you can ask, "Do you affirm that the statements, facts and

representations in the document you are signing are true and correct?" As another alternative, the notary may read the oath statement verbatim as it appears in the document and obtain the signer's affirmative response.

3. Ask the signer to sign the document. A notary MAY NOT notarize a previously signed document with a sworn statement unless the signer signs the document again in the presence of the notary.
4. The notary may then sign and seal the notary certificate and enter the required data in the notary book.

Subpoenas. A notary is authorized to issue a subpoena or subpoena duces tecum for written depositions. Prior to issuing a subpoena, the notary shall:

1. Require proof of service of notice to take a deposition for the requesting party or attorney; or
2. Personally execute service of the notice to take a deposition. Additionally, the notary shall confirm that there is no court or administrative order or procedure that precludes the issuance of the subpoena. The notary shall obtain an affidavit from the requesting party or attorney stating whether the party or attorney is aware of any such procedure or order.

These rules do not independently authorize a notary public to issue a subpoena. The issuance of a subpoena by a notary must be authorized by other law, rule or procedure and in conformity with such law, rule or procedure. Failure of a notary to conform to these administrative rules does not affect the validity of a subpoena but may subject the notary to disciplinary proceedings.²⁴

Can These Documents Be Notarized?

Can a notary notarize or otherwise assist persons with disabilities? Yes, but the notary must proceed as follows. The following definitions apply:

- Legal disability usually means individuals whose legal rights have been

impaired by legal action.

- Physical disability means individuals with a physical impairment that impedes the ability to sign or make a mark on a document.
- A notary may not notarize documents for those who have a legal disability.
- However, since 1997 a notary may sign the name of an individual who is physically unable to sign or make a mark on a document presented for notarization if directed to do so by that individual, in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed. The notary shall require proper identification of the individual for whom the document is signed as well as for the witness and include this information in the notary book.
- A notary who signs a document for a disabled individual shall write, beneath his/her signature, the following or substantially similar sentence: "Signature affixed by notary in the presence of (name of witness), a disinterested witness under Section 406.0165, Government Code."

Can a notary assist and notarize for a blind or visually impaired individual? A notary may read the document to the signer who is blind or visually impaired but must not give any advice concerning the document. Once the signer has had the document read to him/her, the usual procedures apply for notarizing the document. Be sure to enter the pertinent facts regarding the notarization in the notary book.

Can a notary issue an identification card? Absolutely not. This is prohibited by Section 406.016, Government Code.

Remember, a notary may be required to appear in court and testify with regard to any document he/she notarized. Relying on one's memory on the witness stand when testifying about a notarization that occurred years ago may be difficult and risky. For this reason, notaries are encouraged to write complete notes in their notary book indicating any special circumstances that occurred during a notarization. Also, if the notary has established a

legally sufficient procedure by which he/she always notarizes documents, then the notary may inform the court of such procedure and provide testimony based on the procedure instead of the notary's memory. For example, if a notary always requires that the signer appear in person at the notarization, the notary may testify that, based upon this procedure, the signer appeared in person on the date specified in the notary's certificate even if the notary cannot remember the specific notarization.

Identification of the Signer, Introducer, Witness. Texas law requires that a notary properly identify the person who is giving an acknowledgment or signing a statement under oath. Proper identification also must be obtained for the introducer and each witness.²⁵ There are three methods of identification set out in the law.²⁶

Personally know the signer. This is the best way to identify a person. However, this does not mean known for only a short period of time. The notary should have a long term personal acquaintance with the signer. Remember, the notary may be asked to identify the signer in court.

Identification card. Six types of identification cards that can be used to identify persons for notary purposes are: driver's license issued by an American state, an identification card issued by the Texas Department of Public Safety or an equivalent agency in another state, military ID card, U.S. veterans card, U.S. alien residency card and passport issued by the United States government.²⁷ A notary should always verify that the ID card is valid (e.g., not expired) and that the address information is current at the time of notarization. Unacceptable forms of identification include a credit card, a U.S. social security card, a private company's security badge and a letter of introduction.²⁸

By introduction. The introduction should be from a credible person the notary knows well.

Notary Certificate Issues

1. *When to Revise the Notary Certificate.* Most pre-printed notary certificates state

that the signer is “known to me,” however it is often the case that the notary does not know the signer. When this happens, the notary should revise the notary certificate (by hand if necessary) to make it correct.

