SUMMER 2009 VOL. 15 NO. 1

TPJ

Texas Paralegal Journal

HB4— After Five Years— Plaintiff's Perspective

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PRESIDENT'S *Message*

I I bring you this, my last President's report. I have really enjoyed my second term as President of the Paralegal Division it truly has been my honor to serve you again. During this year I have made it my goal to continue to expand your member benefits. I believe that being a member of the Paralegal Division is one of the best professional assets you can have, but I also believe it needs to be worth your hard earned money.

We know that CLE is very important to our members, so by the time this magazine reaches you the Paralegal Division will have held three webinars. In addition, the Division continues to grow its online CLE library, with several new events recently added, find them at *www.txpd.org*. We offer some of the most affordable and up to date online CLE. Finally, the Paralegal Division Directors and the District CLE Sub-Chairs continue to work very hard to provide CLE to our members statewide. Approximately 40 hours of District CLE have either taken place Districts around the state.

Did you know that PD has a job bank? Well we do, yet another benefit, it is on our website at *www.txpd.org*. This is there for you, so that you can continually have access to potential jobs all over the state.

The Paralegal Division is also trying to keep up with the technology available to us. Stephanie Hawkes, President-Elect has set up groups on Linked In and Face Book. The URL is *www.linkedin.com* and *www.facebook.com* enter "Texas Paralegal Division" in the Search Groups box. These are just a few of the benefits of being a member of the Paralegal Division, a complete list can be found on the Paralegal Division website.

While it is the end of my term it is the beginning of the term for Stephanie Hawkes, your incoming President and Debbie Guerra, your incoming President-Elect, I know that I leave you in very capable hands. They both have very great ideas to continue to make the Paralegal Division the best it can be for PD members.

SUSTAINING MEMBER PROFILE

Open Door Solutions, LLP

In January 2002, three industry veterans, Randy Crews, Tom Miller and Bob Sweat, founded Open Door Solutions, LLP (ODS) in Dallas, Texas. Having worked for large, national vendors where pricing and services were not flexible, the partners designed procedures and technologies at ODS to deliver the highest quality at very competitive prices. Critical to the success of their business model was the inclusion of experienced personnel, most who have been with the partners through many companies for many years. Boutique-like in its look and hands-on approach, ODS provides litigation support services and document management solutions to law firms and corporations. They are well known for utilizing sound business practices and proven technologies that provide premiere services exceeding both industry standards and clients' expectations.

The skills, duties and responsibilities of the partners are distinct, lending to the strength of the organization. Randy Crews, the managing partner, is responsible for business services, including contracts and general administration. He also has experience as a facility manager and a project manager. Tom Miller is a uniquely experienced senior technical consultant and programmer. Clients often incorporate Tom as an important and trusted member of their legal team. Bob Sweat is a project manager and responsible for client services and overall customer satisfaction. His unique perspectives come as a former paralegal and manager of processing facilities with as many as 250 employees. Clients enjoy his hands-on support and appreciate his estimating, budgeting and reporting skills. Bob and Tom have written several articles, co-authored books on litigation support, and have given multiple CLE presentations over the past 15 years. ODS's support staff is made up of personnel highly experienced at converting paper and electronic documents into digital format. In addition, they are often called upon to provide direct project support.

ODS successfully converts and links images to databases to assist researchers in locating important documents, performs sensible electronic discovery processing, and provides unparalleled consulting and project management services. They are capable of handling document projects of any size and have successfully completed hundreds of projects that involve multiple types of media and complex litigation support. Firms enjoy ODS's practical understanding of how documents are used by paralegals and litigators at various stages of a case. As a result, they have been called upon to convert data from other vendors for proper data loads and use. In the testimonial section of their website, one of their clients remarked, "With ODS you don't have to go through sales representatives for your questions or problems, often resulting in delays in obtaining the needed answers. You simply call the people with knowledge directly – no middleman and no waiting for callbacks."

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It's 5:00 p.m. on Friday and you're ready to go home. But before you can leave, your attorney comes to you with a few tasks to be completed first thing Monday morning.

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Focus on . . .

Hot "Cites"

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Columns

Et Al.

EDITOR'S *Note*

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

Déjà vu?

Some of you may be thinking this issue's *Focus On* article seems familiar. First, I want to thank you for your readership of TPJ. Second, I want to explain the wonderful thing that happened after the last issue of the TPJ was distributed: we received a call inquiring if the TPJ would run an article on the same *Focus On* issue—Five Years after House Bill 4—but from the *other side* of the bar. As you can imagine, I could hardly contain my joy! Hence, the great article from the plaintiff perspective by Paula Sweeney and Jim Perdue, Jr. runs in this issue.

Now for the second double-take. Open Door Solutions, LLP is a sustaining member of the PD and was spotlighted in last issue's Sustaining Member Profile. Unfortunately, some gremlins got in the works, and the advertising that Open Door Solutions, LLP placed in the same issue printed like . . . , well, not right. I can only imagine that the horror of the fine folks at Open Door Solutions was similar to that of mine when the problem was discovered—which was about the same time each of you was reviewing your issue. Open Door Solutions was very kind and understanding, but we clearly had a problem that needed to be addressed. Please be assured that new procedures are in place to ensure this never happens again. Our graphic designer, David Timmons, and our printer all worked together so we now have a system of checks and balances for triple- and quadruple-checking the magazine as it goes to print.

And again, our sincerest apologies to Open Door Solutions for the error; I hope we can regain their faith—and that of our entire readership—and continued support of the Division and the TPJ.

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DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS JULY 15, 2009.

Focus on...

HB4—After Five Years—Plaintiff's Perspective

by Paula Sweeney and Jim M. Perdue, Jr.

INTRODUCTION

In 2003 the combined forces of the insurance, medical and tort reform lobbies succeeded in destroying access to the courts for large segments of the Texas population. The Republican hegemony, with control of the offices of Speaker of the House, Lt. Governor and Governor, prevented any meaningful dialogue or compromise on the enactment of all of the industry's wishes. Since that time, the courts, with a miniscule number of exceptions, have marched in lockstep with those political goals. The Supreme Court in particular, rather than acting as a check and balance on the executive and legislative branches of government, has articulated its function as one of *effectuating* the purposes of those other bodies. ". . .if the legislative purposes behind the statute are still attainable. . .Texas courts should not frustrate those purposes by a too-strict application of our own procedural devices." *In Re McAllen Medical Center, Inc.*, ___ S.W. 3d ___, 2008 WL 2069837 (Tex. 2008). At least, this is the view articulated by Justice Brister, speaking for the majority in the Court's most recent pronouncement on the interplay between the judicial and executive branches. This paper thus studies jointly the effect of legislative and judicial tort reform efforts.

This paper is designed as a summary only, and as a roadmap to some of the significant changes to tort law in Texas. The reader is also directed to several excellent law review articles: "Judicial Tort Reform in Texas", Anderson, David A., Review of Litigation, University of Texas, Winter 2007, "Juries Under Siege", Hardeberger, Phil, Chief Justice, 30 St. Mary's L.J. 1, 1998, "Judges, Juries, and Review in Courts", Dorsaneo, William V., 53 SMU L. Rev. 1497, 2000, "A Survey of Sea-Change on the Supreme Court of Texas and Its Turbulent Toll on Texas Tort Law", Rackley, J. Caleb, 48 S. Tex. L. Rev. 733, 2007, and "Jury Erosion: The Effects of *Robinson, Havner, & Gammill* on the Role of Texas Juries", 32 St. Mary's L.J. 383, 2001.

Multiple commentators have noted the harsh changes in climate in Texas in recent years. As Professor Anderson puts it: "…advancing an ideology by adopting congenial legal principles is one thing; advancing an anti-tort ideology simply by refusing to allow plaintiffs to succeed is quite another." "Judicial Tort Reform in Texas", Anderson, David A., Review of Litigation, University of Texas, Winter 2007.

I. THE STATE OF MEDICAL MALPRACTICE LITIGATION IN TEXAS IN 2008

A. Chapter 74

It could be argued that the enactment of Chapter 74 of the Civil Practices & Remedies Code during the 2003 legislative session effectively abrogated causes of action in Texas for health care liability. Certainly the limitations on those claims are unprecedented. They include:

i. Caps on intangible damages.
Chapter 74, Section 74.301 limits non-economic damages to $250,000 for physician negligence and another $250,000 for hospital employee negligence. In the odd hypothetical situation that there might be a second negligent hospital, another $250,000 cap is available. Section 74.303 limits damages in wrongful death cases. There is some debate whether wrongful death damages are limited by the statute to $500,000 for all damages except medical expenses, escalating with the CPI since 1977 (the amount in 2008 is roughly 1.6 million), or whether within that cap there is an additional $250,000/$500,0000 cap on intangibles. No case law has resolved this dichotomy.

Further, it is important to note that there is no cost of living (CPI) adjustment for the intangible caps. Thus, by way of example, in June, 2008, the $250,000 cap enacted by the legislature in 2003 is now worth only $213,000 using a CPI calculator.

ii. A shortened statute of limitations
Chapter Section 74.251 takes the well-established language of Article 4590i and adds the following section (b):

A claimant must bring a health care liability claim not later than ten years after the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within ten years or they are time barred.

Undiscoverable injuries. Appellate courts agree that in cases of undiscoverable injuries, the statute of repose is unconstitutional. The ten-year statute of repose is unconstitutional because it unreasonably restricts plaintiff's right to sue before she has a reasonable opportunity to discover the wrong and bring suit. *Rankin v. Methodist Healthcare System*, ___ S.W. 3d ___, 2008 WL 587444 (Tex. App. – San Antonio 2008, n.p.h.). Ms. Rankin had a hysterectomy performed in 1995 at Methodist. She began experiencing abdominal pain in 2006, and underwent exploratory surgery where a surgical sponge was found in her abdomen. The surgery was in July of '06 and suit was filed in October of '06. Defendant sought dismissal on the basis of the statute of limitations and the statute of repose. Plaintiff filed an affidavit to the effect that discovery of the sponge was impossible prior to the expiration of the ten-year period of repose, and there was no controverting evidence. The Court cited *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) and *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985) to support the point that the statute was unconstitutional because it required her to bring a claim before she had any reason to do so, and effectively abolished her ability to bring a well-established common law cause of action without providing any reasonable alternative. Conversely, however, the Houston 1st District Court has found that a woman who had a retained sponge in her abdomen for many years was barred by the statue of limitations from bringing suit because she had "a reasonable opportunity to discover the alleged wrong." Plaintiff contended that the law required only an inquiry of whether she knew or should have known of her injury during the limitations period, which she did not. The defense contended, successfully, that plaintiff had to prove that it was "impossible or exceedingly difficult" for her to have discovered the injury during this time period. The Houston Court found that it was not impossible or exceedingly difficult, and that plaintiff did not show that she could not have discovered the sponge sooner. *Walters v. Cleveland Regional Medical Center*, ___ S.W. 3d ___, 2007 WL 4465298 (Tex. App. – Houston [1st] 2007, pet. filed).

Query. Must patients now perform their own exploratory abdominal surgeries?

