

WINTER 2008 VOL. 14 NO. 3

# TPJ

*Texas Paralegal Journal*

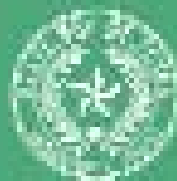


Negotiating an Oil and Gas Lease



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# PRESIDENT'S *Message*

Rhonda Brashears

**W**e enter this wonderful Fall season with many different perspectives around this great state of Texas. This is a time of year when we begin to think about the many blessings that we have and fondly remember the things of the past. At least a portion of our state will have a much different Fall and holiday season, specifically those along the coast who were devastated by Hurricane Ike.

I am proud to say however, that our members have stepped forward and taken the lead in assisting those in need. After an email from Stephanie Hawkes, PD President Elect, and Patti Giuliano, Chair of the PD Pro Bono Ad Hoc Committee, on behalf of the Access to Justice Committee, several responded with the commitment to help by volunteering time to assist with the many legal issues the individuals will face. This is, of

course, the kind of people that our Division is made of.

To continue in this vein, I would like to announce the appointment of Patti Giuliano, immediate past president as chair of the Pro Bono Ad Hoc Committee. Patti graciously agreed to accept this position this year to continue to grow the awareness of the need for pro bono services around the state. Patti is working hard to pinpoint pro bono programs in each district to make it easier for each and every Division member to volunteer their time to assist those in need of legal services. I can tell you that I volunteered for the first time at a pro bono clinic last year during Patti's directive that each Board member get involved at the local level. I found it to be a very rewarding experi-



ence. I hope that if you already volunteer in your community that you continue to do so and that if you do not, that you find a way to get involved.

After all what better way to change the perspectives of those in need in your community, of our wonderful profession and, at the same time, place some added additional blessings in your life.

The Paralegal Division would like to recognize the members that perform pro bono services. Therefore we are asking each member to remember that you can track your pro bono volunteer hours on the Division website at [www.txpd.org](http://www.txpd.org) under the "Members-Only" area (Members Only/Directory/View My Pro Bono Hours).

I wish you and your family a blessed Holiday season.

Rhonda J. Brashears  
President Paralegal Division

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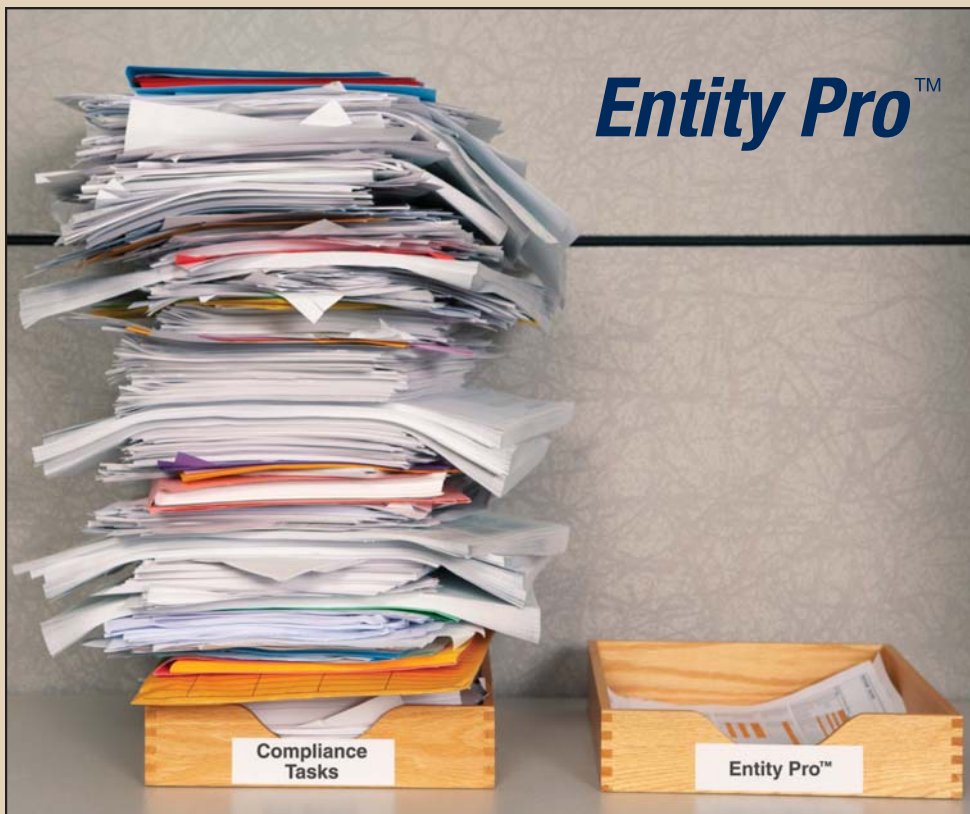
Over the years, NRAI sought out and partnered with other industry veterans to deliver corporate services across the country. Utilizing industry expertise not found with any other Registered Agent provider, NRAI has been praised as the company to use in extraordinary circumstances. Today, our corporate service offices employ corporate specialists with more than 20 years in the industry who can deliver solutions for transactions from the most simple to the most complex and everything in between. Our clients deserve tenured professionals, not training programs.

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# TPJ

## Texas Paralegal Journal

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# EDITOR'S *Note*

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

This month's issue is brimming with timely information on a variety of topics that are in the forefront of our profession, such as oil and gas leases, elder care mediation, the earth-friendly benefits (not to mention the cost savings) of e-filing, other technology trends, and employee privacy rights. Be sure not to miss the article on paralegal regulation in Florida; regardless of whether you applaud or abhor this move, it is certainly a program that could be looked at by other states in evaluating whether to regulate our profession.

Inside this issue you will also find helpful information about upcoming Director elections and the Notice of Nomination/Election of President-Elect of PD. There's also a great recap of this year's TAPS program; reading this review just might make you want to register for next year's TAPS, which I would encourage you to do!

As always, we've also included a terrific ethics article by Ellen Lockwood, ACP, RP and a timely financial planning article by Craig Hackler.

And, last but not least, don't miss former Director Ginger Gage's take on a Paralegal's Night Before Christmas.

Cheers!

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The Paralegal Division would like to extend a special thank you to Rodney Magee (San Antonio) and Esquire Deposition Services for stepping in to complete the Vendor Directory for TAPS 2008. Mr. Magee did not hesitate when we asked him for this favor. The company originally scheduled to print the Directory could not complete the task due to Hurricane Ike.

#### Correction from Fall TPJ—2008 Annual Meeting Committee:

The Annual Meeting article in the Fall 2008 issue of the Texas Paralegal Journal omitted a complete listing of the 2008 Annual Meeting Committee Volunteers. Please see below, the committee members.

- Jennifer Barnes, CP—Co-Chair
- Vanetta Murphree—Co-Chair
- Charie Turner, CP—District 1 Director and Board Advisor
- Sandy Hartman
- Ana Galvan

Thank you very much from the Paralegal Division for all of your hard work!

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WINTER 2008

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#### DEADLINE FOR SUBMISSION OF ARTICLES FOR THE WINTER ISSUE IS FEBRUARY 15, 2008.

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TEXAS PARALEGAL JOURNAL 5







# Tips for Successful Negotiation of an Oil and Gas Lease

By Michael J. Hammond



Oil and gas production in Texas has long been an iconic symbol in our State. From Spindletop to the oilfields of West Texas, perhaps no other image is more frequently associated with our great State. True to the commitment to explore and produce every resource available, a new energy has emerged within the past decade to take center stage in the landscape of Texas energy: natural gas.

Natural gas has long been a resource that was known to exist in the geological shales that hold the liquid, yet only recently has the technology been perfected to make exploration and production of liquified natural gas financially feasible. Through horizontal drilling and high-pressure fracturing of the rock, natural gas is now one of the fastest growing resources available. With all of the new gas exploration, with it comes new opportunities and challenges to advise our clients on how best to address the potential windfalls and pitfalls that come along with a developing market.

For some mineral owners, entering into an oil and gas lease too early may not be the best course of action to take, especially when accounting for geographic trends and potential for actual development. In the case of gas-producing shale, one of the most significant indicators of how successful a well might be is the thickness of the shale under any given property. While there are some geological anomalies within an otherwise producing region (carsts, caverns, fault lines, etc.), generally the shale tends to be thicker and thinner in certain areas. If a client lives in an area where there has been little to no natural gas production, it would be wise to obtain seismic data indicating the probability of drilling a successful well. The risk in failing to do so, of course, is that the owner could be the "guinea pig" in a thinner area of shale. Of course, if the bonus is high enough and the area might otherwise never be developed, it might be prudent to at least consider leasing.

For those mineral owners in stable, proven shale fields, the decision whether or not to lease is often one that is made in the affirmative rather quickly, and with the potential benefits, it is not difficult to see why. Counseling a client to lease or not is only the beginning of the process to secure the best possible deal for your client. Negotiating the oil and gas lease, and knowing what terms and market rates prevail, is crucial. With that backdrop, there are several key terms to any oil and gas lease that should be negotiated.



Some of these terms are fairly self-explanatory, some are more publicized, but they all play in concert to the entirety of a favorable oil and gas lease.

### 1. Primary Term

The length of any oil and gas lease is known as the “primary term,” and is often anywhere from 2-5 years. Keep in mind that the lease will be held in effect for as long after the primary term as there is a producing well. Because a lot of leases allow for pooling of various properties to form a large “pooled unit,” the lease may be held by production for a very long time after the end of the primary term.

Pay close attention to any provision allowing for an automatic extension of the primary term at the option of the Lessee. Many of the older leases only required the oil or gas company to deliver to the landowner a relatively small amount of consideration to extend the life of a lease an additional two or more years. A growing trend now is to allow for an extension only if an amount equal

to the original bonus is paid.

### 2. Granting Clause

The “granting clause” describes the property being conveyed and the subject of the oil and gas lease. Pay close attention to this provision to ensure that the land described is the land that is both owned and intended to be leased by your client. This is especially important if you have a client who owns multiple tracts of land and is only entering into oil and gas lease negotiations for one or some of them.

Also important to note is whether or not the granting clause contains any mention of whether or not the property leased, and subsequently bonus to be paid, contains any acreage lying within an adjacent roadway, street, easement or body of water. This is especially true for urban areas, where many operators, in an effort to secure leases in an increasingly competitive market, are agreeing to pay individual lot owners for a proportionate amount of the road in front of their house (whether or not the actually *own* it).

### 3. Bonus

Perhaps no other term of an oil and gas lease garners as much attention as the bonus payment. This is the amount that is being offered to the landowner as an up-front “bonus” for agreeing to sign the lease, usually reflective of net mineral acres being leased. Historically lease bonuses were not overly significant, between \$15-\$50 per acre as recent as five or ten years ago. This is not the case now, however, especially in the competitive natural gas shale regions of the state. Where a few years ago, a landowner would have leapt for joy at an offer of \$2500 per acre, now bonuses are exceeding \$25,000 per acre for some urban locations.

How much of a bonus to expect, and what is a reasonable amount to negotiate for, will largely depend on the geographical area in which you are negotiating and how much leverage you bring to the table. Obviously, the larger the tract of land, the more persuasive your arguments are likely to be, although neighborhood groups and associations that have the foresight to band

## THE PARALEGAL’S NIGHT BEFORE CHRISTMAS

by Ginger Gage, TBLS, ACP

’Twas the night before Christmas  
and I, still at work,  
couldn’t keep myself from thinking,  
“My boss is a jerk!”

The hallways were quiet—  
not one single peep  
as I shuffled through my work  
trying not to fall asleep.

When up on the roof  
there arose such a blare,  
I dropped all my files  
and hid under my chair.

A tap on my window—  
first anger, then fear  
“I’m gonna kill my boss  
If I live to get out of here!”

Then out of the corner  
of my frightened eye  
I saw eight reindeer  
and a red chubby guy.

“I gotta lay off the coffee,  
maybe this is a stroke.”  
Then to my great surprise,  
the chubby man spoke,

“Now Work, now Order, now Docket and Citation  
On Title, on Commitment, on Juvenile Probation!  
And leader of the pack, Workaholic, move out of that hole  
Grey’s Anatomy starts soon on ABC North Pole!”

Then the reindeer moved on  
with a look much like mine  
“I guess they know what it’s like  
to work at Christmastime.”



together and negotiate collectively have secured some of the largest bonuses.