Examples:

“Before me, a notary public, on this day personally appeared (name of signer), *proved to me through a Texas driver’s license* to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared that the statements therein contained are true and correct.”

“Before me, a notary public, on this day personally appeared (name of signer), *proved to me on the oath of Sam Brown* to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared that the statements therein contained are true and correct.”

2. *What county should be used?*

THE STATE OF TEXAS
 COUNTY OF _____

Fill in the name of the county in which the notary is physically located at the time the signer appears and the notary signs and seals the notary certificate. This is true regardless of the county where the real property described in the document is located, where the instrument containing an acknowledgment was signed or where the signer or notary reside.²⁹

3. *What should be done if the wrong county or state is stated on the notary certificate?*

Cross through the wrong information and insert the correct information. The notary certificate is the only place on the document where the notary may make changes.³⁰

4. *What date should be used for the notary certificate?*

Enter the date on which the notary performs the notarial service, regardless of the date of the instrument, the effective date of the instrument or any other date. Notary certificates must not be backdated or postdated. Also, if the wrong date is stated on the pre-printed notary certificate, the

notary must cross through the wrong date and insert the correct date.³¹

Seal. Each notary certificate must be sealed by a seal in the form prescribed by law. Except for e-notary seals (see below), the seal may be affixed by a seal press or stamp that embosses or prints a seal that legibly reproduces the required elements of the seal that can be photocopied or reproduced by other photographic methods.³² Seals are personal to the notary to whom they are issued and must not be shared. It is essential that the notary keep the seal in a secure location—preferably one that is locked.³³ When the date on the notary seal has expired or the notary ceases to serve as a notary, the seal must be completely destroyed so that it cannot be used. Do not simply throw the old seal in the garbage. Even expired seals can be improperly used to notarize backdated documents. Lost or stolen seals should be immediately reported in writing to the Secretary of State.

Electronic Transaction Act. The advance of computer technology has caused the law to change regarding notarization of documents. In 2001, Texas adopted Chapter 43 of the Business & Commerce Code titled the Uniform Electronic Transactions Act, that addresses electronic notarization and acknowledgments. Section 43.011 states, “If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts [the notary], together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.”

This provision was incorporated in Tex. Gov’t Code Ann. § 406.013(c) as an exception to the requirement that the seal must be affixed by a seal press or stamp. Taken together, these two laws provide for the use of records and signatures in electronic form *provided* the transaction is between parties, each of whom has agreed to conduct the transaction by electronic means. Generally, “signatures in electronic form” means printed images of signatures rather than original pen and ink signatures.

Therefore Texas law now provides for the notarization of electronic documents using a printed image of a notary seal.

The procedure for electronic notarization is similar to the “paper form” of notarization. A notary may add a signature and seal to an electronic document so long as the person for whom the notarization is performed personally appears before the notary to sign the document or acknowledge his/her signature on the document.³⁴ It should be noted, however, that county clerks are not required to accept for recording a paper copy of a document with a so-called “esignature” or “e-notary seal.”³⁵ This area of the law is new and is likely to evolve further in the next few years.

Notary Book. Every Texas notary is required to keep a written record of all of his/her notarial acts in a book or electronically in a computer or other storage device.³⁶ The notary book must be kept whether or not fees are charged and notarizations must be recorded even if the notarization is for a friend, relative, employer or co-worker.³⁷ While many notaries chose to purchase their notary book from a commercial vendor, this is not a requirement and self-made books that comply with the legal requirements may also be used. A notary who charges a fee for providing notarial services must also keep a record of all fees collected. This requirement can be satisfied by recording the fees in the notary book. A notary’s book is the responsibility and personal property of the notary — not his/her employer — regardless of who paid for the notary’s filing fee, the bond, the seal or the notary book itself. Notary books are official State of Texas public records. A notary’s records are subject to inspection by any citizen.³⁸ While a notary may not charge a fee for viewing the notary’s record book, he/she may charge a fee prescribed by law for certifying copies of pages of the notary book.³⁹

Signatures. The notary should always compare the signature on the identification card with the signature on the document to verify theft authenticity. While signatures in the notary book formerly

were required for all persons identified in the book, the law changed in 1989 so that now the signer of the notarized document and others listed in the notary book (e.g., introducers and witnesses) are no longer required to sign the notary book and/or provide a thumb print. A notary may still ask the signer to sign the notary book or provide a thumb print, if desired, but a notary should not imply or tell a person that such signature or thumb print is required by law or refuse to notarize a document based on such decision by the signer.