Minors. The statute has also been held unconstitutional as to minors. "If this argument [the constitutionality of Chapter 74] is to prevail, it must do so in the Supreme Court of Texas. We are bound by *Sax* and *Weiner*." *Adams v. Gottwald*, 179 S.W. 3d 101(Tex. App. – San Antonio, 2005, pet. refused).

iii. An algebraic expert report requirement.
Chapter 74, Section 74.351 took an already incredibly complex area of law under Article 4590i and made it more so. A conservative estimate is that hundreds of lawsuits have been dismissed due to alleged technical deficiencies in the reports, despite the obvious merit of the claims. Examples include:

Service. Even if the defendant has a copy of the report, it must be served on the defendant by plaintiff or plaintiff is subject to dismissal. *University of Texas Health Science Center at Houston v. Gutierrez*, 237 S.W. 3d 869 (Tex. App. – Houston [1st] 2007, pet. filed).

Nonsuit. Plaintiff can no longer nonsuit, despite an absolute right to do so. Nonsuiting during the 120-day period does not stop the clock from running. *Mokkala v. Mead*, 178 S.W. 3d 66 (Tex. App. - Houston [14th], 2005, pet. denied).

Damages. One court has held that plaintiff's expert report must contain a causal link to all of plaintiff's damages,

even if those damages have not yet occurred at the time of the writing of the report. *Farishta v. Tenet*, ___ S.W.3d ___, 2007 WL 1744417 (Tex. App. – Fort Worth, 2007, n.p.h.).
Constitutionality. Several courts have held the report requirement constitutional under various grounds. The report does not violate the separation of powers provision of the Texas Constitution. *Wilson-Everett v. Christus St. Joseph*, 2007 ___ S.W.3d ___, 2007 WL 4198993 (Tex. App. – Houston [14th] 2007 pet. filed). The report does not violate the due process clause. *Bogar v. Esparza*, ___ S.W. 3d ____, 2007 WL 1852904 (Tex. App. – Austin 2007 n.p.h.).
Assumptions. The report cannot be based on assumptions. *Cooper v. Arizpe*, 2008 WL 940490 (Tex. App. – San Antonio 2008, n.p.h.) (**not designated for publication**).
Service. A report filed at the court house but not served on a party results in dismissal. *Quint v. Alexander*, 2005 WL 2805576, (Tex. App. – Austin, 2005, pet denied) (**not designated for publication**).

Service must comply with Rule 21(a). Service by regular mail instead of certified mail, since not in compliance with Rule 21(a), results in dismissal. *Kendrick v. Garcia*, 171 S.W. 3d 698 (Tex. App. – Eastland 2005 (pet. denied).
Name of defendant. A report which identified the defendant by role ("the transplant surgeon") was inadequate because it did not use the surgeon's name. *Baylor University Medical Center v. Biggs*, 237 S.W.3d 909, (Tex. App. – Dallas 2007 pet. filed).

iv. Mandatory payout of future damages.
Chapter 74, Section 74.501 to 74.507 *requires* that, if the hapless plaintiff should die from his or her injuries before a complete stream of payments has been made, the payments *revert to the tortfeasor.* This is a return of the common law "it's cheaper to kill than to maim" doctrine. Chapter 74.501-7 also requires that "some or all" of future payments be structured, without giving the Court discretion to require a lump sum payment of all the damages.

v. Discovery Moratorium
Chapter 74, Section 74.351 prevents most discovery before the filing of the 120 day expert report. This has been extended by case law to preclude the deposition of the defendant physician, *In Re Miller*, 133 S.W. 3d 816 (Tex. App. – Beaumont, 2004, n.p.h.), and also to preclude Rule 202 presuit depositions, *In Re Jorden*, 249 S.W. 3d 416 (Tex. 2008). The Supreme Court in the *Jorden* case found that Rule 202 depositions constitute "a cause of action against a health care provider," therefore were "health care liability claims" and thus fell within the discovery moratorium. Thus, plaintiff must produce the algebraically constructed report without most of the necessary information to do so.

vi. Willful and Wanton Standard
The legislature also codified a willful and wanton standard of proof in emer-

gency cases. C.P.R.C. 74.153. The willful and wanton standard for emergency room cases has been held constitutional. *Dill v. Fowler*, ___ S.W. 3d ___, 2008 WL 1722249 (Tex. App. – Eastland 2008, n.p.h.).

vii. What is a Health Care Liability Claim?

Apparently, under the new definitions of Chapter 74, almost anything is health care. Appellate courts have taken their cue from *Diversicare v. Rubio*, 185 S.W.3d 842 (Tex. 2005), wherein the Supreme Court held that the multiple rapes and assaults of a nursing home patient constituted health care. The Dallas Court of Appeals has followed suit in finding that a claim against a nursing home for hiring an unfit care provider who injured a resident by throwing scalding water on him was a health care liability claim, requiring an expert opinion. *Educare Community Living Corp. v. Rice*, 2008 WL 2190988 (Tex. App. – Dallas 2008, n.p.h.).

Later, a plaintiff alleged that a chiropractor rubbed her genitals during chiropractic examination. The Court, consistent with *Rubio, supra*, held that this constituted "health care," that she was thus bringing a "health care liability claim," and was thus required to produce an expert report. *Vanderwerff v. Beathard*, 239 S.W. 3d 406 (Tex. App. – Dallas 2007 n.p.h.).

viii. Are health care providers now a constitutionally prohibited "special class"?

All of these changes have resulted in a situation in which health care providers are the most specially protected class in Texas history.

An interesting start to an analysis of this special protection for health care providers is found in *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). Therein, Justice Kilgarlin, writing for the majority, noted as follows:

> "Although not necessary in light of our 'open courts' holding, one wonders whether the drafters of the Texas Constitution intended for the legislature to enact special laws for the protection of specified classes of tort feasors. Compare Tex. Const. art. I, 63 ("[N]o Man, or set of men, is entitled to exclusive...privileges, but in consideration of public service.") with Tex. Const. art. III, 656 ("[I]n all other cases where a general law can be made applicable, no local or special law shall be enacted...."). A prior Constitution left it to the legislature, "in its judgment," to decide when a general law could be made applicable. Tex. Const. art. XII, 640 (1873). This language does not appear in the present Constitution. Tex. Const. art. III, 656. at page 689."

The Article I, 63 prohibition against public emoluments has been raised in the Supreme Court before. The Plaintiffs in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984), included that section as part of their constitutional challenge to the purported absolute two year statute of limitations in Article 4590i. Because the Court invalidated the statute of limitations under the open courts provision, Tex. Const. art. I, 613, consideration of the other constitutional claims, including the equal protection public emoluments argument, was unnecessary.

The next time the term is found in the health care liability context is in *Rose v. Doctors Hospital Facilities*, 735 S.W.2d 244 (Tex. 1987) but therein, after citing the provision, the Court went on to discuss whether the application of differing standards of treatment for different types of plaintiffs violated equal protection. It did not specifically discuss whether the treatment of different classes of Defendants, or the accord of public emoluments, or privileges, to specific individuals or groups, violated the Texas Constitution. Similarly, in *Lucas*, the Court considered the equal protection clause, but its analysis keyed on the treatment of disparate classes of Plaintiffs, not on special protection afforded to a group or groups of Defendants.

Each time the Court has considered the equal protection clause of the Texas Constitution, it has done so in the context of differentiating between classes of Plaintiffs. It has yet to address the argument raised by Justice Kilgarlin in his *Lucas* footnote, that the drafters of the Texas Constitution never intended for the legislature to enact special laws for the protection of specified classes of tort feasors [public emoluments]. This Constitutional challenge seems uniquely suited to the "wilfull and wanton" standard of conduct embodied in Section 74.153.

Perhaps in order to determine whether health care providers have in fact been set aside as a specially protected class, in contravention of Article I, 63, it would be helpful to consider the array of special protections afforded health care providers in Texas law.

No other class of litigants, or citizens, enjoys the protection that health care providers have under Texas law. A brief summary of those protections is instructive:

1. Damage Caps. In injury cases, though previously held unconstitutional at the $500,000 level, those caps are now $250,000 for all claimants for intangible damages arising from a single occurrence. In death cases, the caps are now a total of approximately $1.5 million for the entire case, including loss of earnings, and only excepting medical costs.

2. *The Stowers Doctrine* Does Not Apply. Under Chapter 74,

unlike the predecessor statute, the insurance company for the physician enjoys the protection of the caps regardless of whether it negotiates in good faith or exposes the physician to an excess verdict.

3. Expert Reports. 674.351. Plaintiff must, within 120 days of filing suit, provide a fantastically detailed, intricate and complex expert report. A tremendous cottage industry has sprung up in which defense lawyers and their insurers strive to have valid cases dismissed for alleged technical deficiencies in Plaintiffs' reports. The Courts have been happily complicit in this endeavor. No other defendant has this unique benefit: not just a peek, but a long look at Plaintiff's hand before discovery is even well under way.

4. Discovery Stay. 674.351(s)-(u). Only very limited discovery is allowed before Plaintiff must generate this technically demanding report. No other class of litigants enjoys the boon of having the other side's case mapped out before having to respond to the allegations. In fact, though not well supported by the language of Chapter 74, one court, in *In Re Miller*, 133 S.W. 3d 816 (Tex. App. – Beaumont, 2004, n.p.h.), has held that the defendant physician cannot even be deposed until after plaintiff's expert report has been filed. Why should defendant physicians, unique among defendant litigants of all other possible categories, have before them a road map of plaintiff's claims before they can testify to what they did, why they did it, what they observed, and so on?

5. Sixty (60) Day Notice Letter of Intent to File Claim. 674.051. With the exception of governmental entities, no other class of litigants is entitled to this kind of warning. The government gets it because of the common law notion that "the King can do no wrong." No such fiction, at common law, applied to health care providers. The stated legislative purpose of Section 74.051 is to encourage early negotiation and settlement. Yet, the statistics make this a mockery. The notice period does, however, allow plenty of time before court authority can be invoked to prevent chicanery with the records.

6. Rigid Two (2) Year Statute of Limitations. 674.251. This provision (or its 4590i predecessor) has been construed so strictly that in some delayed onset cases, the Plaintiff's cause of action is extinguished before it could have been filed. This protection is unique to health care providers. In death cases, the statute in health care liability cases can run before the patient dies - thus precluding suit... something else found with no other class of wrongful death Defendants.

7. The Peer Review Privilege. Article 4495-B, Sections 5.06 and 4.05, and Texas Health and Safety Code, 6161.031-.033 create a privilege for properly constituted peer review proceedings. Problematically however, these privileges have been construed so broadly that Plaintiffs are often precluded from discovery of the only information available to prove their claims. No other industry has such an all-encompassing exception from discovery into post-tort investigations. The privilege is based on the increasingly fictional nature of collegial, self-policing health care practice.

8. Proof of Malice in Negligent Credentialing Claims. Since *Agbor v. St. Luke's Episcopal Hospital*, 952 S.W.2d 503 (Tex. 1997), Plaintiff's burden of proof in negligent credentialing cases, including credentialing of drug impaired physicians, requires proof of malice on the part of the hospital. Needless to say, no such proof is required in cases involving negligent association or retention of any other profession – lawyers, architects, engineers or the like.

9. The Wilful and Wanton Burden of Proof in Emergency Care. 674.153. All other tort feasors in our society are held to a standard of negligence. Uniquely, health care providers can only be found liable if a Plaintiff can prove willful and wanton negligence in the emergency room context.