#### 4. Royalty

One of the most important terms of any oil and gas lease is the royalty, that portion of the revenue (which may be contractually defined in a number of ways) that will be paid to the mineral owner by the operator. Historically, the usual and customary royalty was 1/8, or 12.5%. Royalties on natural gas wells now go for double that figure. Depending again on what the market will generally support, the royalties are now anywhere between 20% and 25%. Much like exorbitant bonuses, some operators are agreeing to break what was once thought of as the ceiling of 25% and paying up to 27% or even 28%, although these amounts are typically limited to a lessor with considerable bargaining power in a very desirable area.

#### 5. Pooling

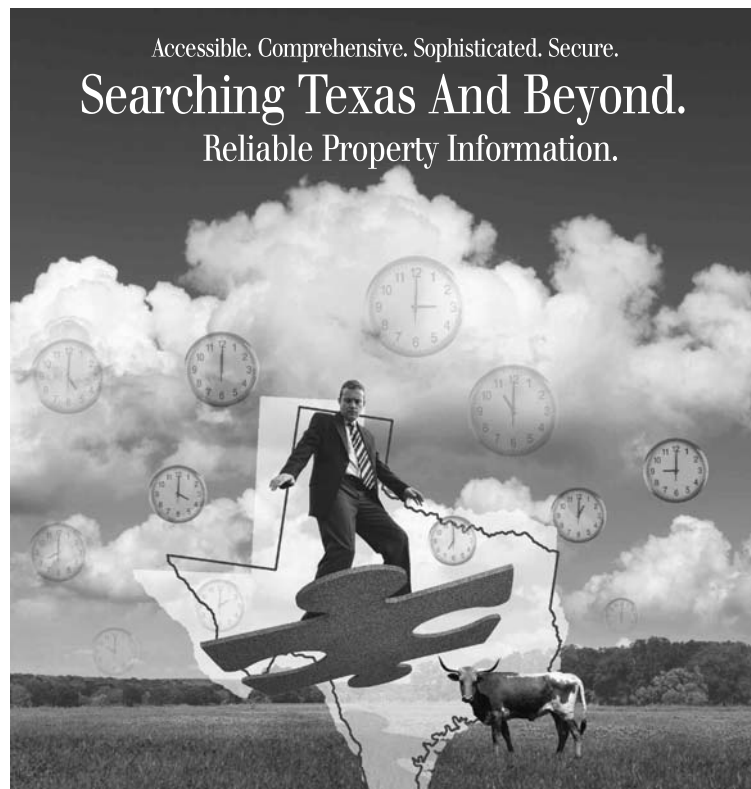
Of all of the important terms of an oil and gas lease, perhaps the most important is the "pooling" provision. This clause, if added, gives the lessee the ability to pool the leased property with other land to develop a "pooled unit." In Texas, the Railroad Commission has established that for a gas well, the maximum amount of acreage that can be held by any one well is 640 acres, and although many operators try to present this provision as "standard," this is really a misnomer. It certainly does not require anywhere near 640 acres to drill a horizontal gas well, and if you represent a client with any substantial acreage (anything over 25 acres), you would be providing a true disservice by not demanding a lower, more reasonable pooling clause. The benefit of a smaller pooled unit, of course, would be the increase in overall percentage of the unit any one lessor owns, and thus fewer royalty owners with whom to share a royalty. Depending on the seismic data and the geographic layout of the land, a decent and efficient natural gas well can be drilled

by pooling less than 200 acres. Some smaller operators even drill wells with as few as 80 acres of pooled lands.

Of course, in an urban setting, the ability to negotiate a smaller pooled unit is reduced drastically by the availability of padsite locations, and the general temperament of most urban landowners that drilling is great, and to benefit from the drilling is even better...so long as they don't see or hear the rig! Naturally, the farther away the rig is located from any given property, the larger the pooled acreage will have to be to accommodate inclusion of that property.

The terms discussed are certainly not all of the important items to review, understand and negotiate on behalf of clients, but with an working knowledge of these, you are much better equipped to advise your client and to better situate them to allow the ever-growing oil and natural gas market to work to their benefit.

*MICHAEL J. HAMMOND attended law school at Texas Wesleyan University School of Law, where he earned his Juris Doctor in 2004. Mr. Hammond is a general practice lawyer with an emphasis on real estate and oil and gas.*



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# Notice of Nomination/Election of President-Elect

Pursuant to Standing Rule XIV of the Paralegal Division of the State Bar of Texas, notice is hereby given of an election for the office of 2009-2010 President-Elect. This election will be held by mail during the month of January 2009 by the Board of Directors.

Qualifications for serving as President Elect of the Paralegal Division are contained in Standing Rules XIV as follows:

## XIV. OFFICERS

### B. ELIGIBILITY

1. Any current or past Director who is currently an Active member of the Division is eligible to be elected as President or President-Elect.

Any qualified individual who is interested in running for office of President Elect should forward a one-page resume,

together with a letter of intent to run, to the nominations committee at the following address **NO LATER THAN JANUARY 15, 2009.**

### NOMINATION COMMITTEE CHAIR

Misti Janes

Underwood Law Firm

P.O. Box 9158

Amarillo, Texas 79105

806.379.0315 (o)

806.349-9473 (fax)

*misti.janes@uwlaw.com*

In the event the Board elects an individual who is currently serving as a Director, a vacancy will be declared in the district in which that individual serves. An election will be held to replace the outgoing Director (President Elect) at the time the elections for the Board of Directors are regularly scheduled.

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## State Bar of Texas, Paralegal Division—Sustaining Membership Roster

(as of November 3, 2008)

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

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Courtroom Sidekicks  
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# Elder and Adult Care Mediation: The New Horizon in Family Practice

By Barbara Sunderland Manoussou, Ph.D., M.P.H.



With the population aging at an unprecedented rate, families are more frequently encountering strained situations about how to best care for a loved one who no longer is able to drive, live alone, requires assistance with daily living, or requires a new level of medical care. Even in the best of families, communication can shut down or never open up to quality decision making.

“My brother has been handling mom’s money the past two years, but my sisters and I think that he is using mom’s money for his benefit. How do we find out? Can you help us?”

“My father is 92 and still wants to drive. He can hardly see over the wheel. Every time my siblings and I bring up the matter, dad screams that it is none of our business. However, it will be our business if he gets killed or he kills someone else with his car. What can we do?”

“My mom needs assisted living, but won’t leave her house. How can we convince her?”

“My parent is in a nursing home and isn’t getting medications on time and has developed new health issues. The administrator told me that I’m crazy. I want to sue them. Can you help?”

These are typical calls to my elder care mediation practice. These family dramas need immediate resolution, not a lawsuit that could possibly take years. Mediation is an opportunity to provide families guidance and timely assistance in having a quality conversation that can address, negotiate, and resolve issues related to aging and family communication.

## **What is Mediation?**

Mediation has been recognized in Texas and nationally for over twenty years. In the past few years, most cases that go to family and probate courts are requested by the judge to be mediated first. Mediation is an informal, confidential process held in a private setting in which a neutral third party, a mediator, helps people to better understand their individual interests and needs. An experienced, certified mediator can empower families to

## Focus on...



recognize and implement workable solutions to their problem(s).

Mediation is different than other alternative dispute resolution processes in the following ways. The basic idea behind mediation is that a dispute is resolved through an agreement among the parties, instead of a resolution mandated by a judge or negotiated by attorneys. First of all, the parties establish their own outcome, so the result fits their cultural expectations, needs, and family nuances. It provides an opportunity for a win-win outcome: There doesn't need to be a winner and a loser. *Negotiation* involves a third party that physically separates the contending parties and shuttles ideas between them. *Arbitration* uses one or more third party neutrals that hear the facts and make a decision on how to resolve the conflict *for* the parties, like a judge might. *Litigation* is far more expensive and time consuming than mediation and involves a judge who makes the final decisions *for* the parties with the aid of attorneys representing the involved parties.

In mediation, whether it is voluntary or court ordered, the parties might, or might

not, be represented by attorneys. Usually, parties attend mediation without an attorney, if they even have hired an attorney. Then, if an attorney attends the mediation, their role is of advisor, not as a direct participant to the conversation. Mediation is a process for the parties to talk to each other and to make decisions that will work for them. The mediation is confidential in either case and the mediator does not impose or make decisions for the parties or offer legal advice. Using mediation as a means of discovery is forbidden.

The mediation process has several advantages. A main advantage is that the parties retain control over the decision(s) they choose to agree to in writing. Also, results are generally win-win because outcomes fit the needs and interests of the opposing individuals or family. Because the outcomes also reflect the party's choices and priorities, in turn, there is a higher level of compliance with the written agreement than with court judgments.

### **Why is Elder Care Mediation Different from Other Family Mediations?**

First of all, in elder care mediation, the issue involves the care, safety, and comfort

of someone over 50, although usually much older. End of life issues are not hidden. There have been cases that the "senior" was under 50 years old, but impaired by a stroke, heart problems, or early dementia.

Second, the case usually is initiated by the children of the senior. The scenario is that the kids see a downward spiral in their family's communication, or new communication skills need to be established. End of life decisions are uncharted territory for most families.

Third, the mediation might not take place in a business office. It is not uncommon for elder care mediators to convene the mediation in a long term care facility or the family living room. Some elder care mediations are held at the family dinner table with favorite foods on hand. Sometimes the elder might be in bed clothes.

Fourth, flexibility is a key to a successful mediation. The children might be in different parts of the country, so video cams, conference calls, and email might be tools for communication during the mediation. Mediations can also be held in the evening and on weekends to accommodate family schedules and to lessen the burden on parties.

And, fifth, but my no means conclusive, elder care mediation's goal in finding resolution embraces strengthening family communication, not pitting one family member against the other.

Since elder care mediation involves working through the established patterns and dynamics of a family, the mediator eases communication among family members for whom the elder-care dispute may reopen decades of old wounds and, often, dysfunctional communication. All family members have roles, postures, and personal issues that have developed over lifetimes. A qualified mediator helps to bring out the best in everyone. Sometimes an apology may be all that is needed for resolution. Forgiveness, complemented with new ways of listening and understanding, may be the fruits of the mediation.





In elder care mediation, the elder is strongly encouraged to participate. Their opinions, needs, and interests are heard directly. The children don't talk about their parent; they learn to communicate with their parent.

Pre-conferences for guardianship are also included under elder and adult mediation. Mediation allows a ward or potential ward to possibly participate in arrangements that allows for maximizing independence or as an alternative to guardianship.

The cost of mediation over litigation is also convenient in dollars, as well as in time. Mediations can be scheduled within in hours or days. Court cases take weeks, months, or, unfortunately, sometimes years. Sometimes, the elder person doesn't have time on their side, so the immediate implementation of mediation is important.

Every mediator has their own price structure, but, on average, the cost is between \$300 to \$500 dollars per hour. Many elder care mediations are multi-party and require facilitation and negotiation before the actual mediation. A spouse, children's spouses, grandchildren, neighbors, friends, care givers, physicians, nursing home administrators, and tax consultants might also be in attendance or need to be included somewhere in the process. In general, the cost would be a fraction of a legal battle tied up in litigation. Costs are usually under \$2,000. Some employee assistance programs (EAP) share or cover the costs.

#### **Finding a Mediator**

Since elder care mediation is relatively new as a genre, there is a small national pool of qualified mediators well versed in aging issues, but the field is growing steadily. Family mediators generally have been those who have been working with Children's Protective Services and handling divorces. However, adult and elder care mediation needs a different orientation with depth and scope into family issues

**The mediation process has several advantages. A main advantage is that the parties retain control over the decision(s) they choose to agree to in writing. Also, results are generally win-win because outcomes fit the needs and interests of the opposing individuals or family.**

with community senior resources.

An elder care mediator should have completed the state's 40 hours certification course in basic mediation, a 24 hours course in family mediation, and a 24 hours course in elder care mediation. In addition to this core training, the mediator should have practice hours in mediation, in general, and involvement in professional organizations with advanced mediation training in guardianship and elder issues. Some Texas courts, since 2007, will only appoint elder and adult mediators who are Nationally Registered Guardians. Pursuant to Texas Government Code sections 111.002 and 111.042c, the Court adopted the rules governing the certification of guardians. Even if the mediator does not act as a guardian, through the certification process, the court is assured that the mediator is familiar with aging and guardianship issues.