Data to be Included in the Notary Book.

Data to be recorded in the notary book is required by law⁴⁰ and most required information is self-explanatory. However, the following provides some additional information.

Notarization Date and Document Date. The date a document is notarized may be different from the date stated on the document. Therefore both dates must be recorded in the notary book — even if they are the same date.

Printed Name. Be sure to identify on separate lines all individuals who are pertinent to the notarized document, including the signer, witnesses (e.g., for a Last Will and Testament) and/or the introducer. If a photo ID is used as the means of identification, the name entered in the notary book should be the same as the name that appears on the photo ID. If the name shown on the document is different in any way from the one shown on the photo ID, this fact should be entered in the notary book with the notary's explanation of the reason for the difference.

Residence Address. While some individuals will want to provide a business address or post office box address since a notary's book is public information, state law requires that the residence (or alleged residence) address be recorded, including the city, state and zip code.⁴¹

Identification. The notary should describe how he/she identified the person listed in the entry. If the identification is

by personal knowledge, a notation of "Personally Known by Me" (or the like) is sufficient. If the identification is by identification card, the law changed in 2007 and now a notary is prohibited from recording in the notary book the identification number assigned by the governmental agency as set forth on the identification card or passport or any other number that could be used to identify the person listed in the notary book. However, the notary is not prohibited from recording the type of identification card relied upon and the number related to the residence address of the listed person.⁴²

Type of Notary Act. The usual types of notary acts are acknowledgments and oaths. However, the notary may provide other types of services such as certifying a non-recordable document or a page from the notary book so the exact type of notary service performed should be recorded in the notary book.

Comments. The notary should enter notes to explain any unusual circumstances involving the notarization. For example, if the signer is blind and the notary read the document to the signer before he/she signed the document, these facts should be entered here. Comments made in the notary book contemporaneous with the notarization of the document may prove helpful if the notary is asked to testify in court years later regarding the document or the signer.

Notwithstanding the above, a notary who administers an oath for a criminal complaint issued under Article 45.019 of the Texas Code of Criminal Procedure is not required to record the notary's action in the notary book.⁴³

Upon the completion of a notary book or the death or cessation of service of a notary, the notary book must be deposited with the clerk of the county where the notary resides or resided.⁴⁴ The notary should always obtain a receipt from the county clerk for the deposited notary book.

FREQUENTLY ASKED QUESTIONS

1. May I notarize the signature of my spouse? May I notarize signatures relating to my spouse's business? May I notarize signatures for my relatives?

Answer:

There is no specific prohibition against a notary notarizing these signatures. The basic rule is that the act of taking and certifying acknowledgments cannot be performed by a notary who is financially or beneficially interested in the transaction. Texas is a community property state so the notary's interest in the transaction may be complicated. Therefore the facts in each situation will determine whether such action is proper.

2. May a notary alter or change the *instrument* he/she notarizes?

Answer:

A distinction must be made between the instrument and the notary certificate. A notary may not change, alter or draft an instrument for the signer. However, a notary must correct the notary certificate to state the correct facts.

3. May I take an oath or an acknowledgment over the telephone?

Answer:

Absolutely not. The signer must personally appear before the notary at the time the notarization is performed.⁴⁵

4. May a notary ever date the notary certificate using a date other than the actual date on which the notary signed and sealed the notary certificate?

Answer:

No. A notary must not backdate or post-date a notary certificate.

5. May a notary ever notarize a stamped signature (e.g., a signature that was applied from a pre-printed stamp.)?

Answer:

No. All signatures must be original and must either be signed in the presence of the notary (for sworn statements) or acknowledged before the notary (for

acknowledgments). The only exception is the procedure promulgated under the Electronic Transaction Act.

Notary name change. A notary must notarize documents using the name listed on the commission issued by the State of Texas. If a notary legally changes his/her name, the notary may change the name on the commission by sending the Secretary of State a name change application together with the original current commission certificate, a rider or endorsement from the insurance agency or surety, and the applicable filing fee. However, this formal name change is not a requirement so the notary may continue to notarize documents using the name on the current commission until filing the renewal application.