10. The National Physician's Databank (NPDB), to which insurers are required to submit data any time a health care liability claim is paid on behalf of a doctor, whether by way of settlement, verdict or final judgment, is closed to the public. Only hospitals and insurance carriers have access to this information. This federally managed database is unique in keeping this mandatory data from the public, which would clearly be well served by having access to information about the claims history of its health care providers. Such protection has led to gamesmanship on the part of the industry in significantly under-reporting settlements by physicians.

11. Mandatory Payment for Future Losses. 674.501. Only health care liability insurance companies are afforded this boon. Personal injury and wrongful death damages are con-

sidered "liquidated damages," that is, the best assessment of the present value of damages, including future damages, is made at the time of settlement or judgment, and the amount of the recovery is based upon that calculation. Thus, insurers pay the present value of future damages at the time of settlement. Only health care insurers in Texas are provided the protection of a return of future payments should the hapless claimant die before payments are fully made. The insurance industry thus gets a multiple reduction: the value of future payments is reduced to present value for purposes of computing the amount of the judgment, yet if the claimant does not live to receive all his/her payments, the funds are returned to the carrier.

12. 202 Depositions. An active political battle is in process to protect health care defendants from the 202 deposition process, though no such protection exists to any other class of litigants. Particularly troublesome is the fact that health care records may be indecipherable, incomplete, lost, or deliberately obfuscative, such that only a Rule 202 deposition can provide plaintiff with adequate information from which to generate a Rule 74.351 report, yet health care providers are actively striving to protect themselves from having to give such depositions. Appellate courts are divided on whether 202 depositions are appropriate in health care liability claims. *In Re Christopher Allan*, 191 S.W.3d 483 (Tex. App. - Tyler 2006, pet. granted) holds that a request for a 202 deposition is not a "health care liability claim," and that Rule 202 depositions are therefore permissible, and not precluded by either the discovery moratorium or *In Re Miller*, 133 S.W. 3d 816 (Tex. App. – Beaumont, 2004, n.p.h.). *See* also, *In Re Nix*, San Antonio, permitting depositions under Rule 202 in health care liability claims, and *In Re Lifecare Hospitals of Plano*, 2005 WL 3360886 (Tex. App. – Dallas 2005 n.p.h.), also permitting depositions. A contrary result, on different grounds, was reached in *In Re Raja*, 216 S.W.3d 404 (Tex. App. - Eastland, 2006, pet filed) and in *In Re Memorial Hermann Hospital System*, 209 S.W.3d 835 (Tex. App. – Houston [14th Dist.], 2006, n.p.h.). Both of these cases barred plaintiffs from taking Rule 202 depositions.

13. Suits Involving the Death of an Unborn Child. Physicians are the only class of tortfeasors against whom no cause of action may be asserted for the wrongful death of an unborn child. CPRC Section 71.003(c) provides a cause of action for negligently causing the death of an unborn child. This section was added by the 2007 legislature. It provides an **exemption** for physicians: "(c) this subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against: … (4) A physician or other health care provider licensed in the state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider."

B. Negligent Credentialing

The Supreme Court eliminated negligent credentialing causes of action in *Agbor v. St. Luke's Episcopal Hospital*, 952 S.W. 2d 503 (Tex. 1997, in 1997. The Court applied a malice standard to "negligent" credentialing claims.

Oddly, in a later opinion by Chief Justice Jefferson, the Court again discussed the issue of negligent credentialing. Though the case turns largely on the issue of what is or is not health care (credentialing claims, the holding goes, are health care liability claims - overruling a well-reasoned Dallas Court of Appeals opinion to the contrary), it also does two interesting things with regard to negligent credentialing causes of action.

> 1) The Court "assumes without deciding" that Texas recognizes such claims and
> 2) The Court, throughout the extensive opinion, refers to such claims as "negligent" credentialing, not "malicious" credentialing. "We hold that a claim for negligent credentialing is a health care liability claim under the MLIIA."

Interestingly, in a footnote, the Court states "this Court has never formally recognized the existence of a common-law cause of action for negligent credentialing, but we will assume for purposes of this case that such a claim exists." The opinion, throughout, carries this assumption forward and implicitly answers the question raised in *Agbor* as to whether or not a claim for negligent credentialing exists in Texas. By the Supreme Court's holding, it now seems clear that a cause of action for "negligent" credentialing in fact exists.

Yet the Court went on to hold that malice must be proven for a claimant to be able to pursue a "negligent" credentialing cause of action. Worse, on the facts of the case, plaintiff failed to meet his burden of proof even when 1) the physician was a known drug user, 2) the hospital chief of staff knew of the impairment and 3) the chief of staff admitted the physician was a danger to patients. This raises the ques-

tion: What possible factual scenario would support a claim for negligent credentialing (requiring proof of malice) if the facts in *Romero* did not? *Romero v. KPH Consolidation*, 166 S.W.3d 212 (Tex. 2005).

Therefore, credentialing claims are virtually impossible in Texas.

C. Bystander Claims

The Supreme Court eliminated bystander claims in health care liability claims in the *Trevino* case. *Edinburg Hospital Auth. v. Trevino*, 941 S.W.2d 76 (Tex. 1997). Justice Spector, writing for the majority, reasoned that since medical care is always difficult to watch and traumatic, that it would be wrong to allow plaintiffs to recover for witnessing negligent health care.

D. Loss of Chance

The Supreme Court eliminated loss of a chance causes of action in *Kramer v. Lewisville Memorial Hospital*, 858 S.W. 2d 397 (Tex. 1993). The Court established as policy in Texas that having "only" a 49 percent or less chance of survival is not significant enough to support a claim for negligent loss of that percentage chance. Accordingly, plaintiff in a misdiagnosis or delayed treatment case must prove that, but for the negligence, he or she would have had a greater than 50 percent chance of survival.

E. Death of a Fetus

1. Judicial Action

The Supreme Court has steadfastly refused to recognize a cause of action for wrongful death of an unborn fetus. *Witty v. American Gen. Capital Distrib., Inc.*, 727 S.W.2d 503 (Tex. 1987).

2. Legislative Action

Physicians are the only class of tortfeasors against whom no cause of action may be asserted for the wrongful death of an unborn child. CPRC Section 71.003(c) provides a cause of action for negligently causing the death of an unborn child. This section was added by the 2007 legislature. It provides an **exemption** for physicians: "(c) this subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against: …

(4) A physician or other health care provider licensed in the state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider."

F. Good Samaritan Cases

The legislature and the Supreme Court together have essentially abolished health care liability causes of action where the Good Samaritan Defense applies. Defendant must conclusively establish the Good Samaritan defense. The Good Samaritan defense is subject to three exceptions: 1) a doctor performing his or her work in an emergency room, 2) a doctor associated by the admitting or attending physician or 3) a doctor who charges for his or her services. An issue of material fact existed in the Do case as to whether defendant was "associated by the admitting or attending physician", and dismissal was therefore improper *Chau v. Riddle*, ___ S.W. 3d ___, 2008 WL 1069841(Tex. 2008). Since it was part of the anesthesiologist's job to assist in the delivery room with the intubation of newborns, when required, defendant's Good Samaritan defense failed. The conduct in question was part of the professional's ordinary duties. *Chau v. Riddle*, ___ S.W. 3d ___, 2008 WL 2069841 (Tex. 2008).

1. Legislative Changes

C.P.R.C. 74.151 recodified the Good Samaritan Statute to provide immunity for anyone who in good faith administers emergency care in the absence of willful or wanton negligence, if that person was not acting in expectation of remuneration.

2. Judicial Changes

The Good Samaritan Statute shields emergency medical services personnel. *Moore v. Trevino*, 94 S.W. 3d 723 (Tex. App. – San Antonio 2002, writ ref'd). If a physician proves that he or she would not ordinarily have received remuneration for the care given, he is entitled to immunity. *McIntyre v. Ramirez*, 109 S.W. 3d 741 (Tex. 2003).

G. Informed Consent

Texas law has been for decades that a physician must respect a plaintiff's decisions about the care plaintiff is or is not to receive. The Supreme Court has abrogated this ruling in S*chaub v. Sanchez*, 229 S.W. 3d 332 (Tex. 2007). Therein, Ms. Sanchez had previously agreed to a particular type of pain relief procedure. In the instant circumstance, she very specifically told the physician she did not want that same type of block again. However, once she was unconscious, the physicians did in fact perform that type of block, resulting in injuries. The Supreme Court reasoned that since Ms. Sanchez had previously consented to such surgery, then she had given her informed consent. In other words, in Texas, at least in medicine, "no" apparently does not mean "no."

H. Comparative Negligence

It has been well-established law for decades that a plaintiff cannot be comparatively negligent in either being in bad health or giving a bad history. Comparative negligence could only apply to failure to follow a physician's orders or to causing oneself additional damage. The Supreme Court has abrogated this rule in *Jackson v. Axlerad*, 221 S.W. 3d 650 (Tex. 2007). Therein, the Court holds that a patient (in this case a physician) must provide an adequate history or can be found negligent of contributory negligence.

I. No Vicarious Liability for Emergency Rooms

In *Sampson v. Baptist Memorial Hosp. Sys.*, 969 S.W.2d 945 (Tex. 1998), the Court ruled that there is no hospital liability for negligent emergency room physicians even though such liability has been recognized previously in Texas and in many other jurisdictions.

J. Duty to Warn Third Parties

Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998) is the case in which the Texas Supreme Court found that a physician owes no duty to third parties to warn epileptic patients not to drive, even when such driving causes injury to third parties.

K. Foreseeability of Harm

Two negligent discharge cases illustrate the difficulty in proving the foreseeability component of a negligent discharge cause of action. First, a patient who was sought to be involuntarily confined as a danger to himself "or" others was discharged. He subsequently killed three people. Families of those three brought suit, and the Dallas Court finds "generally, there is no duty to control the conduct of others." Further, the conduct was "not foreseeable" because although he threatened suicide and injury to himself, or danger to himself "or" others, the application for emergency detention did not specify that he was a danger to himself "and" others. And accordingly "the evidence negates foreseeability as a matter of law." *Boren v. Texoma Medical Center*, ___ S.W. 3d ___, 2008 WL 1886770 (Tex. App. – Dallas 2008, n.p.h.). Second, the Supreme Court finds that an emergency room which dismissed a mentally ill patient, only to have him commit suicide within two days, was not liable because causation was "too attenuated" to support liability. *Providence Healthcare v. Dowell*, ___ S.W. 3d ___, 2008 WL 2154093 (Tex. 2008). Twenty-one year old Lance Dowell had a history of threatening suicide, and took an overdose of Tylenol along with slashing his wrists. He was taken to the emergency room where he was seen and discharged. The next day he hung himself. The jury found negligence and proximate cause and awarded damages to decedent's parents for their loss. The Supreme Court re-finds facts found by the jury, reassesses expert testimony, redetermines the probable outcome of non-negligent conduct, and, substituting its judgment for that of the jury, finds "we conclude that Lance's discharge from Providence's ER did not proximately cause his death." A fine example of judicial fact-finding in contravention of the constitutional prohibitions of same.