Unfortunately, anyone can hang out a shingle and hold themselves out as a mediator, since there is no formal licensing. A lawyer is not automatically a mediator. Mediation is a profession in its own right, so a lawyer would need certification and mediation training in addition to law school, unless the certification hours were earned in the course of their legal studies.

Therefore, as a precaution, a mediator should be selected from a roster that only uses well trained and professional mediators. Ask questions. Review resumes.

Elder care mediation training could also provide paralegals with valuable insight and resources to complement their profession.

*Barbara Sunderland Manoussou is the past-president of the Association of Conflict Resolution Houston chapter. She has been actively involved in elder care as a popular speaker at the international Association of Conflict Resolution. In practice since 1993, Manoussou serves on a variety of federal, national, and local mediation panels and numerous community boards. In 2008, Texas Governor Rick Perry appointed her to the statewide Nursing Facility Administrative Advisory Committee for a term until 2013. She has accrued over 2,000 hours in advanced mediation and alternative dispute resolution training and practice. She is a member of the Texas Bar Association – ADR Section, Texas Association of Mediators, New England Chapter for the Association of Conflict Resolution, the Labor Employment Relations Association, and a director of the Judge Evans Center for Mediation at South Texas College of Law. She is a National Registered Guardian. Her degrees include a baccalaureate from Brown University in Rhode Island, Master of Public Health, from the University of Texas School of Public Health in Houston, and doctoral studies at Nova Southeastern University in Florida, in Conflict Analysis and Resolution with concentration in eldercare.*

*Dr. Manoussou resides in Houston with her husband John and can be contacted at 713.840.0828 or mediation@manoussou.us. Go to <http://www.manoussou.us> for information on certification programs, workshops, lectures, and elder care mediation. The next elder care course will be held in January 2009. Texas paralegals who sign up before December 1, 2008, can benefit from an early bird special and CEU.*

*Focus on...*

# Trends in Trial Technology

By **Connie Janise**

he writing is on the wall. Or, rather, the monitor. Venues across the country are increasingly integrating electronic presentation hardware into the infrastructure of the courtroom. Judges are encouraging the use of non-obtrusive, built-in equipment and banning bulky trial boards, easels, foldout screens and the like - so much so that the use of technology in the courtroom is becoming less a question of style and more a matter of compliance.

Research on jury attentiveness and individual learning styles indicates that a majority of people process information presented visually better than if the same material is heard or read. Not only do they understand the information better, they also stay more focused on the given task. Because juries, ideally, comprise a cross-section of the public, it stands to reason that the typical jury pool contains more visual learners. So courts are encouraging legal teams to bring their arguments to life in the medium most familiar to the





jury and most likely to hold their attention.

Which brings us to that most inescapable of courtroom innovations—the flat-screen television. The modern courtroom is filling up with monitors, with several mounted in front of the jury box, and others at the lectern, at counsels' tables, in the witness box, in the gallery and on the bench. These built-in monitors dispose of the awkward scenes that can accompany the set-up of portable screens and they satisfy the multiple viewpoints of judge, jury, witness, counsel and audience.

In order to keep the jury from seeing evidence before it is admitted, these systems are typically controlled from the bench. When a party is proving up an exhibit, it may be displayed to opposing counsel, the witness and the judge. Only after the document is admitted does the judge activate the jury and spectator monitors, officially publishing the exhibit.

What's more, courtroom monitors sometimes provide additional functionality uniquely suited to the display of evidence. In some courtrooms, monitors at the witness box and lectern have touch-screen annotation capabilities, allowing the witness or examining attorney to mark up or point out portions of a document.

At its best, integrated courtroom technology makes bringing electronic evidence

to trial as simple as plugging in a laptop to the inputs at counsel's table. So each party is allowed the freedom to choose from any number of trial presentation software programs or slideshow applications best suited to the evidence. Sanction<sup>®</sup>, Trial Director<sup>®</sup> and PowerPoint<sup>®</sup> are among the most widely used programs for presenting demonstrative evidence and documents.

But wait—there's more. Newly built or redesigned courtrooms often feature integrated audio systems to provide a natural diffusion of sound. Special headsets for the hearing impaired or jurors who require an interpreter are available in some venues. Even the lectern is going high tech – in some courtrooms, the lectern features a panel that allows the examining attorney to select the source of the video and audio feeds. Time indicator lights may warn when a speaker is nearing their allotted time at the podium. And video conferencing capabilities are also becoming a fixture of the electronic courtroom, ushering in the ability to call witnesses to the stand from anywhere in the world.

Every courthouse is different, and the available technology will vary even from one courtroom to another. Consult the court's website to get an overview of what, if any, hardware is integrated into the assigned courtroom. Some venues even provide a guidebook describing the tech-

nology available and how to use it. The website of the USDC for the District of Minnesota provides an excellent example of such a manual—see [www.mnd.uscourts.gov/Courtroom\\_Technology/courttech.shtml](http://www.mnd.uscourts.gov/Courtroom_Technology/courttech.shtml). Follow up by setting a conference with the court's technology contact to confirm the information on the website and find out if permission from the judge is required to bring in additional equipment. This is also a great opportunity to schedule a training session for the legal team on the use of the court's equipment. Most courtroom technologists are happy to facilitate a test of the law firm's laptops on their system, train attorneys and staff on use of the technology and troubleshoot any issues prior to a party's appearance.

So get to know the new face of modern evidence presentation. And leave your trial boards at the office.

*Connie Janise is a litigation/trial paralegal at the law firm of Fulbright & Jaworski L.L.P. and serves as the litigation technology liaison for Fulbright's San Antonio office. Connie attended Texas State University's graduate-level Legal Studies program and is a certificated Texas mediator and active member of the Alamo Area Paralegal Association and the Paralegal Division of the State Bar.*

## DATES TO REMEMBER

District 6 CLE—Technology in the Court Room, Lubbock, TX on January 28, 2009, contact: [District6@txpd.org](mailto:District6@txpd.org)  
District 3—Fort Worth—January (TBD), Texas Notary Law, and February (TBD), Roundtable discussion on e-filing.  
Contact [District3@txpd.org](mailto:District3@txpd.org)

District 7 CLE—Amarillo on January 31, 2009, "The Paralegal in the Computer Age and Assisting at Trial, the Litigation Paralegal's Role." Contact: [District7@txpd.org](mailto:District7@txpd.org)

District Director Elections for odd-numbered District Nominating Period—February 1, 2009  
District 10 CLE—Important Skills for Today's Paralegal, Montgomery, TX on February 6, 2009,  
contact: [District10@txpd.org](mailto:District10@txpd.org)

Board of Directors Meeting—February 27–28, 2009, Dallas, TX  
Annual Meeting—June 26, 2008—Dallas, TX

Texas Advanced Paralegal Seminar (TAPS)—October 14–16, 2008—League City, TX

# Assisting at Trial:

## *The Litigation Paralegal's Role*

*Lisa Sprinkle, ACP, Board Certified—Civil Trial Law, Texas Board of Legal Specialization*

**B**y being organized and having a system, a paralegal can become a valued asset at the trial of a case. Assuming that a system has been utilized to organize the paperwork the actual preparation for trial can be minimized. This article will address some of the things a paralegal should be able to do to assist the attorney during trial.

There may be times when the paralegal stays back at the office during the trial. At such times, the paralegal's role may be to entertain witnesses, transport witnesses from the hotel or airport to the court, to continue drafting certain documents such as trial briefs, or to manage other client needs that are pending. At these times, the attorney will probably give specific instructions to the paralegal about what needs to be done in their absence.

### **Second Chair at Trial**

If the paralegal is expected to second chair at trial, the paralegal's duties may be quite different. The most important role for a paralegal second chairing is to assist the attorney in keeping the trial moving. This involves:

1. pulling and handing exhibits to the attorney for each individual witness testifying;
2. keeping detailed notes of the proceedings;
3. anticipating the need for certain documents (pleading or discovery response that is being disputed or used for impeachment);
4. keeping track of the introduction and admission of exhibits;
5. lining up witnesses for each day's testimony;

6. having subpoenas prepared and ready;
7. anticipating need for introduction of prepared trial briefs;
8. helping the attorney prepare direct and cross-examinations for the witnesses;
9. being alert to anything the attorney may forget when examining a witness and passing a note to see if it was purposely or accidentally omitted;
10. MAKING THE ATTORNEY APPEAR EFFICIENT AND WELL PREPARED.

A lot of attorneys get so wrapped up in the trial and what is coming next that they skip certain details like admission of documents, a follow-up question, objections to preserve appeal. A good trial paralegal will pick up on these matters. Through the discrete practice of passing a note, subtly, to the attorney, the paralegal can become a very valuable asset in trial. A paralegal, therefore, must be knowledgeable about the rules of procedure, evidence and the preservation of appeal.

Having second-chaired at trial numerous times, I would like to share my role during a typical trial. I have second chaired for both the defendant and the plaintiff.

- 1) The weekend before trial all witnesses are contacted and the dates and times of their testimony are confirmed. Telephone numbers where the witnesses will be at all times during the trial are recorded.
- 2) Court records are reviewed to ascertain any and all subpoenas served by the opposing party.
- 3) Jury sheets are finalized and juror profiles are discussed.
- 4) Discussions are held with the attorney

about strategies for the case.

- 5) Exhibits are finalized and the documents that will be taken to trial are organized.
- 6) A paralegal trial notebook is prepared. A paralegal trial notebook is a mini-notebook containing a copy of the witness statements, a copy of the witness list, and a copy of the exhibit list with any and all direct and cross examinations that have been prepared and completed. This notebook will also contain the telephone numbers for all witnesses expected to be called during trial.
- 7) Prepare a "first-aid kit" to include a stapler and staple remover, tape, Post-It Notes and flags (various colors), pens (various colors), highlighters, pencils, paper clips, scissors, pointer/laser light, blank file folders, cell phone, if allowed by the court – (Remember to keep the phone turned off in the courtroom) and legal books.

On the first morning of trial, the paralegal helps transport files to the courtroom. Once at the courtroom, the paralegal sets up the attorney's table by placing appropriate files in accessible locations. The paralegal must be aware at all times of the impression being given to the jury panel and eventual jury. Being aware of facial expressions will help a paralegal control displaying emotions during trial. How the trial team sits, interacts and acts toward the client makes an impact on each individual juror. A paralegal should always be cognizant of the image being portrayed to the jury.

During voir dire, the paralegal observes and make notes and then helps the attorney with jury selection. The paralegal keeps notes during opening arguments, pulls files for witnesses expected to testify during this trial session and pulls exhibits that may be admitted during these witnesses' testimonies. During breaks the paralegal checks the halls to make sure witnesses that will be called are present. If they are not, the paralegal must contact them.

After the first day of trial is complete, the paralegal meets with the attorney, and possibly the client, to discuss the day's progress. There also needs to be a discus-

sion about things needed for the next day. The paralegal may be asked to call any witnesses that are needed for the following day. The paralegal should type up notes or print up notes taken during trial that day. If the attorney needs any documents prepared for the next day or for during trial, the paralegal will need to do that work also. The paralegal may be asked to do research. Basically, just because the court has adjourned it does not mean that the paralegal is done for the day.

Each day of trial proceeds this way until trial is complete. Prior to the day on which closing arguments will be presented, the final and complete notes from the trial are provided to the attorney. Sometimes specific highlights of what the evidence has shown are prepared by the paralegal for the attorney to use in closing. Sometimes these highlights tie to the theme or strategies in the case. The paralegal's notes taken during opening argument will also remind the attorney of what was stated in opening so that those statements can be tied to the closing.

During closing arguments the paralegal

may take notes concerning the reactions of jurors to statements made during closing arguments. The case then goes to the jury. While the jury is out, the paralegal begins to reorganize the file. It is important to put the file back in the same position it was in when it was originally taken to trial. The file cannot be archived or torn apart until it is clear no appeal will be taken and judgment is final.

When the jury returns, the paralegal is often sent in to poll the jury. Sometimes the attorney also questions the jury on their reactions to certain evidence, to the attorney's appearance or performance. Information gathered from the jury can be extremely beneficial to both the attorney and the paralegal. Jurors are often more than willing to critique your performance and comment on their perceptions of your conduct, presentation and efficiency during trial. Also, by comments from the jurors a paralegal can learn better ways to present evidence or how to act during trial.