Notary address change. When a notary moves from the address provided to the Secretary of State, he/she is required to notify the Secretary of State of such address change not later than the 10th day after the date on which the change was made.⁴⁶ It is especially important that a notary file an address change since the Secretary of State sends official notices (including renewal notices) to the notary's last known address. To determine the address on file at the Secretary of State, a notary can look up his/her name on-line at www.sos.state.tx.us. This search is free.

Notary reappointment. Notary appointments are made for four years and, unless renewed, they expire at the end of the four year period.⁴⁷ There is no grace period. A notary may apply for reappointment within 90 days of the expiration date of the notary's current term. If a notary's term expires before being reappointed, the term of the notary's new appointment is four years from the date of the new qualification — not from the date of the expiration of the old term.⁴⁸ Documents notarized after a notary's term has expired may be questioned or invalidated. A notary who knowingly notarizes a document after his/her commission expires may be held personally responsible for any problems or legal issues that ensue. It is the notary's duty to keep track of the expiration date of his/her commission and not rely on the Secretary of

State to send a timely renewal notice.

How to Notarize a Certified Copy of a Non-Recordable Document

Since notaries are sometimes asked to certify copies of non-recordable documents, it is important to tell the difference between recordable and non-recordable documents.

Recordable documents are documents that are or may be recorded with a governmental agency or entity or are otherwise available from certain official entities. Examples of recordable documents the notaries may not certify are: car titles, birth and death certificates, deeds, deeds of trust, marriage licenses, divorce decrees, driver's licenses, wills, documents filed with the Secretary of State, military identification cards and records, passports, social security cards, visas, naturalization certificates or other identification cards and documents issued by the U.S. Department of Homeland Security. Certified copies of these types of documents and records must be obtained from the proper governmental agency or entity and notaries must not certify copies of any of these types of documents. As well, notaries may not certify copies of college transcripts issued in the United States since certified copies of these documents may be obtained from the issuing school.⁴⁹

While a notary may not certify copies of recordable documents, a notary may notarize an affidavit signed by the custodian of a recordable document in which the custodian certifies that the attached copy is a true reproduction of the original document. The rules for notarizing this type of affidavit are the same as for notarizing an ordinary affidavit. Remember that a notary may not prepare the affidavit but may notarize an affidavit presented by the custodian of a recordable document. Be sure to note the specifics of this type of notarization in the notary book.

Non-recordable documents are documents that cannot be recorded with any type of governmental entity. These documents include documents received by or were drafted by individuals for their own

personal use. Examples of non-recordable documents: original college diplomas, awards, proclamations, photographs and personal letters. Notaries may certify copies of the original of these documents. If a notary has any question with regard to whether a document may be certified, he/she should obtain an opinion from the Secretary of State.

To certify a copy of an original non-recordable document:

1. Make two copies of the original document. The notary must not use a photocopy of the document instead of the original since the certified copy must be made from the original document. Also, do not accept two photocopies of the original document supplied by the custodian of the document — even if they appear to be copies of the original. A notary should always make his/her own copies from the original document.
2. Ask the custodian of the document for identification.
3. Enter the required data in the notary book. Be sure to indicate that the notarial service is the certification of an original non-recordable document.
4. Complete two copies of the form entitled "Certified Copy of the Non-Recordable Document" and staple the first signed and sealed original form to the first document copy. Give this set of documents to the custodian of the document.
5. Staple the second copy of the document to the second signed and sealed original form entitled "Certified Copy of the Non-Recordable Document" and place it in the back of the notary book. Notaries should keep a copy of all such notarizations. A copy of the entitled "Certified Copy of the Non-Recordable Document" can be found at the end of this article.