L. Tort Claims Immunity

The 2003 Legislature abolished the distinction between medical and governmental discretion, and has, in essence, barred suit against physicians employed at state or county hospitals. Previously, where physician employees could be held liable for their exercise of medical discretion, they are now included in the definition of "public servant," and therefore have conferred upon them governmental liability protection. Tex. Civ. Prac. & Rem. Code 6108.001(3). This limits their liability for damages to no more than $100,000, as long as their conduct was within the course and scope of their employment as physicians. Plaintiffs will also have to come within the tort claims limitations on liability, including the "use" or "misuse" of tangible property discussed below. This new statute applies to claims filed after September 1, 2003.

In *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994), the Texas Supreme Court held that government-employed medical personnel are not immune from tort liability if the character of the discretion they exercise is medical and not governmental. *Id.* at 11. The Court overruled the language in *Armendarez v. Tarrant County Hosp. Dist.*, 781 S.W.2d 301 (Tex. App. – Fort Worth, 1989, writ denied), stating that official immunity protects only "uniquely governmental" discretionary functions, instead adopting the governmental/ occupational function test. The *Kassen* Court reasoned that the phrase "uniquely governmental" is ambiguous and does not state the appropriate method for determining if doctors, nurses, or other government employees have official immunity. 887 S.W.2d 4 at 10. The Court held "that government-employed medical personnel are not immune from tort liability if the character of the discretion they exercise is medical and not governmental. A state-employed doctor or nurse has official immunity from claims arising out of the exercise of governmental discretion, but is not immune from liability arising from the exercise of medical discretion." *Id.* at 11.

Importantly, the legislative action barring suit against physicians does not apply if the governmental entity could not have been sued. If the claim for example does not involve misuse of tangible personal property, then the governmental entity could not have been sued, and the employee still can be. *Phillips v. Dafonte*, 187 S.W. 3d 669 (Tex. App. – Houston [14th Dist.]), 2006, n.p.h.), *Williams v. Nealon*, 199 S.W. 3d 462 (Tex. App. – Houston [1st Dist.], 2006, pet filed). See also *Franka v. Velasquez*, 216 S.W. 3d 409 (Tex. App. – San Antonio, 2006, pet. filed) in which the court found that the allegations against the individual physicians were essentially allegations of negligence, not negligent use of tangible property per se, and that, accordingly, there was no immunity for them. Similarly, the plaintiff in *Walkup v. Borchardt*, 2006 WL 3455254 (Tex. App. – Amarillo, 2006, n.p.h.) (**not designated for publication**), made allegations that the defendants were negligent in failing to order appropriate tests, and in failing to act on her symptoms until she was paralyzed. These allegations did not include allegations of use or misuse of tangible property, and thus, plaintiff could not have brought suit against the state entity, and suit against the physicians was permitted.

Physicians must conclusively establish that their allegedly negligent conduct occurred during the exercise of governmental, as opposed to medical discretion. Failing to conclusively establish such proof precludes application of the affirmative defense of official immunity. *Mussemann*

v. Villarreal, 178 S.W.3d 319 (Tex. App. - Houston [14th], 2005, pet. denied).

Nurses seeking dismissal under 101.106, Texas Civil Practice and Remedies Code must show that plaintiffs "could have sued" the tort claims hospital for which the defendant nurses worked. Absent proof that plaintiff could have sued the employer, the nurses were not entitled to dismissal under 101.106(f). *Lanphier v. Avis*, ___ S.W.3d ____, 2008 WL 89755 (Tex. App. – Texarkana, 2008 n.p.h.).

Similarly, in *Hall v. Provost*, 232 S.W.3d 926 (Tex. App. – Dallas 2007 n.p.h.), Plaintiff's allegations against the physician were "simply medical malpractice claims and are not encompassed by the Texas Tort Claims Act limited waiver of sovereign immunity." "She has not alleged her injury was caused by a condition or use of tangible or real property." Likewise, Dr. Provost has not provided any evidence that a condition or use of any tangible property by a governmental unit caused the injury for which plaintiff sued. Therefore, since defendant doctor Provost did not show that plaintiff could have sued the hospital, the dismissal of Dr. Provost was improper, even though he did successfully prove both that he was an employee of the tort claims hospital and that he was acting within the course and scope of his employment. The same result was reached for the same reasons in *Turner v. Zellers*, in which the trial court erred in dismissing claim against the physician. *Turner v. Zellers*, 232 S.W. 3d 414 (Tex. App. – Dallas 2007 n.p.h.).

The 2003 Legislature in a complicated "election of remedies" section, applicable to claims filed after September 1, 2003, barred suit against both the governmental employee and the governmental unit. Suit against one is an irrevocable election that forever bars recovery against the other. Tex. Civ. Prac. & Rem. Code Ann. 6101.106(a), (b).

Further, settlement of any claim under the Tort Claims Act with an employee bars judgment or recovery from the governmental unit. Tex. Civ. Prac. & Rem Code Ann. 6101.106(d).

If the employee is sued, upon motion requesting dismissal, the Court "must" grant the dismissal. Tex. Civ. Prac. & Rem. Code Ann. 6101.106(e).

Thus, physician employees of tort claims entities are now provided with very broad new protections.

In *Villasan v. O'Rourke*, 166 S.W.3d 752, (Tex. App – Beaumont, 2005, pet. filed), the Court makes clear that Plaintiff has little choice in this area. In *Villasan*, the plaintiffs initially sued both a Tort Claims hospital and an individual physician employee of that entity. Thereafter, they non-suited the hospital and sought to proceed only against the physician, who filed a motion to dismiss under Section 101.106(e), which was granted. In the interim, the statute of limitations against the entity had run, so plaintiffs found themselves out of court. The Court is clear in its interpretation of the statute: the Legislature meant to "encumber" plaintiffs' ability to pursue the alternative theories that either the governmental employee was acting within the course and scope of his/her duties (and thus the entity is responsible for the employee's actions), or the employee was acting outside the scope of those responsibilities, and is thus individually liable. In effect, Section 101.106 bars this approach, and forces the irrevocable election to be made at the time of filing of suit.

The O'Rourkes request that we construe the statute to allow TTCA claimants two elections to determine against whom to proceed. We consider their request in light of the enactment of a comprehensive statute wherein the Legislature specifically dealt with each possible option regarding the parties to a TTCA suit: (1) when suit is filed against the governmental unit, suit or recovery against the individual employee regarding the same subject matter is barred by Code section 101.106(a); (2) when suit is filed against the government employee, suit or recovery by the plaintiff against the governmental unit regarding the same subject matter is barred absent consent of the governmental unit by Code section 101.106(b); and (3) when suit is filed against both employee and governmental unit, suit against the employee shall immediately be dismissed on the governmental unit's filing of a motion to dismiss under Code section 101.106(e). Under this statute, when TTCA claimants elect to include the governmental unit as a party to a suit, whether alone or in conjunction with a governmental employee, TTCA claimants have made an election of remedies that they will look solely to the governmental unit for compensation for injury. *Villasan*, *supra*.

Note that if a suit is dismissed against the governmental entity on summary judgment finding governmental immunity, that judgment against the entity precludes suit against the employee. *Hathaway v. Wichita Falls State Hospital*, 2004 WL 1416279 (Tex. App. – Tyler, 2004, no pet) (**not designated for publication**). *Fiske v. Heller*, 2004 WL 1404100 (Tex. App. – Austin, 2004, no pet.) (**not designated for publication**). Importantly, in a case in which the physician was dismissed under the mandatory substitution clause, and plaintiff amended his pleadings to add the defendant entity, the pleading was allowed to relate back to defeat the hospital's statute of limitations defense. The hospital was not misled or disadvantaged by the substitution, and the amendment to the pleadings was not based on new, distinct, or different transactions. *Bailey v. University of Texas Health Science Center at San Antonio*, ___ S.W. 3d ___, 2008 WL 1733230 (Tex. App. – San Antonio 2008, n.p.h.).

II. THE STATE OF HEALTH CARE IN TEXAS IN 2008; BENEFITS OF HB4 AND PROP. 12?

The primary impetus for drastic changes to medical malpractice law proposed in 2003 was a so-called medical liability "crisis." The alliance of insurance executives, hospital administrators, and tort reformers threatened Texans with a mass exodus of physicians, diminished access to care,

increasing liability coverage rates and unavailable health insurance coverage. If HB 4 was passed and Proposition 12 approved, they promised an influx of physicians who would serve rural and stressed communities, decreased liability premiums, and available, affordable health coverage for Texans.

One of the primary challenges in determining any causal effect HB 4 or Prop 12 had on such metrics is understanding the true conditions which existed before changes in the law were passed. Barriers to prosecuting lawsuits or capping recoveries are supposedly efforts to reduce litigation and its exposure. The primary claims of "crisis" were of increasing claim numbers and increasing payouts. However, in 2005, legal scholars from three major universities, including Professors Silver and Black from the University of Texas, found that the number of large medical liability payments (over $25,000) in Texas were stable between 1991 through 2002, while the number of small claims dropped significantly. Bernard S. Black, Charles M. Silver, David A. Hyman and William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, Univeristy of Texas Law & Economics Research Paper No. 30; Columbia Law & Economy Research Paper No. 270; University of Illinois Law & Economics Research Paper No. LE05-002, March 2005. Additionally, the number of claims per 100 Texas doctors fell 28.12% (from 6.4 to 4.6) between 1990 and 2002. *Id.* Thus, correlation of the "before" and "after" should be based on something more than a threat, a promise, and a new landscape.

Were doctors leaving?

Statistics from the Texas Medical Board (TMB), show that since 1997 Texas has seen a steady *increase* in the number of doctors licensed to practice medicine. Between 1997 and 2003, Texas had an average annual rate of increase in medical licensees of 3.5%. Not only was there not a decrease in the number of doctors obtaining licenses, but there was a dramatic jump in the rate of new licensees the year *before* Proposition 12 was debated and passed. In 2002, the rate of increase jumped to 5.11% – well above the average rate of annual growth.

Proponents of HB 4 offer absolute numbers from TMB showing an increase of 8,391 licensed physicians from 1999 to 2003, compared to 10,878 from 2004 to 2007. *See* "A Texas Turnaround," Texans for Lawsuit Reform Foundation, Whitepaper, April 2008. But when measured by ratios of annual growth, those absolute numbers are consistent with growth experienced *before HB4 was passed.* When it comes to whether those increases represent physicians actually treating patients, the data is even less compelling. The Texas Department of Health reports that in 2006, Texas gained only 639 direct care physicians – those actually practicing medicine. This is an increase of just 1.8%, slower than it was pre-Proposition 12. *See* Charles Silver, *Did Texas Lose Physicians in 2006? Is Tort Reform to Blame?*, TORTDEFORM.COM, November 30, 2006.

Additionally, what kinds of physicians respond to a call to practice where there is no accountability – the best or the worst? There is anecdotal evidence of physicians with long claims histories and the inability to obtain licenses in other states as those responding to the siren call of caps on patient recoveries. *See* Cheryl W. Thompson, *Doctor Formerly in Va. Applies for Tex License*, WASHINGTON POST, July 15, 2005.

Is there increased medical availability?

The promise of service in underserved regions was made repeatedly. But analysis of medical service in underrepresented areas requires examination of regional data, not statewide absolute numbers. The absolute increases continue to be found in metropolitan, well served areas (where the typical quality of life concerns of well educated professional are fulfilled). When we look at particular regions of the state, we see that underserved areas remain underserved. In 2006 – three years after Proposition 12's enactment – rural, remote, and indigent parts of our state continue to struggle with rates of physician growth far below the statewide average of 3.54% over the last decade. Rural West Texas has actually experienced negative growth.