It is clear that the role of the paralegal at trial can be extremely invaluable. Each

paralegal/attorney team will develop its own approach to trial. The jury can be effected, negatively or positively, by the way in which an attorney and paralegal work together during a trial. A lot of decisions made by juries are based on their perceptions, of the paralegal, the attorney, the evidence, the client and/or the type of case they are hearing. The paralegal's main duty during trial is to assist the attorney in efficiently presenting the case.

*Lisa Sprinkle is a free-lance paralegal in El Paso, Texas. She has served on the Paralegal Division Board of Directors as Director of District 16, Parliamentarian, member of the Long Range Planning Task Force, and Division President 1999-2000. Lisa has achieved the Certified Paralegal and Certified Paralegal Litigation Specialist recognitions from the National Association of Legal Assistants. Lisa was certified by the Texas Board of Legal Specialization in the area of paralegal - civil trial law in 1994. Lisa was a co-author of the Paralegal Ethics Handbook published by West in 2007.*

## Going Green with E-filing

By Tammy Carter, General Manager, and Dr. Carole Pettijohn, CaseFileXpress, LP

**W**ith all of the talk about "green business", it was inevitable that law offices would get caught up in the move toward more environmentally friendly practices. Law offices are massive consumers of paper and related printing/copying supplies. In a study done by GreenOrder, it was estimated that the average attorney is responsible for the use of 800 sheets of paper each workday per year (nearly all 100% virgin pulp) and that the average law firm consumed about a ton of paper per attorney for its copying need (Makower, 2007). It has been estimated that a half ton of paper from pro-

duction to recycling, results in the generation of about 9 tons of carbon dioxide (CO<sub>2</sub>)—equivalent greenhouse gas emissions. (Disposal in a landfill results in an additional two more tons of such emissions per year.) The American Bar Association (ABA) instituted the Climate Challenge to increase awareness of the impact that the massive amounts of paper has on the environment. This has resulted in various suggestions for reducing the carbon footprint left by the legal profession. Most of the suggestions though are still based on the assumption that documents need to be printed and distributed in hard copy but one of the top ways the ABA suggests

that you can go green is to "cut out the paper" (ABA, 2008). E-filing technologies enable law offices to reduce the amount of paper that needs to be printed, copied, and distributed which in turns saves trees (and a provides a significant saving in their office supply budget improving their bottom line).

E-filing technologies have come of age. By the end of 2007, 26 states had adopted rules allowing for e-filing and all federal courts are expected to offer e-filing (Matthais, 2008). The State of Texas, through TexasOnline, has been a leader in expansion of the use of e-filing. The benefits of e-filing have been touted as the use of e-filing has gained acceptance. Among the benefits most often mentioned are convenience, timeliness, accessibility, flexibility/accuracy, security, and cost effectiveness.

### Convenience

With e-filing you can e-file from any location as long as you have Internet



access and documents to be filed. You will receive immediate online and email confirmation that your documents were filed successfully. The days of fighting traffic, finding parking, going through metal detectors, standing in long lines, rushing to file during business hours, and paying parking or speeding tickets are gone. Additionally, if you live any distance from the courthouse, you can complete your filing and have it filed within minutes of completion, saving the time (and gas) needed to file your documents.

#### **Timeliness**

Timing is everything and with e-filing, the courthouse doesn't need to be open to file your documents on time. No longer are you confined to filing during the regular business hours of the court. In the past

attorneys living some distance from the court had to complete the brief hours, even days ahead to either drive or mail a hard copy in order to meet the filing deadline. With e-filing, the brief can be filed with an acknowledgement from the court within minutes of completion 24 hours a day. This saves staff time, courier fees and gasoline.

#### **Accessibility**

E-filing has also opened up an array of accessibility options. Courts have started to provide access to electronic documents through the web. Additionally, e-filing allows attorneys representing various parties to have immediate access to documents via public access or e-service options instead of having to wait days to receive briefs in the mail. When attorneys elect to send and receive filed copies by e-service, substantial paper savings can be realized. Think about the last case where you had five or more opposing counsel. How much paper did you use to fax or certify mail your motion to opposing counsel? And how much easier it would be to view the service documents online and email to your litigation team instead of making copies for everyone?

#### **Flexibility and accuracy**

With a web-based e-filing system, no special software is needed. E-filers prepare their documents as they would to file in

Not only is the filing immediate, but the 'green' savings with the e-filing far surpass the costs associated with traditional filings. In the past, if a deadline is involved, one had to either send the document via a local courier, Federal Express, or Lone Star service. Service upon opposing counsel had to be made via the same methods, via facsimile, or via certified mail—again along with the various associated costs. In addition, if, instead, the document is mailed to the court, one must provide return postage for the court's use in returning a file-marked copy. Finally, the cost of paper, ink for the printer, and wear and tear on the copy machine should also be considered. Alternatively, if one utilizes electronic filing and serving services, there are very minimal fees for filing and serving the document—and both are done with just a few clicks of your mouse. As more and more courts (district, county, small claims, and probate) come online in Texas, the ease with which our firms can service our clients through the entire state becomes invaluable.



TABLE 1

Statement	Average Score
I receive my file stamped copy quicker	4.3
The time and date stamp is immediate	4.1
Keeping up with my case load is easier	3.9
Tracking status of cases is easier	4.1
Reduces stress	4.1
E-filing has helped to reduce paper storage.	3.7
E-filing has reduced the amount of discovery copying. (e-filing has reduced the need for printing and copying – I now email the file stamped to clients and co-counsel)	3.8
The security within E-filing prevents unauthorized filings.	4.0
Travel cost and time has been reduced with e-filing (automobile costs, travel time, courier fees have been reduced with e-filing).	4.1
E-filing saves time we used to spend filing and locating files (Now it's all in one place on my computer)	3.8

person. All standard document types and formats are accepted by the e-filing system which converts the documents into standard PDF files which cannot be modified but are searchable. Court fees are calculated accurately by the system eliminating the guessing or court clerk interaction needed to determine fees. And if you happen to make a mistake, the clerk can fix it online. You can request jury demands, citations and process service when e-filing.

### Security

With respect to the security of the e-filing documents, state, national and industry standards guarantee filing security. The records cannot be altered and are filed just as presented. Additionally, in light of the recent disruption in service in south Texas due to Hurricane Ike, e-filers were back in business the Monday following the storm since filings are kept on remote e-filing servers and the clerk's office can electronically view and process e-filings from anywhere through a secure web portal. Firms and courts that did not participate in e-filing and were in the evacuation zones, had to deal with equipment loss and the loss of paper records. In fact, in the aftermath of Hurricane Ike, the *only* way to file into Harris and Brazoria Counties was through e-filing. Certainly e-filing is one strategy that should be included in any disaster recovery or business continuity plan for courts.

### Cost-effectiveness

While users of e-filing recognize the value,

non-users still spend time paper filing and wonder if e-filing is cost-effective. During economic hard times, we need to look at cost effective alternatives. Think about these questions and see if you can reduce your firm's carbon footprint while saving expenses. How valuable is your time? Does your firm bill clients for your time? How much paper does your office use? How much does the firm pay for gas, parking, toner, fax, FedEx, postage, certified mail, and courier expenses? Once the savings are considered, e-filing is very cost effective and as the number of e-filing transactions increase, we can expect e-filing fees to decline. By maintaining and filing records online, the cost of paper storage is dramatically reduced. Courier fees are reduced or eliminated. Organizations that have taken advantage of the e-discovery and e-service options have significantly reduced copying and costs associated with distribution. Staff time spent in line at the court filing, tracking status and finding documents is reduced.

### Survey

In order to evaluate the anecdotal evidence of the benefits of e-filing, an informal survey was conducted during August and September 2008. The survey asked current e-filing customers to rate e-filing services in light of the above benefits. The respondents were asked to rate various questions about their experience with e-filing based on a 5 point scale, 5 equating to "strongly agree" and 1 equating to "strongly dis-

agree". Some of the questions and their responses are as follows: When asked "I use e-filing because it's convenient", the average of all responses was 3.75 suggesting that a majority were in strong agreement with the statement. "I use e-filing because it's cost effective" was given an average rating of 3.89 suggesting that a majority were in agreement with the statement. Another set of questions focused on whether e-filing has made their job easier by specifically targeting several presumed benefits. When asked to rate the following job attributes the scores were as indicated in Table 1.

When asked a series of questions about E-service, the results were as follows:

My time	3.9
Paper usage	4.1
mail / courier costs	3.8

Again, based on these results, respondents were in agreement that when used, e-service has saved time and money. Many of the respondent's free form comments had to do with the fact that not all jurisdictions were signed up for e-filing and not all attorneys had signed up to receive service electronically.

While this survey was limited in scope, it is an indication that e-filing is rapidly becoming one way for law offices to go green and provide cost savings when the total costs for filing and maintaining paper documents is considered. Over the next few years we should see an increase in firms interested in reducing their carbon footprint and providing effective business continuity procedures turn to e-filing as an effective strategy.

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# Paralegal Regulation in Florida

by Jodye Kasher

## Background:

In 2005, bills were introduced in the legislature proposing a regulatory scheme for paralegals in Florida, which specified that paralegal fees could only be awarded when performed by state-licensed paralegals. The bills were pushed largely by paralegal organizations, and the Florida Bar opposed the proposed legislation, partly because it believed any regulation should be not be in the legislative branch, but rather in the judicial branch.

After the introduction of those bills, the President of the Florida Bar appointed a Special Committee to Study Paralegal Regulation, which consisted of 24 members, including 3 paralegal educators, and 4 paralegals, as well as members of the Bar.

After a public hearing in October, 2005, and much study and debate, The Florida Bar filed its Petition to Amend the Rules Regulating the Florida Bar to Add *Chapter 20 – Florida Registered Paralegal Program* on August 15, 2006. The filing of the petition and petition's proposed amendments and actions were approved by the Florida Bar's Board of Governors. The Florida Bar then published the proposals in *The Florida Bar News* and posted the proposals on its website. The website directed readers wishing to comment to file those comments with the Court. Of the 103 comments received by the Court, 2 were from paralegal organizations supporting the proposed comments, and 2 were paralegal organizations opposing the adoptions of the proposed rules. The supporting organizations providing comments were the Paralegal Association of Florida and the American Alliance of Paralegals, Inc. The Court noted, however, that "One individual later withdrew her comment in support of the proposed rules." The 2 paralegal organizations opposing the adoption of the rules were

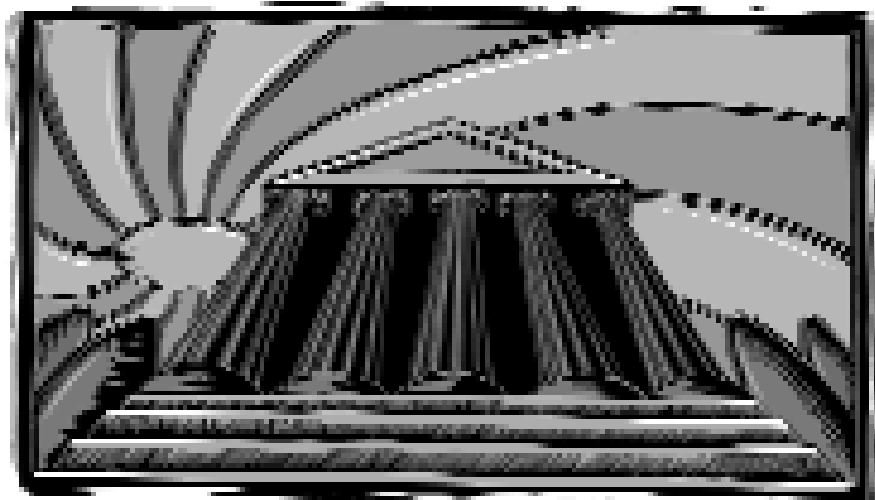
American Institute for Paralegal Studies, Inc. and the South Florida Paralegal Association (SEPA). The opposition filed by South Florida Paralegal Association (SEPA), can be found at the following website: <http://www.floridaregisteredparalegal.com/newsarticlesweblinks.html>. Many of the oppositions provided to the Court were due to the belief that the program should be overseen by the Court, rather than the Florida Bar, and/or the rules presented a conflict of interest. SEPA's opposition was due to a number of reasons, including but not limited to, further clarification of some of the items in the rules, and wanting a more mandatory (rather than voluntary) certification program with minimum standards of education and experience.