How to Notarize a Certified Copy of a Record in a Notary Book

Entries in the notary book are public information. Therefore a notary must provide a certified copy of any page or record in the notary book to any person request-

ing such a copy.⁵⁰ To certify a copy or page:

1. Make two copies of the page(s) or record(s) requested. **Note:** Entries made to notary books prior to 2007 will likely include personal information of the signers (e.g., driver's license numbers). While the Secretary of State has endeavored to redact all such information from documents previously filed with the Secretary of State, it does not require notaries to do the same with information included in their notary books. Instead, the Secretary of State instructs notaries to redact such information from the certified copies of notary book pages prior to delivery of those pages to the requestor.
2. Enter the required data in the notary book. Be sure to indicate the name of the requestor and note that the notarial service was the certification of the specified page(s) from the notary book. If personal identification numbers were redacted, be sure to note that as well.
3. Complete two copies of the form entitled "Certified Copy of the Non-Recordable Document (Notary Record Book)" and staple the first signed and sealed original form to the first copy of the notary book page or record. Give this set of documents to the requestor.
4. Staple the second copy of the page of the notary book or record to the second signed and sealed original form entitled "Certified Copy of the Non-Recordable Document (Notary Record Book)" and place it in the back of the notary book. Notaries should keep a copy of all such notarizations. A copy of the "Certified Copy of the Non-Recordable Document (Notary Record Book Page)" can be found at the end of this article.

CERTIFIED COPY OF A NON-RECORDABLE DOCUMENT

STATE OF TEXAS
COUNTY OF _____

On this _____ day of _____, 200__, I certify that the preceding or attached document, and the duplicate retained by me as a notarial record, are

true, exact, complete, and unaltered photocopies made by me of

(description of document), presented to me by the custodian of the document, _____ (name of custodian), and that, to the best of my knowledge, the photocopied document is neither a public record nor a publicly recordable document, certified copies of which are available from an official source other than a notary.

(NOTARY SEAL) Notary Public Signature

CERTIFIED COPY OF A NON-RECORDABLE DOCUMENT (Notary Record Book Page)

STATE OF TEXAS §
COUNTY OF _____ §

On this _____ day of _____, 200__, I certify that the preceding or attached document, and the duplicate retained by me as a notarial record, are true, exact, complete, and unaltered photocopies made by me of _____ (description of notary book page), held in my custody as a notarial record, and that, to the best of my knowledge, the photocopied document is neither a public record nor a publicly recordable document, certified copies of which are available from an official source other than a notary.

(NOTARY SEAL) Notary Public Signature

¹Tex. Gov't Code Ann. §406.004 and §406.006
²*Id.*, §406.008 (b)

³ Secretary of State, Notary Public Educational Information
⁴*Id.*

⁵*Id.*
⁶ Gov't Code, *op. cit.*, §406.003
⁷*Id.*, §406.013

⁸*Id.*, §406.024
⁹Notary Public Educational Information, *op. cit.*

¹⁰Gov't Code, *op. cit.*, §406.0165

¹¹Secretary of State, Frequently Asked Questions
¹² Gov't Code, *op. cit.*, §406.017 (a) (1)

¹³*Id.*, §406.016(d)

¹⁴*Id.*, §406.017 (a) (4)

¹⁵*Id.*, §406.024 (b)

¹⁶*Id.*, §406.009 (d) (6)

¹⁷*Id.*, §406.016 (c)

¹⁸*Id.* §406.016 (b)

¹⁹*Id.*, §406.016 (a) (5)

²⁰Notary Public Educational Information, *op. cit.* page 7

²¹ Secretary of State, private opinion letter dated July 10, 1997. I obtained this letter from the Secretary of State after I refused to notarize a warranty deed prepared by a relocation firm hired to move the signers, an executive and his wife who were moving to his new post. The warranty deed had only the seller's name and the legal description of the property filled in. Since the property had not yet been sold, the buyer's name and other information such as deed of trust information was blank. The seller told me that the rest of the information would be filled in on the warranty deed after the property was sold. I requested a Secretary of State opinion on this issue and in a private letter ruling the Secretary of State backed up my refusal to notarize the document.

²²Notary Public Educational Information, *op. cit.*

²³ Op. Atty. Gen. 1988, No. JM-883

²⁴ Tex. Admin. Code §87.50 - §87.54

²⁵ Gov't Code, *op. cit.*, §406.014

²⁶Notary Public Educational Information, *op. cit.*

²⁷ Secretary of State, private opinion letter dated July 10, 1997

²⁸ Notary Public Educational Information, *op. cit.*

²⁹*Id.*

³⁰*Id.*

³¹ *Id.*

³² Gov't Code, *op. cit.*, §406.013

³³ Notary Public Educational Information, *op. cit.*

³⁴*Id.*

³⁵ Op. Atty. Gen. 2004, No. GA-0228.