According to data from the TMB and TDH, the underserved regions in our state saw *lower* average growth in the rate of new doctors in the three years since Proposition 12 passed (2004–2006), than in the three years before (2001–2003). See Table 1.

During the debate on Proposition 12, proponents of the measure also bemoaned the lack of specialists – especially obstetricians – in counties all across Texas. In fact, they noted that 60% of Texas counties did not have a practicing obstetrician. According to TMB statistics, 152 of Texas' 254 counties (59.8%) did not have an obstetrician in May 2003. Unfortunately, that trend persists. Sadly, fewer Texas counties have an obstetrician today than before Proposition 12. By September 2007, 156 counties (or 61.4%) reported no obstetrician licensed to practice in their county. *See www.tmb.state.tx.us*

Did medical malpractice insurance premiums decrease?

Correlation between a cap on non-economic damages and insurance premiums always seemed tenuous at best. By the insurance industry's own admission, non-economic damages are only a small percentage of total losses paid. *See* The Medical Protective rate filing to the Texas Department of Insurance, October 30, 2003, posted at *http://www.consumerwatchdog.org/malpractice/rp/2059.pdf.* In the four years preceding the debates of 2003, insurance companies increased premiums on doctors as much as 147.6%. *See* Texas Department of Insurance, *Medical Malpractice Insurance: Overview and Discussion (Table 1: Estimated Physician and Surgeon Medical Malpractice Rate Changes)*, February 12, 2003.

Correlation of rate reductions and civil

Table 1: Average Rate of Change in Number of Doctors in Rural and Underserved Regions of Texas

REGION	2001–2003 (Pre-Proposition 12)	2004–2006 (Post-Proposition 12)
Panhandle and South Plains	3.23%	1.00%
North Texas (exc. DFW area)	2.17%	0.73%
Northeast Texas	3.92%	1.67%
Deep East & Southeast Texas	3.00%	1.11%
Rural West Texas	2.57%	-0.67%
South Texas	3.56%	2.86%

law changes becomes more opaque when examining the immediate experience after HB 4. In the period just after Proposition 12 passed, insurance companies refused to reduce their premiums and many of the major carriers sought rate increases:

> The Medical Protective, the nation's largest medical liability insurance provider, asked for a 19% rate increase one month after Proposition 12 passed. In its filing to Texas insurance regulators, the company stated: "Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0%." *Supra.*
>
> The Medical Liability Insurance Association (JUA), which covers 12.3% of Texas doctors, asked for a 35.2% rate increase immediately after Proposition 12's passage. *See* JUA rate filing to the Texas Department of Insurance, October 2003.
>
> American Physicians Insurance Exchange, the state's third largest medical malpractice insurance company with 15.0%, requested a 16.6% rate increase in September 2003. *See* American Physicians Insurance Exchange rate filing to the Texas Department of Insurance, September 2003.

Through March 2006, medical liability premiums fell just 13.5% market wide. *See* Texas Department of Insurance, *Texas Medical Professional Liability: Physicians, Surgeons and Osteopaths (chart)*, March 15, 2006. Preferred Professional Insurance Company actually increased its premiums 33.5% in the 3 1/2 years after the passage of HB 4. *Id.* Every business should be so lucky to raise its prices almost 150%, then decrease prices 15% in the same time interval and proclaim "New Low Prices!" Nor does this reduction represent an "apples to apples" comparison. While absolute premium costs have generally been reduced in the past 5 years, coverage has likewise been reduced. No data establishes any reduction in the ratio of coverage to premium cost. Reducing premiums 10% while reducing coverage 40% is not a reduction – it is an insurance company utilizing legislative power to liquidate its exposure and offering nothing real in return.

Lastly, the challenge of any fair correlation between malpractice premiums and civil justice changes in Texas demands that data from Texas Medical Liability Trust (TMLT) be analyzed for the years preceding and following HB 4. Unfortunately, this data is not available. According to its website, TMLT insures over 14,000 Texas physicians. However, TMLT is a unique insuring entity, a trust created by statute. It is not subject to regulation by TDI nor does it file the rate and claims data discoverable from other insurers.

Reduced care costs resulting in health insurance for more Texans?

Statistics have historically established that liability premiums constitute less than 1 cent of a dollar spent on health care. Nonetheless, health care cost inflation over the past 5 years has been 75% more than the inflation rate for all items in the CPI. *See http://www.cdc.gov/nchs/data/hus/hus07.pdf#122.* Since 2003, neither national nor Texas experience supports any correlation between reducing cost of malpractice premiums and a tapping on the brakes to slow health care cost inflation. The objective data show that health care in Texas continues to have cost increases consistent with the national inflationary experience.

Access of Texans to care is more directly tied to the ability of patients to get health insurance than costs. Here, Texas experience is inconsistent with the national averages. According to both the Texas Department of Insurance and Texas Medical Association, 25% of all Texans do not have access to health insurance, constituting well over 5.5 million Texans without health insurance. *See* Texas Department of Insurance, *Biennial Report of the Texas Department of Insurance to the 80th Legislature*, December 2006, *http://www.tdi.state.tx.us/reports/documents/finalbie07.pdf*; Texas Medical Association, Report on the Uninsured in Texas, *http://www.texmed.org/Template.aspx?id=5517.*

Unfortunately, nothing done in 2003 has reversed Texas' dismal record on this metric. Despite claims that Texans would have greater access to health care, Texas continues to have the highest rate of uninsured adults among the 20 largest states. While some data could have argued Texas was 49th in the nation for access to health care in 2003, in 2008 it is now undisputed – we are dead last. *See, e.g.,* Katherine Shea, U.S. Variations in Child Health System Performance, A State Scorecard (Appendix, Table 1.1), The Commonwealth Fund, Vol. 94, May 2008.

Perhaps this new distinction is directly attributable to HB 4?

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Should Education and Training Be Required Prior to Being Vested with the Title "Paralegal"?

By James D. Scheffer

It is a debate that ensues within the occupational field, the national paralegal organizations, and all areas of employment of paralegals. It has been my personal position at times, and expressed often by others, that "If an individual has experience and/or certification, they don't need formal education and should be exempt." While there is merit to this position, at what point do exemptions from formal education expire? How long should paralegal organizations continue to perpetuate exemptions while promoting education as a hallmark of professionalism? Grandfather-type clauses are usually put in place to allow those already in a profession time to achieve new standards or complete their careers prior to full implementation. The paralegal profession has, by conservative calculations, surpassed the 30 year mark and practically all paralegal organizations maintain a clause that allows for exemption from formal education for membership.

Review of Occupational Outlook Statistics published by the U.S. Department of Labor reveals that the "Paralegals and Legal Assistants" occupation is firmly established and is "projected to grow 22 percent between 2006 and 2016, much faster than the average for all occupations." How is such growth to be managed? From where should the new paralegal come? On the job training, formal education, or a combination of both — what should the standard be? Who should train these paralegals and according to which criteria? Should paralegal organizations develop and recommend standards or should they rely upon institutions of higher learning? Pioneers, like the membership of the Paralegal Division of the State Bar have led and provided clear vision and leadership throughout the years. However, the profession is reaching a point of full maturity. The time has come for guidance in the area of training and education in order to receive proper recognition from institutions of higher learning and the working world. This recognition can only come through education and training that clarifies who is and who is not a paralegal.

Standards for education and training will allow career schools and institutions of higher learning to design coursework ***based on input from those practicing in the profession*** so they may better prepare paralegals to meet future employer demands. Currently there is no true academic model for paralegal training so attempts are made to fit training into historical academic models. Does paralegal education belong within the school of business, political science, criminal justice or should there be a discipline specifically dedicated to paralegals just as there is with nurses, educators, counselors, and other skill based occupations? Development of education standards supported by paralegals is the first step to finding paralegal education's proper place in the world of academia because consulting paralegal organizations is usually the first step most take in learning how to become or train paralegals. Standardized education may also facilitate the promotion and development of new ideas and concepts, while refining knowledge, skills, and abilities expected from paralegals. Standard credentials for those who train paralegals could also be developed.

To date, many paralegal organizations have not developed and/or recommended specific standards for education and the result has been the proliferation of programs all over the map with various criteria that may confuse those contemplating entering the profession as well as those hiring paralegals. Paralegal training programs are housed within career schools, community colleges, four year universities, and continuing education programs. Proof of completion of a paralegal program comes in just as many varieties, to include Certificates with no other educational criteria, Associate of Applied Science Degrees, Bachelor Degrees, Certificates for College graduates, and even Master Degree programs. How does a prospective student, employer, or even a professional paralegal organization offering a path to certification decide which credentials are legitimate and/or preferred? Clear guidance is needed and desired.

The American Bar Association and American Association for Paralegal Education have set substantial standards which are acceptable for membership in most of the paralegal associations.

Basic American Bar Association Guidelines require a paralegal program of education to be:

- At the postsecondary level of instruction;
- At least sixty semester hours, or equivalent, which must include general education and legal specialty courses; and
- Offered by an institution accredited by an institution accrediting agency acceptable to the committee.

The American Association for Paralegal Education advises that paralegal education programs should be able to demonstrate that their graduates possess:

- Critical Thinking Skills
- Organizational Skills
- General Communication Skills
- Legal Research Skills
- Legal Writing Skills
- Interviewing and Investigation Skills
- The Paralegal Profession & Ethical Obligations
- Law Office Management Skills

The guidance above is solid and appears to be industry standard. However, such standards are only embraced as long as they are recognized by the professionals within the paralegal occupation. The paralegal career field is on the cusp of full maturity and may only reach a full level of respect, full understanding of what a paralegal is versus what it is not, and proper place within the academic setting when clear standards are set as they are in other professions.

What is a profession? According to Encarta, it is "an occupation that requires extensive education or specialized training." Competent paralegals require extensive education and specialized training; therefore, education and training should be required prior to being vested with the title paralegal.

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E-Discovery and Information Management First Steps

Identifying and Preserving Potentially Relevant Electronic Information

By Laurie A. Weiss

The initial days after learning of an anticipated litigation matter or investigation can pose challenges and present potential risks. Often with tight time constraints and minimal information, companies and their counsel must take steps to understand the issues, identify and preserve sources of electronically stored information (ESI), and protect the company from inadvertent destruction of relevant information. The checklist of considerations below is intended to serve as a quick reference guide for companies and their counsel. The precise steps taken will vary depending on the nature of the matter, the issues presented, and the company's resources, practices and technology infrastructure. Many companies are taking steps to put response plans in place *before* becoming the target of a major litigation matter or a government investigation. An effective response plan, one that considers the issues identified below and is implemented quickly when litigation or an investigation is reasonably anticipated, can have a substantial impact on the ultimate outcome.

UNDERSTAND SCOPE OF LITIGATION AND COMMUNICATE WITH COMPANY REPRESENTATIVES.

Review complaint, summons, subpoena, formal notice, or other available documentation.

Communicate nature of the litigation and obligations to corporate representatives from legal, information technology ("IT"), risk management, records management, human resources and/or other departments.

CONSIDER USE OF OUTSIDE EXPERT.

Consider whether an outside consultant is advisable for identification and preservation of potentially relevant information, including electronically stored information ("ESI").

If so, identify and retain the outside expert, and include the outside expert in developing and implementing the data identification and preservation plan.