## Florida Registered Paralegal Program is Established:

The Florida Supreme Court recognized that the program, at least currently, would not be mandatory at least until such time as it had been in place long enough so they could determine the success and/or impact of the program, as the Court stat-

ed: "It behooves us to tread with caution in implementing a registration program for professionals who have hitherto been largely self-regulated, so that the efficacy of the program being adopted and its impact on both the legal and paralegal professions can be assessed before any mandatory plan is instituted." In their decision of November 15, 2007, in SC05-998, the Court did amend the Rules Regulating the Florida Bar adopting chapter 20 establishing the Florida Registered Paralegal Program, as proposed by the Bar, with only minor stylistic changes. The rules became effective on March 1, 2008.

Currently a voluntary program, the Florida Registered Paralegal Program consists of two tiers. Tier one consists of paralegals, as defined by the Texas Bar Rule 10-21.1, currently continuing to work as paralegals (not Registered Paralegals), under the following definition: "A paralegal is someone qualified by education, training, or work experience who, under the supervision of a lawyer, performs delegated, substantive work for which the lawyer is responsible." Tier two consists of paralegals who meet the definition of a paralegal, and additionally the requirements for registration, who would then be "Florida Registered Paralegals." There is a grandfathering period of only three (3) years (application must be made prior to March 1, 2011), as set out below, for paralegals who show substantial experience, but who do not meet the education or certification requirements to become registered paralegals. The require-



ments for Registration consist of meeting one (1) of the following:

Educational and work experience requirements:

- Bachelor's degree in paralegal studies from an approved paralegal program, plus one year of paralegal work experience;
- Bachelor's degree from an institution accredited by a nationally recognized accrediting agency approved by the U. S. Dept. of Education or the Florida Dept. of Education, plus a minimum of 3 years of paralegal work experience;
- Associate's degree in paralegal studies from an approved paralegal program, plus a minimum of 2 years of paralegal work experience;
- Associates degree from an institution accredited by a nationally recognized accrediting agency approved by the U. S. Dept. of Education or the Florida Dept. of Education, plus a minimum of 4 years of paralegal work experience; or
- Juris doctorate degree from an American Bar Association accredited institution, plus a minimum of 1 year of paralegal work experience.

Certification requirements:

- Successful completion of PACE exam and good standing with NFPA; or
- Successful completion of CLA/CP exam and good standing with NALA

Grandfathering until March 1, 2011:

- Providing attestation from an employing or supervising attorney(s) that the person has paralegal work experience as defined elsewhere in the rules for 5 of the 8 years immediately preceding the date of such attestation. (Time spent performing clerical work is specifically excluded).

Work experience in this program only includes work experience under the supervision of an employer belonging to the Florida Bar. Work experience obtained in other states would not apply to the work experience criteria, unless it was under the supervision of someone belonging to the Florida Bar Association.

There are also provisions in the program setting out those who are ineligible for registration, including, but not limited to, persons who have been convicted of a felony, and persons disbarred, or suspended from the practice of law in any state. Interestingly, although those persons previously mentioned cannot apply for Registered Paralegal status, it does not appear that they are entirely excluded from still calling themselves paralegals under Tier One. The Court also noted that the voluntary registration program does not relieve attorneys of their duty to monitor the activities and conduct of paralegals working under their direction.

The registration fee for the Registered Paralegal program is paid annually to the

Florida Bar, and set by the Florida Bar at an amount which is not to exceed the amount of the annual fees paid by inactive members of the Florida Bar. The fee at the time of the preparation of this article is \$150.00 to file the application. There are also CLE requirements that must be met of thirty (30) hours every three (3) years, five (5) of which are required to be in legal ethics or professionalism. The program accepts courses approved for credit by the Florida Bar, NALA, or NFPA.

It is still too early to determine the impact of the Registration Program as to paralegal hiring practices in the future. However, the number of FRPs seems to be increasing rapidly. As of October 6, 2008, there are 2,390 paralegals who have become Florida Registered Paralegals (FRPs).

*Jodye Kasher is a Certified Paralegal through NALA, and a Board Certified Paralegal through the Texas Board of Legal Specialization in Personal Injury Law. She has 20 years of experience as a litigation paralegal, and has worked in a variety of areas. Ms. Kasher has been a past paralegal seminar speaker for the Division, as well as the Institute of Paralegal Education. She currently works in the Litigation Department of the international firm of Fulbright & Jaworski L.L.P.'s San Antonio office. She is a member of AAPA, STOP, the Bexar County Women's Bar Association, and the Paralegal Division, currently serving as the Professional Development Chair for the Division.*

## Employee Privacy Rights and Identity Theft

**W**e live in a wonderful age in which information flows quickly and abundantly, giving savvy businesses a better chance to stay on top of things, effectively manage change, and anticipate

future trends. Much of the improvement in the speed and availability of information is due to advances in computers and to the growth of the Internet. However, our information and technology resources have a dark side that many do not yet real-

ize is there, an aspect that some are all too willing and able to exploit. That aspect is invasion of privacy, the potential for which has never been greater than now and can only grow in the future.

There are several areas of concern, some of which have to do with privacy issues in the workplace, some with privacy in our personal lives, and some with both our work and private lives. This article is meant to introduce you to some of the privacy issues that will be of increasing importance to employers and employees.

First, we make a few assumptions that we think are widely acknowledged. Employers are custodians of a great amount of personal and private informa-

tion relating to their employees. A related fact is that like it or not, employees depend upon their employers to do the right thing with that information. Finally, there are many reasons why third parties want to get at that information, some bureaucratic, some financial, some nosy, and some even downright dangerous.

In dealing with these realities, employers should try their best to keep some important basic principles in mind:

- Good starting point: all information relating to an employee's personal characteristics or family matters is private and confidential.
- Information relating to an employee should be released only on a need-to-know basis, or if a law or court requires the release of the information.
- All information requests concerning employees should go through a central information release office within your organization.

#### Common Misconceptions

Many employers and employees share common misconceptions about privacy in the workplace. One widely heard misconception is that either the "Freedom of Information Act" or the "Privacy Act" forbids a company from releasing an employee's personal information, including a Social Security number (SSN). In actuality, those federal laws generally do not apply to a private employer's actions. They either obligate federal government agencies to release, or forbid them from releasing, certain private information about citizens to outside parties. Without significant exception, employee information furnished by employers to federal agencies, such as with payroll information to the IRS, is exempt from public disclosure.

What about Texas state law? The Texas equivalent to the Freedom of Information Act is the Public Information Act (PIA - formerly known as the Open Records Act). It, like the FOIA, applies only to government agencies. Private employers are not covered. Now, it is well known that employers must furnish payroll information to the TWC in the form of wage reports. The private information, i.e., information tied to specific employees, is

exempt from disclosure under the PIA.

That means, among other things, that TWC is not permitted to release sensitive employee (or company) information to the public.

Can private companies be forced to reveal private information concerning employees? Generally not, although under certain circumstances, a company could be ordered by a court to turn over certain employee information to either the court or to the other side in a lawsuit. Even with that, your attorney would still be able to argue for limitations on the release or use of such information.

#### Where's the Danger?

Most risk associated with invasion of privacy stems from loose, ill-advised practices on the part of an employer. Employers sometimes pay much more attention to protecting business secrets than they do to protecting their employees' privacy. In reality, employees are among the greatest assets of any company, and an employer should put as much care into protecting their privacy as it does into protecting its trade secrets from disclosure.

The worst type of invasion of privacy is probably "identity theft", in which someone else using a victim's personal information incurs obligations in the victim's name, leaving that person with a tangle of financial problems to sort out. In a recent incident, a dishonest former employee found a box full of employee personnel information lying completely open and unattended in an ordinary company warehouse. She took the information, mainly name, address, birth date, next-of-kin, and SSN records, and used it to apply for fake credit cards and other credit applications for herself and some like-minded cronies. The company's employees starting getting collection calls from various credit bureaus and stores, wanting to know why bills they had never heard of had not been paid. It took quite some time before the affected employees even realized they were all more or less in the same boat. After much investigation, time, and trouble, most of the credit problems were sorted out, and the former employee was arrested. However, many of the employees are still having to explain the situation to

credit companies and banks.

A similar thing happened in the case of an employee whose personal information was given out over the phone to a caller who claimed to be checking on a credit report. That person sold the information to a network of fraudulent operators, and multiple bogus credit cards were issued in the employee's name to several different people. The resulting credit card bill avalanche is still being sorted out by civil and criminal investigators in two states.

Much worse was the case of a person who lost his driver's license, reported in the February 2000 issue of "HR News", the journal of the Society for Human Resource Management. Apparently, a thief picked the license up and used it to establish a new identity. Somehow, it got associated with the victim's SSN, and after the thief racked up some other criminal acts, the victim's identity was thoroughly tainted. He first noticed problems when applying for another job - an employer that seemed very interested suddenly refused to return his calls. Persisting, he was finally told to never contact the company again, since he was an "unsavory character". Even after years of trying to set things straight, even with a letter from the police stating that he had committed no crime, he still could not get a job.

Texas employers need to be aware of a new statutory provision that became law in 2003 and took full effect on January 1, 2006, having to do with use of social security numbers as employee identifiers. Texas Business & Commerce Code 6 35.58(a, b) are the most relevant provisions, generally prohibiting an employer from printing employee SSNs on any materials sent by mail, which of course includes paychecks sent by mail. There is a "safe harbor" for printing the SSN on paychecks if 1) that was the practice prior to January 1, 2005, and 2) the employer makes an annual disclosure to the employee that upon the employee's written request, the SSN will no longer be included on the paychecks. An exception also exists for the mailing of IRS- and TWC-related forms, such as W-2s and quarterly wage reports, and any other official government forms that require the employer to include SSNs.

Identity theft is a federal crime, regarded as a felony offense and punishable by a fine, time in prison, and/or restitution to the victim. Any suspected misuse of personal data should be reported to the Federal Trade Commission (FTC) at 1-877-438-4338 (toll-free call) for assistance.

Among the best ways to avoid such problems are the following:

- Using up-to-date digital and/or hardware-based methods, thoroughly wipe all data from the hard drive and removable magnetic media of any obsolete computers discarded or sold by the company, and physically destroy any data CDs or DVDs containing company and employee information. If necessary, hire an outside data security company to ensure that this gets done.
- Shred and securely dispose of any paper records containing sensitive company and employee information.
- Do not use social security numbers as employee identifiers. Rather, use random identifiers and keep the SSNs as narrowly distributed as possible.

#### Job Reference and Employment Verification Calls

In general, it is not recommended that employers give out any information about current or former employees to callers seeking information about specific individuals, such as full name, date of birth, SSN, address, pay level, or work schedule, since there is no way for a business to know who the caller really is. The caller could be a prospective new employer genuinely seeking job reference information,

or a bank seeking to verify employment for your employee's loan application, but could just as easily be a private investigator or a debt collector attempting to harness the business into making their own job easier, or else someone with ill intentions, such as a disgruntled neighbor or relative, or, even worse, a stalker or identity thief. For that reason, it is advisable to adopt as a general practice a three-pronged procedure:

- Have the person who receives the call route the call to a designated company official, such as the owner, a specific manager, or the HR department, i.e., someone who is presumably aware of the importance of safeguarding information about employees;
- Document the call as to time, date, identity of the caller, and purpose of the call; and
- In the event that the person handling the matter does not know with certainty who is calling and why, give the caller a standard response such as "I'm sorry - we don't give out information about our current or former employees over the phone, but if you forward to us a written authorization signed by your applicant that allows us to do so, we'll give you any information that the form authorizes us to release."

It goes without saying that the individual employees should be trained not to casually give out such information, as employees often do over the phone or in person (and as is well-known among identity thieves, private investigators, and debt collectors,

among others). Rather, the company should stress point 1 listed above regarding proper routing of such calls or in-person inquiries.