³⁶ Gov't Code, *op. cit.*, §406.014 (a) and (e)

³⁷Notary Public Educational Information, *op. cit.*

³⁸ Gov't Code, *op. cit.*, §406.014

³⁹Notary Public Educational Information, *op. cit.*

⁴⁰ Gov't Code, *op. cit.*, §406.014 ~

⁴¹ *Id.*, §406.014

⁴² Admin. Code, *op. cit.*, §87.60

⁴³Gov't Code, *op. cit.*, §406.014

⁴⁴ *Id.*, §406.022

⁴⁵ *Id.*, §406.009 (d) (6) and *United Services Auto. Ass'n v. Ratterree*, 512 S. W.2d 30, 32 (Tex. Civ. App. — San Antonio 1974, writ *ref n.r.e.* holding that oath taken over the telephone was void because "a certificate of a notary is defective where the party did not appear before a notary public."

⁴⁶ Gov't Code, *op. cit.*, §406.019

⁴⁷ *Id.*, § 406.002

⁴⁸*Id.*, §406.011

⁴⁹ Notary Public Educational Information, *op. cit.*

⁵⁰ Gov't Code, *op. cit.*, §406.014 (c)

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Technicalities

By Pamela L. Crosby

If there are any of you who feel as though your growing experiences with today's technologies is very much like a trip with Alice down the rabbit hole, this column is for you. Our purpose here is to familiarize you with many of the features present in today's technologies that we hope will make your day easier. We invite your comments and suggestions as we focus on improving skills and gaining new perspectives on technology as it affects a paralegal's daily tasks.

Learning to Excel

The following applies to Microsoft® Office Excel® 2000, 2003, and 2007.

Many people use Excel for numeric calculation and lists, but did you know that Excel can calculate dates, also? The date functions provided with Excel (plus at least one "hidden" function) can be tremendous time-savers if you learn to use them properly.

Those Tasty Dates

So where are these date functions found? If you click on the function button (the small button to the left of the formula bar—the one with the letters "fx"—see Figure 1, below) an "Insert function" box appears. (See Figure 2.)

Click on the button to the right of the "Or select a category" dropdown list and select "Date & Time." A list of date functions will appear in the "Select a function" box. Click on one of the functions and a brief explanation or description of the function appears below the box. For this article we will look at two very useful functions: the "WEEKDAY" function, and the hidden "DATEDIF" function.

Just Another Manic... WEEKDAY

So what use is the WEEKDAY function? The WEEKDAY function is very handy when you are trying to determine the day of the week for a certain date. This function has built-in arguments or parameters

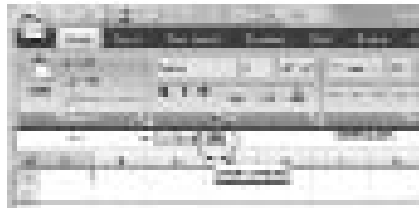


Figure 1

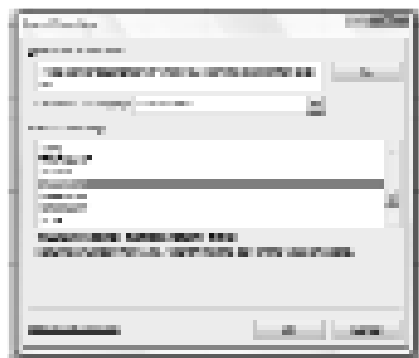


Figure 2



Figure 3



Figure 4

that you must assign a value to before you can obtain an answer (see Figure 3).

Let's take a look at the function wizard in action. Figure 4 shows a date in cell B1 with the function wizard activated in cell B2. The wizard is activated by clicking first in cell B2 then (1) clicking on the *fx* button, (2) selecting "Date & Time" from the dropdown list, then (3) selecting WEEKDAY from the dropdown list. In this example the wizard is requesting values for the arguments. The first argument (Serial_number) has been assigned a value by pointing the wizard to cell B1 so it will analyze whatever date is typed in that cell. The second argument is set to "1" indicating that the user wishes to use the normal week format, where Sunday is the first day of the week.

Figure 5 shows the result after the user clicked the OK button. The result is "3," indicating that March 25, 2008 was a Tuesday. But what if you'd rather see the actual name of the weekday in cell B2 than a number?



Figure 5

To display the name of the weekday in cell B2 rather than a number, right-click on cell B2 and select "Format cells" (see Figure 6). The "Format cells" dialog box will appear (see Figure 7).