IDENTIFY SOURCES OF POTENTIALLY RELEVANT ESI.

Identify key employees and third parties most likely to have potentially relevant data.

Interview IT representatives and other employees to determine what relevant information is stored on network email and non-email accounts, personal computer, laptops, databases, applicable web sites, outsourced locations, etc. Gain an understanding of Company's IT environment and infrastructure.

Determine whether potentially relevant information may be within the individual employee's control, such as on personal digital assistants, flash drives, personal email accounts, personal cell phones, etc.

TAKE INITIAL STEPS TO PRESERVE ACTIVE ESI.

Preservation Notice to Employees and Third Parties.

Issue a written Preservation Notice to employees who may possess potentially relevant material, and remember that the Notice may be discoverable. Include records manager/coordinators and IT representatives. Diary for Reminder Notices at appropriate intervals.

Identify types of materials, including paper documents and ESI, to be retained and the employees who may possess such materials. Also, identify the relevant time frame to which the preservation obligation applies.

Consider third parties who may possess documents and ESI under the Company's

control and whether they should receive the Notice or a letter requesting preservation.

Consider having recipients of the Preservation Notice acknowledge their receipt and understanding of the memorandum, and track such acknowledgements.

Develop a plan to reissue the Preservation Notice periodically and to reevaluate the scope for necessary alterations and expansion as more information about the litigation becomes available.

Routine Disposal Practices.
For key players, suspend routine data disposal practices, such as email auto-delete processes, if possible within the information infrastructure.

Suspend the disposition of relevant records under the retention schedule.

How to Preserve Various Data Sources.
Consider whether litigation risks and Company resources justify creating a forensically sound copy or mirror image of network email accounts and network directories of employees likely to have responsive documents. Segregate and preserve any copies made in a secure repository. If employees' network accounts and directories are not imaged, develop an alternative preservation plan for network data sources. Balance data privacy concerns against the need to preserve relevant information quickly.

Consider creating a forensically sound copy or mirror image of the hard drives of key players' desktops or laptops. Determine appropriate timetable for copying data, and segregate and preserve any copies made in a secure repository. If key players' hard drives are not imaged, consider alternative means of preserving relevant information and develop an alternative preservation plan. Again, balance data privacy concerns against the need to preserve relevant information quickly.

Determine whether potentially relevant data may exist in databases, such as a document a management system, and whether that data may be subject to modification or deletion. Develop a plan to preserve unaltered data, which may include "locking" documents to prevent inadvertent alteration or deletion.

DEVELOP PLAN FOR NOT REASONABLY ACCESSIBLE ESI, INCLUDING BACKUP TAPES AND LEGACY DATA.

Investigate Company's archival and backup practices and existence of potentially relevant legacy data.

Consider whether to continue normal recycling of backup tapes or identify specific backup tape(s) to be withdrawn form the normal rotation cycle and preserved for the duration of the litigation or until an agreement can be reached between the parties.

CONSIDER DATA OF TRANSFERRING AND DEPARTING EMPLOYEES.

Develop a procedure for preserving data of transferring and departing employees who may possess potentially relevant information.

Image hard drives before redeployment or preserve the original hard drive for the duration of the litigation.

NEGOTIATE ISSUES WITH OPPOSING COUNSEL AS SOON AS POSSIBLE.

Develop and discuss a reasonable plan for preservation with opposing counsel as early as possible.

The Meet and Confer process can be an effective tool to limit scope of discovery and drive desired results.

If an agreement cannot be reached, consider motion practice to request a protective order from the court. Volume drives the cost of electronic discovery, and a strategic focus on reducing volume as early as possible, while meeting discovery obligations, can reduce costs.

DOCUMENT STEPS TAKEN TO PRESERVE POTENTIALLY RELEVANT MATERIAL.

Document actions taken and reasons for those actions, in preparation to explain and answer questions about the preservation process.

Contemporaneous documentation of rationale for decisions may help demonstrate that reasonable efforts were made in good faith.

Laurie A. Weiss is a partner in Fulbright & Jaworski L.L.P.'s San Antonio office.

Enterprise Content Management

Providing Cost Efficiency to the Electronic Discovery Process

By Julie Wade

The whole world is in economic turmoil, perhaps the worst global depression ever recorded. There were about 1,400 legal jobs lost during the last week of January alone. During these times, we will see more lawsuits filed as contracts go south and employees are laid off. There will be more shareholder derivative suits, more lawsuits seeking injunctive relief and restraining orders, and we will witness a new cause of action created in order to recover damages as a result of the sub-prime-rating agency-collateralized debt obligation-derivatives-securitization meltdown. A bona-fide lawsuit feeding frenzy is on the horizon.

For these reasons, inhouse counsel are now hard-pressed due to their devalued stock prices and marching orders to reign-in the costs of litigation. Electronic Discovery is one of the most expensive cost components that parties to litigation are required to incur. KPMG estimates that first level document review encompasses anywhere between 58% and 90% of the total litigation costs. (*See "Cutting to the Document Review Chase," American Bar Association Newsletter, Business Law Today, Vol. 18, No. 2, Nov.-Dec. 2008*).

But it doesn't have to be this expensive, and it shouldn't be. Despite the vendor's assertions today that the attorney review time is causing all the weight, if you drill down into KPMG's study, you will find that the costs for "processing" native files into TIFs needed for loading into review software on the market today is in fact the cause of most of the costs. That is why paralegals will start seeing their firm's clients wanting to utilize their own enterprise content management (ECM) solutions to bridge the gap between their own records libraries with their electronic discovery compliance requirements during litigation.

To understand why an ECM solution will lower e-Discovery costs, let's look at the why's and wherefore's behind the e-Discovery process, and address how using the client's ECM system will facilitate native document reviews and productions in a secured, cost-controlled environment, thereby reducing a significant portion of out-of-pocket costs incurred for discovery.

Preparing a Case for e-Discovery

Litigation is a contentious proposition. You have a lawsuit. There are issues of standing, venue and jurisdiction to consider in addition to the four corners of the case. Once these issues are fleshed out and a lawsuit is filed, the corporate defendants are notified through service of process and generally have 20 days to employ an attorney and file an answer or response to the allegations asserted against them.

In federal court actions, the attorneys will have to meet and confer with opposing counsel within 99 days of service of the complaint to address plans for the management of the litigation including discovery issues relating to electronically stored information (ESI). During this first 99 days after service of the lawsuit, the attorneys and their paralegals should, among other things:

- initiate, implement and manage a proper litigation hold;
- establish and meet with the client's Discovery Response Team (DRT) and establish protocols for the collection and review of the client's ESI;
- establish the paralegal as the single point of contact between counsel and the DRT to coordinate and manage the collection, review and production;
- know their client's computer systems and storage methodologies and cycles;
- create or be provided with a data-map of same,
- identify key players and custodians relevant to the issues of the lawsuit;
- cull and sample documents from the key custodians' computers or records libraries;
- interview the key custodians and witnesses;
- identify a corporate representative of the client for testifying and meet with same;
- consider and draft proposed key word search terms to initiate on the collection of their client's ESI and search terms to impose on the other party's collections;
- sample the key custodians data sets with the proposed search terms and annotate the results, refine and do again as necessary;
- consider and draft first discovery requests to opposing parties and co-defendants;
- consider and identify review tool platforms, search methodologies and vet ESI vendor partners if necessary; and
- prepare a training methodology for the document review team.

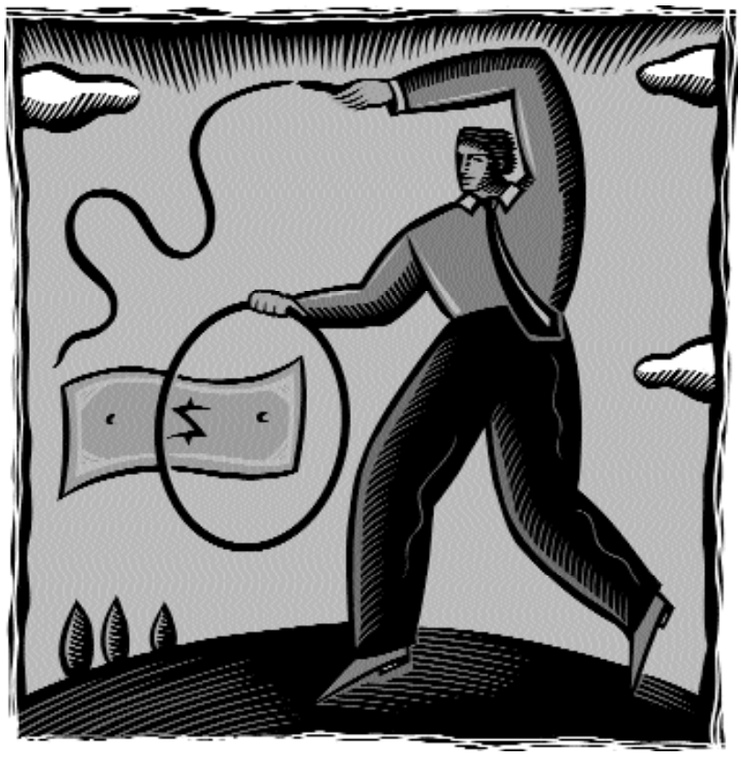
All of these tasks are all performed *pre*-collection. Once the data is collected, life gets much busier.

Collection Methods & Technologies

There is nothing more ubiquitous than electronic files. Massive quantities, terabytes and petabytes, of ESI are being collected for the review process. It is a large and costly proposition.

There are a myriad of operating systems, software applications and utilities available to facilitate the organization and law firm in culling down the amount of e-Discovery required for the first pass review. Some of these technologies are promising, such as robust review tools that

offer clustering analysis and data mining and provide for efficient high level filtering and foldering of data. None of which, by the way, have been tested in court. You should know that.



But more frightening to me is the fact that our current 'best practices' model takes an electronic file and strips it of all its properties, data and metadata and then "attempts" to shove it back together again in separate text files for loading into a flat and obsolete database architecture that was never designed to house massive amounts of electronic files. I say 'attempts to put it back together' because this method consistently fails by delivering high error rates. Indeed, research of the very best OCR software available on the market today indicates that these error rates are reflected at "8 errors per 2,000 character page." (*See http://www.ocrdoc.com/why_primeocr.htm.*)

Therefore, our best practice system of utilizing OCR in this manner to recreate data and metadata after extraction is one fraught with errors that have been clearly documented as being as high as 50% during document reviews. (*See id: "Cutting to the Document Review Chase," American Bar Association Newsletter, Business Law Today, Vol. 18, No. 2, Nov.-Dec. 2008*).

This system of "processing" ESI has assailed itself into our legal system. We must find a replacement because the courts are mandating today that we demonstrate a legally defensible and repeatable methodology for producing electronic discovery.

The Answers

What are the answers? First, the courts want cooperation between the parties during the discovery process. *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008). No more tanking opposing counsel with dubious search terms during the meet and confer to throw them off track. Judge Grimm wants to ensure you aid opposing counsel or he will sanction you. (Does this mean that you should just provide user logins and passwords to your client's networks to the opposing counsel? Not yet.)

Aside from the sampling protocols suggested in established electronic case law (*Zubulake III*), other recent case law suggests expert analysis of our search terms and sampling as means of assisting the requestor in obtaining additional discovery. *Ross v. Abercrombie & Fitch Co.*, 2008 U.S. Dist. LEXIS 87039 (S.D. Ohio Oct. 27, 2008).