#### Other Forms of Privacy Invasion

Employers must also be concerned with newer technology such as camera phones (also known as cell phone cameras), digital cameras, and digital movie recorders. In just a few seconds, offensive pictures of coworkers in private, embarrassing, or intimate situations can be taken and sent via e-mail or the World Wide Web to other people and locations. Similarly, such technology can be used to quickly and efficiently conduct industrial espionage. Many employers are now banning the use of such devices in the workplace unless the employee has been given express permission by the Company to use them. Prohibiting such devices and their use can be one tool in preventing harassment claims from employees who feel their privacy has been invaded. Employees should also be warned that they may face both civil and criminal liability for misuse of imaging devices against coworkers and the Company. For an example of how such a policy might be worded, see the sample policy titled "Internet, E-Mail, and Computer Usage Policy" in the companion book "The A-Z of Personnel Policies."

*Reprinted with permission from the book Especially for Texas Employers, a free publication (<http://www.twc.state.tx.us/news/efte/tocmain.html>) of the Texas Workforce Commission.*

## Discovering the Inaccessible

By Julie Wade

What exactly are inaccessible sources and when should production from such sources be permitted?

Back-up tapes are the first source that comes to mind. These are considered inaccessible because they

often have no organizational structure, are not indexed in any way, and are difficult to search.... Functionally speaking, then, an inaccessible source is one where a party would have to acquire or create software to retrieve potentially respon-

sive information or would otherwise be required to render inaccessible information accessible (e.g. restore/translate), which is always an expensive proposition....

*FAQ's of E-Discovery  
by Judge Shira A. Scheindlin, S.D.  
N.Y.*

**M**ore and more, we are starting to see document requests in Texas state court litigations calling for the production

of electronically stored information, or "ESI" for short.

Rule 196.4 of the Texas Rules of Civil Procedure sets forth the procedures for a party to obtain discovery of data or information that exists in electronic or magnetic form. This rule states that the requesting party must (1) specifically request the production in electronic form, and (2) specify the form in which that party wants the ESI produced. Then, the responding party must produce ESI responsive to the request that is reasonably available to that party in the ordinary course of business. Should that responding party not produce any ESI data it deems relevant to the case, then that party must file an objection with the court setting forth the basis of its reasons for not complying with the court's rule. After consideration, the court may order the responding party to comply with the request. If it does, then the court must also order that the requesting party *pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information*. That can be expensive.

So, in a Texas state court litigation, your client is not obligated to produce ESI that is deemed to be reasonably inaccessible—at least initially. This includes deleted data, legacy data and data on backup storage tapes. Backup tapes are a cost effective storage solution and that is the reason they are widely used. But backup tapes are not designed to be a records management solution. They were designed to serve as a "backup" for your system for disaster purposes. Unlike computer files that can be searched individually, all the data on backup tapes are stored "sequentially," which means that you have to reload everything on a backup tape in order to be able to separate out the file or files you need to access. This further complicates and escalates the costs when retrieving backup tapes to search for files for discovery purposes. The best storage method is archiving as much as possible which allows you to maintain your search capabilities of the archived media without having to restore an entire tape.

Archiving systems are designed for long term document retention and for the retrieval of records. Technological advances with indexing protocols help

**But we are in Texas, and if your attorney really wants Exxon's backup tapes, your client may have to pony up, at least according to the state court rule.**

facilitate retrievals based on standardized criteria, and new archiving applications are incorporating more sophisticated search capabilities across an archived system.

If an opposing party responds with inaccessibility objections to your discovery request for ESI, they must set forth the reasons their client is unable to produce the requested material. Then you can decide whether to set a hearing on their objections or walk away because of the costs involved. If the court rules that the electronic discovery is necessary to the litigation and orders it to be produced, the court will also order that the requesting party pays for the reasonable costs of any "extraordinary steps" taken to produce the inaccessible data.

There are very legitimate reasons that ESI may be too burdensome or costly to access or produce. Multi-national corporations, such as Exxon, have huge volumes of ESI and are able to easily demonstrate that their email volume is equally gigantic. Charles Beach of Exxon told the Advisory Committee contemplating the rules amendments that at the end of 2006, Exxon used 800 terabytes of total storage and 121,000 backup tapes per month. If they were to stop recycling their backup tapes for a litigation hold, it would cost Exxon almost \$2 million per month. So, the inaccessibility rules are important and are in place for a good reason.

Under the Texas rules, a party seeking to access any of the information stored on Exxon's backup tape rotations would be in

for a rude shock when the court granted its request, but turned right around and ordered that they also pay for costs associated with accessing the data.

Rule 26(b)(2)(B), however, the companion rule addressing inaccessibility issues for federal court litigations, is more balanced in weighing the obligations of the parties as to their ability to pay for and produce ESI that is deemed inaccessible. This rule states that a party is not obligated to produce ESI from sources it identifies as not reasonably accessible because of undue burden or cost. A requesting party could then file a motion to compel or for a protective order. The responding party would need to show the court at that point why the ESI is inaccessible because of the undue burden or cost. And the court could then rule that the ESI should be produced, considering the limits of Rule 26(b)(2)(C) (discovery cannot be compelled if it is unreasonably cumulative or duplicative, or if it is obtainable from some other source that is more convenient, less burdensome, or less expensive, or if the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues). But at the end of the day, federal judges or magistrates can act on their own initiatives and do something entirely different.

The seminal case on point in Texas concerning whether backup tapes should be produced in response to a discovery request is found in *In re C.I. Host*, 92 S.W.3d 514, 516-17 (Tex. 2002) (approving order requiring production of computer backup tapes). This case is deceptive however, because the objection to the discovery related to privacy issues under the Stored Communications Act (18 U.S.C. 6 2701, et. seq.) and not the inaccessibility argument that is usually at the center of discovery disputes involving backup tapes. So although the court allowed the backup tapes to be produced, other courts have found that the cost and burden of producing such tapes outweighs their likely benefit taking into consideration: the needs of



the case, the amount of controversy, the resources of the parties, the importance of the issues at stake in the litigation and of the discovery sought to the resolution of the issues. *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 98 (D. Md. 2003).

But we are in Texas, and if your attorney really wants Exxon's backup tapes, your client may have to pony up, at least according to the state court rule. If your lawsuit was in federal court, Exxon would probably be ordered to pay for the restoration costs because the reasonableness standard would be weighed against the parties' resources. Considering Exxon's financial resources, you could fill in the blank on that.

The federal rule also reaches further than the Texas rule on the inaccessibility issue because the federal rule requires that a responding party identify the sources of potentially responsive ESI that it has not searched or produced because of the costs and burdens of accessing this information. At this point, a requesting party can move for an order compelling the production notwithstanding the inaccessibility arguments, and the responding party would then have the burden to show how the ESI is not reasonably accessible. Once again, if a responding party makes this showing, a court could nevertheless order the discovery when good cause is shown. And, in federal court, a judge or magistrate can impose any appropriate terms and conditions it wants to for the production.

I spoke with Jeff Friedman, a Senior Product Manager with Anacomp's CaseLogistix, on his thoughts on archiving, backup tapes, inaccessible data and the corporate responsibility to apply preservation holds against storage media. Jeff has 15 years of eDiscovery experience as an attorney, consultant, and product manager and has worked on some of the most complex electronic discovery matters that have arisen across the world during that time. Jeff agreed that "companies are going to more comprehensive systems in dealing with document management and life cycle management—and are thinking about these concepts a lot more holistically."

It is interesting to me that the adopters of the amendments to the 2006 federal

rules provided us with their initial thoughts behind including ESI into the new discovery rule amendments, and that was the cost effectiveness of producing ESI. Reading from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States dated September 2005, the Committee states:

"The present electronic discovery proposals grew out of the advisory committee's work on the 2000 amendments, which focused on the "architecture of discovery rules" to **determine whether changes could be effected to reduce the costs of discovery....**"

So, the initial intent behind requiring ESI to be preserved and produced in civil court litigations was to *lower the costs* of the discovery process. This certainly has not proved to be the case as you find your clients struggling to manage the massive amounts of data being created by their workforces.

Friedman also points out that there is a new degree of responsibility for the business owner today that some of these organizations aren't yet used to. "They need to consider, what is my document management policy? What is my backup strategy? What is my recovery strategy? These are things that previously they didn't have to think about because either it was just physically impossible or it was unnecessary. Now it is both possible and necessary."

Businesses must have a plan to manage their electronic records. That is because they have a duty to preserve ESI that can be used as evidence in the event of litigation or a threatened litigation. This culminates in real time cost repercussions to your clients who cope to comply with their records management obligations and in managing their IT systems.

"Because what was a small litigation for smaller companies in terms of documentation is now exploding, and now discovery costs are going up as well across the board," Friedman said.

You cannot repeat enough that correct procedures and protocol need to be implemented in connection with the management of electronic data. Too many times parties are disadvantaged during the course of a litigation because the attorneys and business executives managing the litigation did not communicate sufficiently with the IT staff. For instance, the difference between backup tapes and archives is unknown; the failure to halt the routine overwriting of backup tapes is not attended to can make a huge difference and lead spoliation sanctions in the case. It is simply not good enough any more for your client to establish a proper retention policy if you do not actually reach the persons doing the actual records management of relevant ESI.

A tech-savvy paralegal and a good knowledge expert, such as Jeff Friedman, can reach out to both attorneys and the client's IT staff in situations where help is needed and they are able to "speak the language" to both groups. Developing a combination of these skills can really help facilitate the obvious problems between legal and IT: legal is driven by instant gratification, instant goal accomplishment—whereas IT is budget and project focused and for keeping things moving along in those lines. Conflicts will always exist when legal "wants it now," and IT always "wants it later." That tension exists, so it is very important to have someone with IT knowledge and legal experience to work as a buffer in accomplishing the tasks associated with electronic discovery.

"What we are finding is that much larger cases in terms of electronic discovery are going to much smaller firms, and they need best practices as well as the methodology in place to handle it." Friedman said.

Litigation Paralegals should surf the web for "electronic discovery" + webinar, and get up to speed on these imperative issues facing our work practices today and in the future.

*Julie Wade is a Paralegal for the law firm of Harrison, Bettis, Staff, McFarland & Weems, LLP and is a Certified Electronic Discovery Specialist.*

# PARALEGAL DIVISION

## STATE BAR OF TEXAS

### EXCEPTIONAL PRO BONO SERVICE AWARD

The Paralegal Division of the State Bar of Texas is proud to sponsor an Exceptional Pro Bono Service Award. Its purpose is to promote the awareness of pro bono activities and to encourage Division members to volunteer their time and specialty skills to pro bono projects within their community by recognizing a PD member who demonstrates exceptional dedication to pro bono service. Paralegals are invited to foster the development of pro bono projects and to provide assistance to established pro bono programs, work closely with attorneys to provide unmet legal services to poor persons. This award will go to a Division member who has volunteered his or her time and special skills in providing uncompensated services in pro bono assistance to their community. The winner of the award will be announced at the Annual meeting, his/her expenses to attend the Annual Meeting will

be incurred by the Division, and a profile of the individual will be published in the *Texas Paralegal Journal*.

Please complete the following nomination form, and return it **NO LATER THAN MARCH 31, 2009** to the following:

Jodye L. Kasher, CP  
*Board Certified Paralegal - Personal Injury Trial Law*  
*Texas Board of Legal Specialization*  
Fulbright & Jaworski L.L.P.  
300 Convent St., Ste. 2200  
San Antonio, TX 78205  
210-270-9373 (d)  
210-270-7205 (fax)  
**PDC@txpd.org**

Individual's Name: \_\_\_\_\_

Firm: \_\_\_\_\_ Job Title: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ Yrs. in Practice: \_\_\_\_\_

Work Experience: \_\_\_\_\_

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

1. Renders service without expectation of compensation.
2. Renders service that simplifies the legal process for (or increases the availability) and quality of, legal services to those in need of such services but who are without the means to afford such service.
3. Renders to charitable or public interest organizations with respect to matters or projects designed predominantly to address the needs of poor or elderly person(s).
4. Renders legislative, administrative, political or systems advocacy services on behalf of those in need of such services but who do not have the means to afford such service.
5. Assist an attorney in his/her representation of indigents in criminal and civil matters.