Select "Custom" on the "Number" tab, type "ddd" in the "Type" box, then click the OK button. The result is now the name of the weekday instead of a number.

What's the 'DIF'?

DATEDIF is a "hidden" function in Excel that calculates the difference between two dates. There is no mention of the function in the Help file, nor is it included with the rest of the functions, but Excel 2000 and every version forward supports the func-



Figure 6

Output	Description
"D"	Calculates the number of days between Date1 and Date2.
"M"	Calculates the number of months between Date1 and Date2.
"Y"	Calculates the number of whole years between Date1 and Date2.
"YM"	Calculates the number of months, excluding the whole years, between Date1 and Date2.
"YD"	Calculates the number of days, excluding the whole months and whole years, between Date1 and Date2.

tion. The DATEDIF function arguments are as follows:

=DATEDIF(*Date1*, *Date2*, *OutputRequirement*)

Date1 is the first date, *Date2* is the second date, and *OutputRequirement* is one of the following values (see table above):

In the example below (see Figure 8), DATEDIF is used to calculate the difference in number of years, months, and days between July 10, 1960 and March 25, 2008. As you can see, cell B3 displays the number of years between the two dates. (The formula for that cell is displayed in the formula bar.) The formula for B4 is =DATEDIF(B1,B2,"YM") and the formula in cell B5 is =DATEDIF(B1,B2,"MD"). The answer, then, is that there is 47 years, 8 months, and 15 days between July 10, 1960 and March 25, 2008.

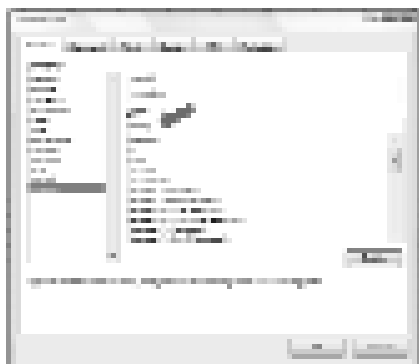


Figure 7

Improvise and Experiment

Taking advantage of the tools available to you is not only smart, it is essential to your success. If you have not already used the date functions feature in Excel, experiment

with them. The hours you save using it to calculate dates for your docket or to fill in the blanks on a contract might convince you that the time you spent learning about this feature was well worth it. Being able to calculate dates quickly and easily may convince you that this feature was just the assist you needed to help you increase your accuracy and efficiency. And while it may not truly *be* magic, your attorneys may think your improved productivity is.

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Figure 8

PARALEGAL DIVISION ANNOUNCES

TAPS 2008 SCHOLARSHIP

For the upcoming 2008 TAPS seminar (Texas Advanced Paralegal Seminar, a three day CLE seminar), the Paralegal Division of the State Bar of Texas will award up to two (2) scholarships for the registration fee to attend the TAPS 2008 seminar. Below go to www.txpd.org, choose **CLE/Events/2008 TAPS Seminar/Scholarship Application** for details on guidelines to apply for this scholarship.

Deadline for submitting application for TAPS scholarship is July 15, 2008.

Scruples

The Ethics of the Texas Paralegal Standards

By Ellen Lockwood, ACP, RP

In April 2006, the Board of Directors of the State Bar of Texas adopted the Texas Paralegal Standards (the “Standards”) (see page _____ of this issue of the *TPJ*). These standards were adopted to clarify and further define the definition of a paralegal as well as “to assist the public in obtaining quality legal services, assist attorneys in their utilization of paralegals, and assist judges in determining whether paralegal work is a reimbursable cost when granting attorney fees.”

While the adherence to the education, training, and work experience portion of the Standards is not mandatory, more and more firms and companies are adopting the Standards as their hiring guidelines for paralegals. In addition, as the judiciary becomes more familiar with the standards, many judges around the state are informing attorneys who appear before them that any request for reimbursement of attorneys’ fees that include paralegal fees must comply with the Standards.

Paralegals should discuss the Standards with their attorneys in order to be prepared to provide evidence that they meet the Standards in order increase the probability of approval of reimbursement of paralegal fees as part of a claim for attorneys’ fees.