Personally, I think the sanctions being imposed by the courts are real, but I also believe that proper use of data maps, interviews of the key custodians, and management of the overall review process would go a long way to alleviate the wrong turns. But clearly, cooperation is indicative of the day.

ECM Solutions

Our clients, themselves, are providing us with the solutions to our e-Discovery problems by their adoption of ECM systems. Whether your client uses SharePoint or an open source ECM solution, bridging these ECM document management systems with e-Discovery review and production will take us in the right direction in the future.

That is because ECM incorporates the organization's structured and unstructured data into records repositories or libraries. This includes all documents, e-mails, images, voice data, and all other content that is received, including faxes and incoming correspondence that are scanned and digitized. The error rates of utilizing OCR in this manner are greatly reduced because only a small fraction of the total corporate content is being digitized, and that content can be controlled through the use of spell checking software and proofreading for accuracy which will greatly reduce or eliminate the errors we are seeing in the review process.

But the main upside to an organization for implementing an ECM solution is that they are able to control their corporate data in a safe environment.[1] Through add-ons, all "touches" to a file are known. This greatly facilitates security and versioning control. Entire groups or segments within the organization can be managed singularly from an administration console.[2] Also, IT loves ECM[3]. And, metadata, corporate taxonomies, retention policies, and litigation holds are easily managed with ECM.[4] Also, when litigation occurs, companies utilizing ECM are now are in a much better position to institute holds, either throughout the entire organization or on a drilled down basis directly to individual operating units and custodians from the administrator's dashboard.[5]

Out of the box, Microsoft Search Server 2008 Express also allows organizations

to search across all their exchange servers, archives, SharePoint servers and websites – *simultaneously*.[6] This feature in itself makes the process worthwhile to smaller organizations who do not have SQL Server 2007. These companies will then also be in a much better position financially to respond to discovery requests during litigation as the larger organizations. Companies utilizing ECM solutions can seamlessly index and migrate relevant libraries and custodian data for privilege and relevancy reviews, behind their own firewalls, onto SharePoint sites for outside counsel's use. None of their data leaves their control. They no longer have their documents strewn across 58,000 different copy shops on any given Sunday. Their outside counsel are provided with secured SharePoint sites, or the data can easily be migrated to counsel's extranets for the reviews.

ECM data is crawled, indexed and migrated to SharePoint sites or extra-nets for use with third-party native review applications such as Anacomp, Attenex, Clearwell, Fios, Kroll, to name a few. The data is not processed into TIF files, which eliminates these huge error rates and easily saves 1/2+ of the costs associated with electronic discovery today. That is huge. And a compelling reason for Fortune 500 companies to adopt their ECM systems with their litigation case management strategies.

AIIM, a non-profit organization that provides education, research, and best practices to help organizations find, control, and optimize their information, offers excellent certificate training programs in Enterprise Records Management, Email Management, Search/Information Organization & Access, among other disciplines (*www.aiim.org*). I highly recommend that you join AIIM ($125 for a professional membership) and at least have access to all the whitepapers that will help you understand corporate information governance.

In the meantime, ask your clients if they have an ECM solution. If they do, work with them to migrate their documents to a SharePoint site or your firm's extranet for privilege and relevancy review. Watch for vendors to release new review applications that will work in conjunction with SharePoint.

Julie Wade is a Litigation Paralegal and Certified Electronic Discovery Specialist in Houston, Texas.

[1] *http://technet.microsoft.com/en-us/magazine/2007.01.security.aspx, http://www.scriptlogic.com/products/security-explorer/sharepoint/*; and *http://www.sharepointsecurity.com/content-198.html.*
[2] *http://www.avepoint.com/products/sharepoint-administration/sharepoint-administrator*
[3] *http://cglessner.blogspot.com/2009/01/self-awareness-with-twitter.html*; and *http://blogs.nuxeo.com/sections/blogs/thibaut-soulcie/2008_06_04_ecm-love-ecm-sites-ecm-web-features-and-ecm-usability.*
[4] *http://www.cadence-group.com/articles/taxonomy/backbone.htm*
[5] *http://www.avepoint.com/products/sharepoint-administration/sharepoint-administrator.*
[6] *http://weblog.infoworld.com/tcdaily/archives/2007/11/post.html.*

Multidistrict Litigation Is Not a Dirty Word

By Cynthia Minchillo, RP

WHAT IS MDL?

We have all heard the term "mass torts," but rarely do we understand the breadth of these cases. Usually if the topic arises up, our eyes roll to the back of our heads. Most mass tort cases conjure up visions of stacks of documents, horrible surroundings in which to review the documents, and hordes of people claiming a critical illness from asbestos. MDL or *Multi-District Litigation* has shaped mass torts, but is by no means meant only for personal injury. MDL can involve intellectual property, contracts, securities, and employment cases. This article will provide you with the basics of MDL practice including why it exists today, how to find the information you need, and the importance of the paralegal in these types of cases. Although not the most riveting of topics, it is a good idea to have some knowledge of MDL no matter what area of law you work in.

We all know that a tort is a civil wrong. Mass tort cases usually involve one or more Defendants that commit a civil wrong against numerous alleged victims. For this article, I will concentrate on cases against manufacturers of products such as Dow breast implants, Ortho Evra birth control patches, Vioxx, Fen-phen, Medtronic implantable cardioverter-defibrillators (ICD's), Ford Explorers, and Firestone tires.

When a law firm decides to accept clients involved in these cases, whether it is for the Plaintiff or the Defendant, and whether you have one client or 3,000, the firm will most likely encounter an MDL designated court. Here is a simplified example of what happens: Your firm decides to take on the manufacturer of a new prescription drug that has allegedly caused serious debilitating side effects. Your firm files an individual lawsuit on behalf of each one of your ten Plaintiffs in State court. Now you have ten individual lawsuits pending, and you move forward with citation and service of the Defendant.

The law firm down the street is hired to represent the Defendant, who is the manufacturer of the new prescription drug. Once they are served, they immediately file a Notice of Removal in all ten cases. Upon removal of all your cases to Federal court,

your attorney and you quickly work on a Motion for Remand. I say quickly, because it is like being hit upside the head by a board. Once the Clerk reviews the Notice of Removal, and recognizes the cases being similar to 300 other cases that have now been tagged and removed to a newly created MDL, the Clerk issues a letter to the Judicial Panel on Multi-District Litigation in Washington, D.C. notifying the panel of the ten new cases pending in Federal court. It is the next piece of mail that you get when you realize your cases are about to get transferred to yet another Federal court assigned to a specific MDL. Now the board you were hit with is giving you a headache. What do you do?

MDL BASICS:

First, try not to panic. It can be a sticky situation because like all courts, especially Federal courts, the Panel has its own set of local rules. It is imperative that the legal team work together to get acquainted with the process as quickly as possible. The role of the paralegal in this type of litigation is critical to the proper management of cases. Main points of information for a legal team's journey through the MDL are as follows:

- Keep all correspondence from the Judicial Panel on Multi-district Litigation ("JPMDL")
  http://www.jpml.uscourts.gov/
- Calendar all deadlines for the Motion for Remand and from MDL Panel. The transfer will be stayed for a short time period in which you will have the opportunity to oppose the transfer. In the meantime, any remand efforts will also be continuing and will not be stayed. Other deadlines will be for your Opposition, Corporate Disclosure, Plaintiff Profile Form, etc.
- Review the local rules of the MDL Panel
  http://www.jpml.uscourts.gov/Rules___Procedures/rules___procedures.html
- Review all case management orders and procedures to determine how cases are distributed and transferred
- Locate transferee courts
- Locate liaison counsel (if designated at the time of transfer-usually imbedded in an order)
- Determine what forms will be used for discovery in this litigation, i.e. Plaintiff Profile Form or Corporate Disclosure.
- Determine how documents are filed and maintained in the litigation, i.e. Lexis / Nexis File and Serve utilized by many MDL courts

MDL TERMINOLOGY:

Different areas of the law have their own set of terminology and MDL is no exception. These definitions should help understand the MDL basics previously listed and answer many questions or at least get you headed in the right direction for the answers.

JPML: Judicial Panel on Multidistrict Litigation, more commonly referred to as "MDL" or the "Panel." Congress created the Panel in 1968 by statute at 28 USC 6 1407. Section 1407 was created to determine whether civil actions pending in differ-

COURT	DEADLINE	ACTION
State/County	SOL	Plaintiff files Original Petition
State/County	w/in 30 days of filing Petition	Notice of Removal to Federal Court by a Defendant (civil cover sheet identifies type of case)
Federal	During the pendency of the case	Clerk issues letter to the Clerk of the Panel on Multidistrict Litigation advising that a case involving "Ortho Evra" has been filed in their court and is a potential "tag-along action" to other "Ortho Evra" cases.
Federal	w/in 30 days of removal	Plaintiff files Motion for Remand back to State Court (Reply Briefs, etc. continue to be filed pursuant to Federal and local Rules of the Removal Court)
MDL	Upon knowledge of the potential "tag-along" case by the Clerk.	Panel on Multidistrict Litigation issues a Conditional Transfer Order listing your "Ortho Evra" case as a potential tag-along action that should be included in the other cases now pending in Federal Court overseeing discovery in "Ortho Evra" MDL cases. *(JPMDL Rule 7.4(a))* (Most of the time this is done BEFORE there is a ruling on the Motion for Remand)
MDL	w/in 15 days of CTO	Any party opposing transfer to the MDL Federal Court must file a Notice of Opposition to the transfer. This is filed with the MDL Panel. **You have 15 days from the date of the CTO to file an Opposition to the Transfer. There is NO mailbox rule. The Opposition MUST be at the MDL Panel by the 15th day.** *(JPMDL Rule 5.2, service rule)* The MDL Panel will stay everything for 15 days regardless of whether an opposition is filed or not.
MDL	w/in 15 days of the Notice of Opposition	The party opposing transfer must file a Motion and Brief to Vacate the Conditional Transfer Order. The Chairman of the Panel will set the Motion for hearing. *(JPMDL Rule 7.4 (d))* **Failure to file a Motion and Brief are treated as withdrawal of the Opposition to transfer.**

ent federal districts involve one or more common questions of fact, and to select judges and courts assigned to conduct such proceedings so as to not duplicate discovery, pretrial rulings and to conserve resources of the parties. The Panel resides in Washington, D.C. and is made up of seven sitting Federal judges appointed by the Chief Justice of the United States Supreme Court with one Chairman, an executive attorney and a clerk. All of the Judges are from different districts.

Tag-Along Action: Any action that a Federal Court determines should be tagged and included in a specific MDL. (*JPML Rules 1.1 and 7.5)*

CTO: Conditional Transfer Order issued by the Panel. The Order explains the reason for the potential transfer. The Order includes a list of potential cases to be transferred and what Federal District the cases are currently pending. This Order also provides the attorneys with a designated time period in which to object to the transfer, usually only 15 days. *(JPML Rule 7.4)*

Show Cause Order: The Panel will issue a Show Cause Order "(a) When transfer of MDL is being considered on the initiative of the Panel pursuant to 28 U.S.C. 61407(c)(i). The parties are to show cause why the action or actions should not be transferred for coordinated or consolidated pretrial proceedings within twenty days of the filing of the order." *(JPML Rule 7.3)*

Removal Court: The Federal Court that the case was initially removed to by a party.