# NOTICE OF DIRECTOR ELECTION

Melanie Langford, ACP, Elections Committee Chair, 210.281.7063 mlangford@akingump.com

The election of directors to the Board of Directors of the Paralegal Division of the State Bar of Texas from District 1, District 3, District 5, District 7, District 11, District 13, and District 15 will be held April 3, 2009, through April 18, 2009. All active members of the Paralegal Division of the State Bar of Texas in good standing and registered to vote as of January 26, 2009, will be eligible to vote online at the Paralegal Division's website (in the Members-Only section). All voting must be completed on or before 11:59 p.m., April 18, 2009.

Each potential candidate must satisfy the following requirements:

- Eligibility Requirements.** The candidate must satisfy the eligibility requirements of Article III, Section 3 and Article IX, Section 1 A and Section 4 of the Bylaws and Rule V B, Section 5c of the Standing Rules.
- Declaration of Intent.** The candidate must make a declaration of intent to run as a candidate for the office of director through an original nominating petition declaring such intent that is filed with the Elections Subcommittee Chair in the candidate's district pursuant to Rule V B, Section 5 of the Standing Rules.
- Nominating Petition.** The original nominating petition must be signed by and must be submitted to the Elections Subcommittee Chair in such district, on or before March 4, 2009. The number of signatures required on the original nominating petition shall be as follows:

Number of Registered Voters Within District Required	Number of Signatures
0 — 50	5 signatures
51 — 100	8 signatures
101 — 150	10 signatures
151 — 200	12 signatures
201 — 250	5 signatures
251 — 300	18 signatures
301 +	20 signatures

Beginning on February 1, 2009 each Elections Subcommittee Chair shall prepare and forward, upon request, the following materials to potential candidates for director in their respective district at any time during the nominating period:

- A copy of the List of Registered Voters for their district;
- A sample nominating petition; and
- A copy of Rule VI of the Standing Rules entitled "Guidelines for Campaigns for Candidates as Director." To request information from the Elections Subcommittee Chair for your district, please contact:

District 1: Sherry Contreras, CLA, 713/241.1028 (County of Harris) sherry.contreras@shell.com

District 3: Maranna Horn, 254/965.6141 (Counties of Callahan, Comanche, Eastland, Erath, Hood, Johnson, Jones, Palo Pinto, Parker, Shackelford, Somerville, Stephens, and Tarrant) maranna\_horn@yahoo.com

District 5: Melanie Langford, CLA, 210/224.2035 (Counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Wilson, and Zavala) mlangford@akingump.com

District 7: Kathy Rieken, 806/468.3355 (Counties of Armstrong, Briscoe, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall Roberts, Sherman, Swisher, and Wheeler) kathy.rieken@sprouselaw.com

District 11: Darla Fisher, 432/683.3351 (Andrews, Coke, Concho, Crane, Crockett, Ector, Glasscock, Howard, Iron, Loving, Martin, Midland, Mitchell, Nolan, Pecos, Reagan, Reeves, Runnels, Schleicher, Sterling, Sutton, Taylor, Terrell, Tom Green, Upton, Val Verde, Ward, and Winkler) dfisher@lcalawfirm.com

District 13: Judi Kleinschrodt, 409/849.5741 (Counties of Austin, Brazoria, Colorado, Fayette, Fort Bend, Galveston, Jackson, Lavaca, Matagor-

da, Waller, Washington, and Wharton) judik@jrgpc.com

District 15: Stephanie Hawkes, RP, CIPP, 214/596.5143 (Counties of Brooks, Cameron, Hidalgo, Jim Hogg, Kenedy, Starr, Webb, Willacy, and Zapata) stephanie.hawkes@nissan-usa.com

The following timetable is provided to guide you through the election process.

- February 1, 2009: In accordance with the Standing Rules V B, Section 5e, the voter registration deadline shall be February 1 of each year.
- February 1, 2009: Contact the Elections Subcommittee Chair for your district and request a nominating petition and, at your option, prepare a short resume to attach to such nominating petition.

**Brochure or Resume:** A brochure or resume pertaining to each candidate for director may be posted on the Paralegal Division's website (in the Members-Only section) and shall be prepared and furnished to the Elections Subcommittee Chair at each candidate's own expense. Such brochure or resume shall be received by the Elections Subcommittee Chair or the Paralegal Division Coordinator on or before March 25, 2009 (7 days prior to the posting of the ballots) to be included in the mailing of the ballots. Such brochure or resume shall not exceed two 8 1/2" x 11" pages or one 8 1/2" x 14" page.

**Campaigning:** After the signatures on the Nominating Petition have been verified (March 13, 2009), the nominee may begin actively campaigning. Solicitation by mail is proper, provided that any mailing is on personal stationery or employer letterhead (provided that the employer's permission has been obtained), or any mailing or communication by electronic mail is conducted by a member of the Paralegal Division. No mailing or communication can be conducted by any individual/entity not a member of the Paralegal Division. Candidates themselves, in addition to the above, may campaign by personal solicitation. The full expense of such mail solicitation shall not exceed the sum of \$500. However, to the fullest extent possible, all communications and solicitations, whether by letter or card or telephone, should concentrate on the candidate's merits and should avoid criticism of the other candidate or candidates. The excessive use of telephone solicitation by persons other than candidates through the use of WATS lines and similar organized solicitation is discouraged. Directors running for re-election cannot use Director communication as a form of campaigning. Any incumbent director must conduct his/her campaigning by personal, separate communication. Candidates shall avoid personal campaigning prior to 30 days before the date designated to mail or post ballots or the next following business day when the signatures on the nominating petitions for Director have been verified.

March 4, 2009: Return your Nominating Petition, properly completed, and at your option, with a resume or brochure (for posting to the Paralegal Division's website) to the District Subcommittee Chair. (Any petition received after March 4, 2009, will not be accepted. Faxed, Xeroxed, or telecopied nominating petitions cannot be accepted as proof of a candidate's eligibility for nomination.)

March 13, 2009: Elections Subcommittee Chair, after verifying signatures on the Nominating Petition, will forward a draft of the ballot to the Elections Chair.

March 25, 2009: Elections Committee Chair shall forward ballots to the Paralegal Division Coordinator for posting.

April 3, 2009: Postcards mailed for Director Election. Voting begins online.

April 18, 2009: Deadline for voting for Director Election. All voting must be completed on or before 11:59 p.m., April 18, 2009.

April 19, 2009: The Paralegal Division Coordinator with the Elections Subcommittee Chair for District 5 will cause such ballots to be tabulated and notify the active candidates of such election results.

If you do not have access to the Internet at home or the office, you can access the Paralegal Division website at your local library. If you have any questions, feel free to contact the Elections Subcommittee Chair for your district.

# Texas Advanced Paralegal Seminar 2008, San Antonio, TX

by Patti Giuliano and Susan Wilen, San Antonio

Another TAPS is in the books and was another resounding success. Of course, none of this could have happened without our very dedicated committee. A very special THANK YOU to Patti Giuliano (San Antonio), Chair; Rhonda Brashears (Amarillo) Board Advisor and Volunteer Coordinator; Gloria Porter (Lewisville) and Lynn Domangue (San Antonio) Marketing; Melanie Langford (San Antonio) Door Prizes; Cel Wiginton (Midland) On-Line CLE; Javan Johnson (Longview) and Kristy Ritchie (San Antonio) Socials; Jennifer Barnes (Houston) Registration; Ellen Lockwood and Jodye Kasher (both from San Antonio) Speakers; Debbie Oaks Guerra (Flower Mound) Vendors; Frank Hinnant (Innovative Legal Solutions, Houston) and Jim Hollerbach (Hollerbach & Associates, San Antonio), Special Advisors; and Norma Hackler (Austin) PD Coordinator and Meeting Planner.

## **Educational Presentations:**

Ellen Lockwood and Jodye Kasher did a fabulous job scheduling quality, thought-provoking speakers. Across the board we have received very favorable comments about our speakers, even from other speakers. Craig Ball and Todd Hedgepeth have already offered testimonials to be used in next year's marketing materials. Mr. Ball's review of our event reads "TAPS is TOPS...in breadth of coverage, practical relevance and, above all, educational value." Every hour is jam-packed with useful tips from thought leaders, helpful advice from peers and valuable takeaways. How do they deliver so much top-notch content and fun at such low cost? That pretty much sums up my feeling as well.

Patricia Stichler, an Estate Planning attorney from San Antonio, offered sage advice in her presentation "Acid Rock to Acid Reflux: How Boomers Pay for Disability." She gave a complete overview of



what disability and long term care options are available for retirees, discussed the differences between Medicare and Medicaid, and made recommendations for management of assets for individuals and families of those caring for impaired family members. This information was relevant for the paralegal in the workplace, and on a personal level for our own lives. Her presentation was both practical and enlightening.

Daniel R. Stern, a TBLS Board Certified Attorney in Labor and Employment Law from San Antonio, presented "Update: The New Amended Family and medical Leave Act-Now More Complicated Than Before," discussed the Family and Medical Leave Act being considered as part of the National Defense Authorization Act of 2008. He offered perspectives on the merits and the potential pitfalls of the proposed legislation, as well as practical recommendations for paralegals to consider in their work world.

Rudy Garza, a TBLS Certified Attorney in Civil Trial Law and Personal Injury Trial Law from San Antonio, discussed "Fiduciary Duty." He explained that attorneys and paralegals have fiduciary responsibilities to clients that are irrevocable as long as there is an attorney-client relationship. These responsibilities demand absolute loyalty to the client without any competing self interest. He also addressed other fiduciary responsibilities in the workplace including employers, banks, accountants, security brokers, insurance companies, and individuals who enter into contracts.

In our personal lives, fiduciary responsibilities may include Powers of Attorney, trustee and executor functions, and spousal relationships. He emphasized that fiduciary duties include transparency, namely that there is no competing interest, there is full disclosure, impartiality, prudent management of accounts, and a duty to enforce claims. Lastly, he discussed the ramifications for breach of fiduciary

trust and the possible penalties for such failure.

On Thursday morning, Attorney John Weber, a Products Liability attorney with Fulbright & Jaworski, LLP in San Antonio presented "Investigation and Discovery in the Development of a Product liability Case." He gave a thorough outline for paralegal involvement in case development and a practical understanding of the many ways paralegals can contribute to a successful outcome in a case, regardless of whether the paralegal is on the plaintiff or defense side.

Judge Pamela Mathy, a U.S. Magistrate Judge in San Antonio, gave "The History, Development and Current Uses of the magistrate System in Federal Court: How to Make Magistrate Court Work for You." She gave a useful history of how the Magistrate's Court evolved in the judicial system and how the Magistrate Court serves the legal process. She explained that "the judge's responsibility is to find the law and apply it correctly." She reinforced that time needs to be respected because speedy trials demand efficient use of time by all parties. She also emphasized the need for civility in the courtroom by all parties and the willingness of the court room deputy to provide assistance in procedural issues.

Robbie Greenblum, an attorney from San Antonio, discussed "Legally Employing Foreign Nationals-What Companies Need to Know." Although his paper discussed the different types of visas and the problems encountered by persons seeking

residence and employment in the United States, this session became an active question and answer session between Mr. Greenblum and the paralegals attending. There were a full range of challenging questions offered, and an equal number of answers providing useful information for all persons attending. Everyone participating in this session left with a new understanding of immigration issues and an appreciation for the complexity of the problems generated by the current laws.

Glenn Cunningham, a Personal Injury attorney from San Antonio, presented "New Paradigms-Life After Tort Reform." He addressed the political and legal dynamics of the passage of House Bill 4 in Texas that ultimately evolved into tort reform in Texas, and how those changes affected his practice of law. He explained that the \$250,000.00 cap on non-economic damages generated a "new paradigm" in what opportunities are now available for pursuit of claims. Revenue streams for plaintiffs have shifted to product manufacturers, drug companies, and Health Maintenance Organizations instead of hospitals, physicians, and nursing homes. He also indicated specific ways in which he has pared his expenses in working up a case, namely negotiating lower rates with vendors, avoiding costs for record retrievals by ordering selective medical records, and asking defense firms for copies of records. Although his perspective was clearly from the plaintiff's point of view, his outline of changes made in his practice gave those on the defense side a valuable insight into how tort reform has changed the legal landscape in Texas.