Education, Training, and Work Experience
If a paralegal is an Active member of the Division, then she meets the Standards’ guidelines for education, training, and

work experience. Active members of the Division must also have at least six hours of CLE per year, which is evidence of efforts to maintain competence. As the

Standards also encourage attorneys to promote paralegal attendance at CLE, as well as certification and membership in professional organizations, paralegals should discuss with their attorneys the benefits of these activities.

Substantive Legal Work

Adherence to the definition of “substantive legal work” is usually critical to the award of paralegal fees as part of a request for attorneys’ fees. Judges are almost never willing to approve paralegal time for tasks that are primarily clerical in nature and opposing counsel will also argue against the inclusion of such time entries in an award. Time entries should be crafted with goal of clearly identifying the substantive legal work performed.

Ethical Obligations

As the definition and Standards make clear, paralegals must work under the direct supervision of a licensed attorney. Unfortunately, when attorneys are busy, and when they come to trust and rely upon their paralegals, they often don’t supervise their paralegals as thoroughly as they should. It is up the paralegal to make sure the supervising attorney is providing adequate supervision. This may mean insisting that an attorney completely

review documents drafted by a paralegal, reminding the attorney that certain duties are not appropriate for a paralegal to perform, and not giving legal advice, even when the paralegal knows exactly the answer the attorney would provide. Paralegals should also be familiar with the ethical requirements for paralegals and help educate their attorneys about paralegal ethics. While these requirements are listed in the Standards, a more complete list is the Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas, available at www.txpd.org.

If a firm, company, or agency is not familiar with the Standards it would be prudent to make the organization aware of the Standards and the likelihood that the organization will need to determine how the organization will comply.



Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past President of the Division. She is a frequent speaker on paralegal ethics and intellectual property and the lead author of the Division’s Paralegal Ethics Handbook published by West Legalworks. Her email is ethics@txpd.org.

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Municipal Bonds: A Little Home Cooking

By Craig Hackler, Financial Advisor, Raymond James Financial Services

Once the almost exclusive domain of institutional investors the municipal bond market has become a magnet for individual investors. Since these bonds are issued by state and local governments, the principles of federalism (remember high school civics?) demand that the interest from municipal bonds be exempt from federal taxation. Although they are generally free from federal taxes, these bonds may be subject to state and local taxation. The interest on private activity bonds may not be tax-free under the alternative minimum tax system. The popularity of municipal bonds has soared among individuals as they seek federal tax-free interest to combat the inherent penalties of high income: deduction and exemption limitations and higher marginal tax rates.

A municipal bond is essentially a promissory note. When an investor buys a municipal bond, he/she is lending money to the issuing state or local government. In return for the loan, the issuer pays interest at a specified rate and, at the end of the period, pays back the principal. Funds raised through the sale of municipal bonds are generally used to finance projects that benefit the public. The two most common types of municipal bonds are general obligation bonds and revenue bonds. General obligation bonds are backed by the "full faith and credit" and the taxing power of the issuer. Revenue bonds are secured by the income from the specific project they were issued to finance.



Comparing the yield on a municipal bond to the return on a similarly rated, fully taxable investment is basically a function of the investor's tax bracket. Generally, the higher the tax bracket, the more the potential benefit from investing in municipal bonds. To illustrate this point, if an individual is in the 25% federal tax bracket, a municipal bond paying interest at 6% will generate the same amount of income—after tax—as a fully taxable investment earning interest at 8%. For an individual in the 35% bracket, that same municipal bond paying interest at 6% will be equivalent to an almost 9.2% taxable return. This taxable equivalent yield will be even greater for investors who purchase home state bonds as these are also exempt from their respective state income taxes. Remember, investing involves risk and you may incur a profit or a loss. The example

provided is hypothetical and does not suggest or guarantee particular rates of return for any investment.

Another important factor in evaluating municipal bonds is how long the investment will last. Different bonds have different maturity dates and choosing the maturity date that is right for an investor depends upon his/her own investment objectives. Retired individuals who are collecting social security should be aware that municipal bond income is included in the determination of taxable social security benefits even though it is not part of their federal taxable income.

Municipal bonds offer an attractive investment alternative for many individuals. They can be purchased

directly or through tax-free bond funds or unit investment trusts (UIT). Remember to compare returns on municipals with other investments using a taxable equivalent yield based upon the investor's marginal tax rate. Of course, this brief article is no substitute for a careful consideration of each investor's particular financial situation. Before implementing any significant tax or financial strategy, contact an investment advisor..

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

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