Thomas Crosley, a Personal Injury attorney from San Antonio addressed "Litigation of Motor Vehicle Cases." He explained the various components of an automobile policy and the how coverage issues vary according to the fine print in the policy. Personal Injury Protec-



tion coverage was discussed in detail, as well as Uninsured/Underinsured Motorists coverage. Policy limits were defined and clarified with respect to settlement credits and offsets. He also defined affirmative defenses which are the defendant's burden including proportionate responsibility, sudden emergency, sole proximate causation, unavoidable accidents, and acts of God. Other defenses might include pre-existing conditions, independent contractors, failure to mitigate damages, failure to use seatbelts or helmets, or failure to seek timely medical care. Specific recommendations for case development included client interviews, accident reports, photos of the accident scene and injuries, and medical records. Damage experts could include physicians and other health care providers, medical examiner, toxicologist, life care planners, vocational rehabilitation experts, economists, and possible independent medical examinations. His final recommendation for all paralegals dealing in this type of litigation is to "begin with the end in mind," the philosophy that you need to get all your information at the



beginning of a case so that you are prepared for all possibilities at the end of a case. Good counsel for all litigation.

Michael McCrum, a criminal defense attorney from San Antonio, addressed the many different issues in "Innocent Until Proven Guilty?" "The Death Stalker Scorpion" was used as the metaphor for the pitfalls of a criminal case which could subsequently undermine the case irreparably. He

explained that the scorpion of any case must be identified, acknowledged, and dealt with. The "scorpion" can often be neutralized by turning negatives into positives in a case. However, it is essential that the defense team must be in sync in order for negatives be recognized and turned into positives. It is also essential for all team members be educated about the most important issues of a case and to be able to articulate the "talking points." Affirmative motions, such as motions in limine, must be an integral part of any defense to advance the core position of the team, and discovery requests must be used to define "the elephant in the room." Lastly, he explained that the "Death Stalker Scorpion" can also be a source of life in that the toxin from the scorpion has been used to identify malignant cells for radiation for those with brain tumors.

Carrying the metaphor further, Mr. McCrum explained that something inherently good can come from a threatening situation. All clients deserve zealous representation in order for the legal system to remain healthy and strong.

Lastly, Linda Levy, a librarian from the University of Texas at San Antonio Health Science Center Library, offered "Legal Medical Research for Paralegals Using the PubMed Database." This seminar provided invaluable resources for the paralegal to use the national library of Medicine to research medical resources at no cost. She demonstrated several different ways to search the database using specific medical terminology or

subject headings in isolation or combination. She also demonstrated how searches can be limited to specific publications, dates, medical errors, named procedures or standards. This was not only an informational seminar it was an opportunity to see how the database is structured and specific strategies to obtain the information you need.

#### **Socials:**

The TAPS socials were outstanding and enjoyed by all. The Wednesday evening "welcome" social, **The Gang's All Here**, was held at the Omni Hotel and featured fortune tellers and card tricks, and some light appetizers. The Thursday night social, **A Little Bit of Texas...at the TAPS Corral** (at Rio Cibolo Ranch), was also a great success with people enjoying a fabulous buffet, a rodeo, and cowboy storytelling. Our attendees also really enjoyed donning cowboy hats and having their picture taken with a real live longhorn. The weather really cooperated and it was a beautiful evening to be outdoors.

The Friday luncheon, **The Final Frontier**, was again our culminating event. Michael Maslanka, a Partner in the Dallas office of Ford & Harrison, was our keynote speaker and he received very favorable reviews. Mr. Maslanka's presentation entitled **Jerks Run Wild: The New Workplace Incivility and What to Do About It** was both educational and humorous as he gave us some points to consider when dealing with difficult people not only in the workplace, but in life in general.

NewLine Legal Practice Support again sponsored a \$1,500 cash prize which was awarded at the end of our luncheon. Attendees make themselves eligible for our grand prize by visiting all the vendors in the Exhibit Hall. While the information is for our benefit, the vendors like it equally as well since they get to meet our attendees, and their potential customers, face to face. It's a win-win for all of us. Last but not least, the TAPS 2008 Vendor Exhibit Hall was superb. There were a total of 31 exhibiting legal service companies, 7 social sponsors, and a grand prize sponsor. The sponsors are listed at the end of this article. The Paralegal Division thanks each sponsor that made this year's

event a great success. If at all possible, the Division is asking each PD member to use these companies as a special thank you for their support.

Save the date and plan to attend TAPS 2009. The Division will celebrate TAPS 11<sup>th</sup> anniversary—and it will be held in League City at the South Shore Harbour Resort on October 14-16, 2009.

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## PD Member LEAPs Ahead

by Mona Tucker. CP

Linda Carrette, CP, TBLS, has been selected as one of only 14 paralegals from across the U.S. to participate in NALA's 2008-2009 LEAP (Leadership Enhancement and Preparation) class. Class members were introduced at the 33rd annual convention of the National Association of Legal Assistants at Oklahoma City, July 24–August 2, 2008.

Linda applied for the inaugural LEAP class last year, but because the class size is so limited, didn't get in until this year. She visited with Ruth Conley, a Houston PD member, about her experience with the 2007–2008 LEAP class, and decided it was a good opportunity. She was very happy when she received notification that she had been selected for the 2008–2009 class. Linda expects to learn more about the inner workings of NALA and hopes to be entrusted with a position of responsibility with NALA. She is excited about the networking possibilities.

LEAP for prospective leaders is based on the common-sense notion that it is better to acquaint volunteers with the concepts and challenges of NALA leadership *before* they are elected to national positions rather than to rely on "orientation" sessions after elected leaders take office. Early leadership training and support will reinforce the strength and progress of the Association as new leaders assume their roles prepared to take charge right away.

LEAP offers participants the opportunity to develop leadership skills beyond what they may have acquired through local association or community experience. Members will benefit from an insider's view of the structure and programs of NALA while gaining first-hand experience working with volunteers to find ways to

get things done.

LEAP members and discussion leaders will work together during a 12-month program and meet via web-based lectures, group discussion, and research.

Originally from Memphis, Tennessee, Linda has been a Texas resident since 1980. She and her family (husband Ed, and sons Jeremy, 16, and Tyler, 11) moved from Houston to Rockwall a year ago, and at the time of this interview, were packing to move back to Houston. Ed is the General Manager of the University of Houston Conrad Hilton School of Hotel and Restaurant Management.

The Ole Miss graduate once considered going to law school, but she got married instead. At the time, she was working at an oil and gas company with someone who was attending Southwestern Paralegal

Institute in Houston. That paralegal convinced her she should also enter the legal field, and the rest is history.

Linda earned her NALA certification in 1980, passed the TBLS civil trial exam in 1995, is a past president of Houston Paralegal Association, NALA Liaison for HPA two years ago, and past director of the Texas Paralegal Division, District 1 (1991–1994).

She is a busy lady, maintaining both her CP and TBLS certifications and membership in DAPA, HPA, NFPA, and NALA. On top of all that, she is a contract paralegal who owns her own company, Legal Analysts and Consultants. For the past year, she has been working with Curran, Tomko & Parski, in Dallas, and will continue that relationship after her relocation to Houston. She works in civil litigation, criminal and corporate law.

Way back in the day, Linda considered anyone with ten years or more experience as a role model. She wanted to emulate them and find out how they had been able to stick with it so long. Today, her role model is Sharon Werner, NALA's 2<sup>nd</sup> Vice President. Linda's idea of a role model is: "Anybody who manages to have more than 2 or 3 kids, work full time, stay happily married, keep everyone in clean underwear, and still keep a smile on her face."



Linda Charrette is the second from the left.

# Scruples

## The Ethics of Interactions with Opposing Counsel

By Ellen Lockwood, ACP, RP

Regardless of the area of law in which you work, dealing with opposing counsel is often a challenge. Sometimes the problem is the attorney, sometimes the attorney's staff. Opposing counsel can refuse or be slow to respond to inquiries or requests, omit information, or just be unpleasant.

While it may be tempting to respond to opposing counsel's unprofessional tactics and behavior by giving them a taste of their own medicine, you should always strive to take the high road. The most important reason to not resort to the same actions is because it is unprofessional. Unprofessional behavior is never considered ethical.

The ramifications of unprofessional behavior may be significant. Opposing counsel may become even more difficult to deal with. Multiple motions may need to be filed in order to get opposing counsel to respond to even basic requests, raising costs for your attorney's client and delaying proceedings. Most important is that your attorney needs to be able to show the judge your side was reasonable and professional in your handling of the matter and in dealings with opposing counsel. Your attorney cannot justify his or her staff's unprofessional behavior and obfuscatory tactics by citing similar behavior by opposing counsel. In fact, evidence of professional behavior on the part of your attorney and his or her staff, especially when there is documentation of oppos-

ing counsel's unprofessional or difficult behavior, may be persuasive when filing certain motions or requesting particular kinds of relief for your attorney's client.

Yet another reason to treat opposing counsel as you would want to be treated, regardless of opposing counsel's tactics, is that you may need a favor from opposing counsel. A paralegal I know once received documents from opposing counsel that included two documents with the same Bates number. She called the opposing counsel's paralegal to ask how the other paralegal would like to resolve the issue. Unfortunately, the opposing counsel's paralegal rather rudely insisted that it was not possible that two documents had the same Bates number. When sent copies of the documents, the opposing counsel's paralegal grudgingly agreed that the Bates numbers were identical. A few days later, opposing counsel's paralegal had to request a favor of the paralegal who had pointed out the Bates number problem. While the paralegal was tempted to refuse the request, and not even bring it to the attention of her supervising attorney, she recognized that to do so would be unprofessional.

Another example of unprofessional behavior is to complain about opposing counsel to others. Although those in your office may grouse about opposing counsel among yourselves, there is nothing to be gained by publicly criticizing others in our profession. You may certainly describe someone as "difficult," but disparaging an

attorney or member of their legal staff has the potential to cause others to view you as less than professional.

It is imperative to keep your attorney advised regarding your positive and negative experiences with opposing counsel. If opposing counsel or their staff is too difficult, uses foul language, or is otherwise completely unreasonable, your attorney may decide to limit communication to emails and letters, or request that all communications be made through him or her.

While opposing counsel and staff may be adverse to your attorney's client, this does not mean the relationship must be antagonistic. Attorneys for opposing parties do not need to agree on every point to grant reasonable requests and have a cordial, professional relationship.



*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. She may be contacted at [ethics@txpd.org](mailto:ethics@txpd.org).*

# Strategies Designed to Meet Your Financial Goals

By Craig Hackler, Financial Advisor, Raymond James Financial Services

**C**lose your eyes and visualize your dream vacation or the shiny new car that you've always dreamed of having. Sure, looks great! Unfortunately, for many of us the planning stops right there. With a little planning and discipline the likelihood of achieving our goals can be dramatically improved. Consider implementing one, if not all, of the strategies listed below to improve your financial picture.

Write down your financial goals and objectives and include deadlines. This will help you stay focused.

Use credit cards as little as possible. Financing your lifestyle with credit cards is a trap. Reach for your checkbook instead.

Payoff your credit cards each month. With the new minimum payment requirements of around 4%, consumers will get out of debt quicker. For example, on a \$2,000 credit card bill at 18% interest, paying the former 2% minimum will still leave you paying 30 years from now. The interest will cost you over \$5,000 on the \$2,000 charge. By making the new 4% minimum payment, you will finish up in about 10 years and the interest will be roughly \$1,100.

Spend a little, but save a little more. As your debts are paid off, save the "extra" cash each month. Many people are tempted to *overspend* with the "extra" cash.

Keep a savings balance of at least 6 months of expenses. This cash cushion can be

used when emergencies do arise instead of charging on credit cards.

Map out a college savings plan and begin funding early.

Manage taxes early in the year and look for deductions, credits and deferral of income to reduce your tax bill. The savings on taxes can be used for other goals.

Go for steady, consistent, long-term

growth in your investment. By the time you read about a "hot tip" it's usually cold.

Protect your valuables and income earning potential with appropriate insurance policies including mortgage, life, and disability policies.

Invest for retirement. At best, Social Security will cover only a fraction of the money you will need for retirement. Talk to your financial advisor about preparing

for a comfortable retirement.

Create an estate plan. Many people think you must be super wealthy to do estate planning which is not true. Avoiding probate and passing assets to heirs estate tax free, are the main goals.

Your Financial Advisor, CPA and Attorney will be able to assist in reaching all of these goals. As the saying goes, "those that fail to plan, plan to fail". It's never too late to begin taking a look at your financial picture and get on board with a real plan for you and your family's future.

*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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