Transfer Order: The official order in response to a Motion by a party to create an MDL forum for conducting discovery and pretrial matters in cases that have common questions of fact. This order usually transfers the initial tagged cases and from there designates the Transferee court.

Transferee Court: The Federal Court that oversees a specific multidistrict litigation assigned to it, i.e. the U.S. District Court, Eastern District of Louisiana manages the Vioxx MDL.

Transferor Court: The Federal Court that the case was originally removed to. Upon receipt of a transfer order from the Transferee Court, the clerk of the Transferor Court will forward the complete original file to the Transferee Court. *(JPML Rule 1.6)*

Panel Service List: List containing the names and addresses of the designated attorneys and the parties represented in the action under consideration by the Panel. The Panel updates the list after each CTO is issued and as new cases are added. Everyone on this list usually gets a copy of the CTO's and other orders and/or actions of that Court.

MDL TIMELINE:

Next and most importantly, the timeline will help you calendar each step. If you miss your opportunity to file a Motion for Remand, the objection to the transfer to the MDL is critical.

FINDING CRITICAL MDL INFORMATION:

The Panel's website has grown up considerably in the last several years and offers most of the information you will need to get started, *http://www.jpml.uscourts.gov/*. The website contains not only the Panel and Clerk information, but also categorizes all of the cases. When looking for a specific pending MDL, or maybe just performing a cursory search of the pending MDL cases, you can scan the "Docket Information." From here, decide which category you want to search. Again, for the purposes of this paper, I have been using "Products Liability." Under "Products Liability", locate MDL-1657 In Re Vioxx Marketing, et al.

Here you find the correct caption, transferee Judge, the District, and the date of transfer. Additionally, there may be a link to the initial Transfer Order and the Court, but not always. It also shows whether you can locate documents on PACER.

MDL No.
MDL-1657

Litigation Caption
In re Vioxx Marketing, Sales Practices and Products Liability Litigation

Transferee Judge
Hon. Eldon E. Fallon

District
Eastern District of Louisiana

Litigation Transfer Date
02/16/05

Transfer Order
http://www.jpml.uscourts.gov/Pending_MDLs/Products_Liability/MDL-1657/MDL-1657-TransferOrder.pdf

Web Links
http://vioxx.laed.uscourts.gov

PACER/Image Access
PACER access; CM/ECF

Master Docket No.

After recovering from the first blow by a board across the head, your attorney may then ask you to locate some forms to continue your journey. Now that you can locate the Panel website and at least know where your case is headed, you can work on your objections and/or briefs. The Panel's website has a summary of the local rules and forms. You can find the following on the website:

- Checklist & Samples for filing a new MDL Motion to Transfer
- Checklist for filing a Notice of Opposition
- Sample Notice of Opposition
- Frequently asked questions

CASE MANAGEMENT ORDERS:

Now that you are in the MDL, you need to know how it is managed. In order to manage mass litigation in one court, like the Vioxx litigation in the Eastern District of Louisiana, there is always an initial case management order ("CMO"). As the litigation progresses, additional CMO's will be entered. In some litigation, there may be 20 or more CMO's depending on how the litigation is managed.

The first order of business for counsel and the MDL Court is to set up Liaison counsel for both plaintiffs and defendants.

Liaison counsel are usually nominated by other plaintiff and defense counsel involved in the litigation, and agree to take on a hefty responsibility both in terms of time and money. Usually identification of liaison counsel coincides with the setup of a Common Benefit Fund to help finance the expenses for management of the litigation. This may change over time, but generally, each firm or lawyer involved in the litigation pitches into the kitty to pay repository and e-filing expenses.

The CMO also sets parameters in which everyone will work including how to split the Common Benefit Fund, how documents are to be filed (i.e. electronically), document storage and retrieval, and how the litigation will be conducted in general. Many times, the CMO is issued upon edicts of the Liaison Counsel who have reported their agreements on how to conduct the litigation to the Judge. Of course, the Federal Rules of Civil Procedure and Evidence apply outside of any agreements or CMO's.

Usually when a case is transferred to the transferee court, counsel representing those tagged clients are sent an initial packet by the transferee court explaining court registration, filing, PACER, and much more. The names of liaison counsel and a list of all pending cases included in the MDL are usually provided as well. Because of backlogs and lack of support staff, this does not always happen, so it is imperative that a paralegal be assigned to these cases and gather the necessary information. PACER is a great tool for searching old CMO's in cases that you have just now been added too. This will give you a history of the MDL.

The CMO's will give you a relevant history of how the case progressed after initial formation of the MDL. This is important because there may be some special requirements to maintain your lawsuit like registering the attorney with the court; signing up for Lexis/Nexis File and Serve (free to sign up); and obtaining a PACER account. In most cases, your attorney will not need to be admitted to practice in the MDL court if he or she is in good standing with the Bar of any other U.S. District Court.

CONCLUSION:
There is so much more to MDL than meets the eye and which cannot be included in this article for space purposes. The main caution is to be sure you are aware of all the deadlines. Contact the clerk of the MDL Panel or court if you have questions, search PACER for previous orders, obtain help from liaison counsel, review local rules again and again, and make sure you have calendared all of your deadlines. The road through MDL can be full of potholes, but with some basics, you should be able to arrive at your destination with your vehicle in one piece.

Cynthia Minchillo, RP, Board Certified Paralegal-Personal Injury Trial Law, Texas Board of Legal Specialization, is the NFPA® ABA Approval Commission Representative.

Turning Obscure Bits of Data into Hard Evidence

A Proposal for the Unorthodox Use of a Document Request to Capture System Metadata

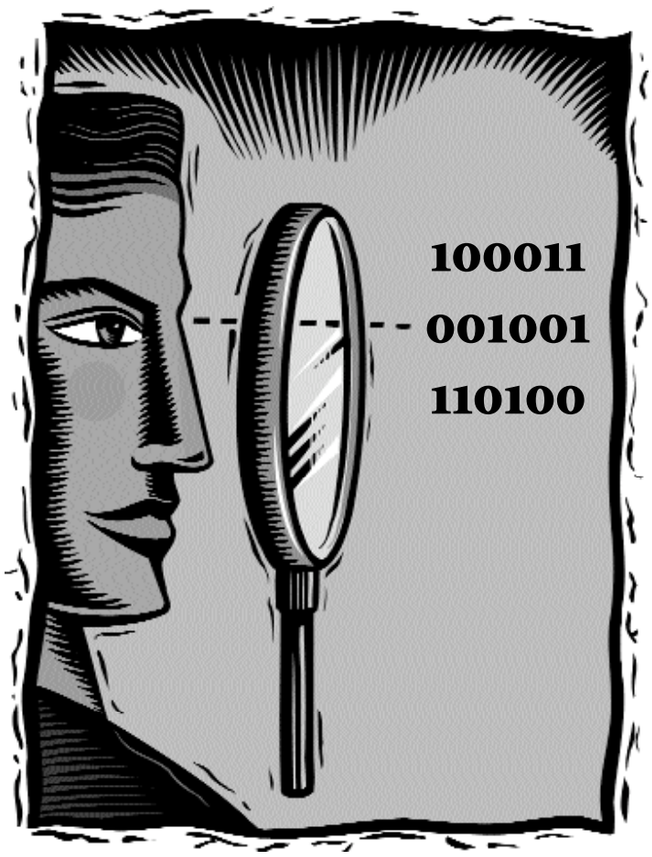
By Nolan M. Goldberg and Scott M. Cohen

A weakness in the discovery process is that it is difficult to determine when a party has not met its obligation to voluntarily produce harmful documents. When it is available, system metadata can solve this problem by providing a different view of electronic evidence that is not readily susceptible to manipulation or concealment.

The term "metadata" is typically used to describe information automatically included in substantive electronic files by application programs such as Microsoft Word or Outlook. Of course, this information is of no help if the file in which the metadata is embedded is not produced. It is often overlooked that applications, operating systems, and file systems also generate numerous "system" metadata artifacts, located in dedicated files separate from the substantive files to which the metadata may relate, which, despite any concealment efforts, can reveal the existence of a file that has not been produced, or even that file's contents. Significantly, system metadata is particularly valuable in discovery as many of these metafiles almost always exist and are not easily manipulated or erased without special tools. Even when these tools are used, they typically leave detectable marks tagging the destruction. See Brian Carrier, FILE SYSTEM FORENSIC ANALYSIS 198 (Pearson Education 2007). Should this be discovered, the target is potentially in trouble regardless of whether the actual metadata or underlying substantive files can ever be recovered.

System metafiles can also themselves have substantive evidentiary value, or provide information useful to the authentication of other documents. See Lorraine v. Markel American Insurance, Co., 241 F.R.D. 534 (D.Md. 2007). ("[B]ecause metadata shows the date, time and identity of the creator of an electronic record, as

well as all changes made to it, metadata is a distinctive characteristic of all electronic evidence that can be used to authenticate it under Rule 901(b)(4).")



System metadata typically enters the discovery process as a result of a request to enter and inspect under FRCP 34(a)(2). However, such requests are infrequently granted in the absence of evidence of discovery misconduct, largely minimizing the historic use of system metadata in discovery. See FRCP 34(a), Advisory Committee Notes to the Dec. 1, 2006 Amendment (there is no "routine right of direct access to a party's electronic information system"). Accordingly, a paradox exists where in order to collect some of the most relevant evidence of discovery misconduct you need to already have substantial evidence in your possession. Additionally, while inspections of computers that are central to a dispute have been allowed in limited circumstances, the general need for system metadata as substantive evidence has not yet been held to alone be grounds for an inspection, effectively rendering useful evidence off-limits. Gaining easier access to this untapped evidence source within the context of existing rules of discovery will open new investigative possibilities.

Instead of routine abandonment, system metadata can instead be requested using a basic FRCP 34(b)(1)(C) document request. System metadata is stored as dedicated files, thus falling within the definition of a document under the Rules. See FRCP 34(a), Advisory Committee Notes to the Dec. 1, 2006 Amendment ("Rule 34(a)(1) is expansive and includes any type of information that is stored electronically"). Additionally, the standardized nature of the names and locations of these files makes them relatively simple to "describe with reasonable particularity." See FRCP 34(b)(1)(A). Accordingly, assuming the general requirements of FRCP 26 can be met, there seems to be no reason why such files cannot be the subject of a properly crafted document request.

The primary considerations of FRCP 26 are relevance and burden. Clearly, blanket requests calling for the production of all system metadata are, more likely than not, inappropriate. See e.g., The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Second Edition p. 4 (The Sedona Conference® Working Group Series, 2007) ("In most cases … metadata will have no material evidentiary value"). However, narrow requests can be directed towards the particular file or files that are most likely to contain discoverable data.

With regard to burden, it is true that the extraction of certain system metadata may be more complicated than copying normal files. For example, a given metafile may be routinely in use by the Windows operating system and therefore cannot be copied during normal operation. Certain files may also be hidden. One approach to address any additional burden is to include instructions on how to extract the speci?c data files requested in the document request. It may be difficult for the party opposing production to maintain a burden objection when there are only a few additional steps to carry out the collection of a narrow subset of documents. This is particularly true as the Rules already contemplate electronic discovery as a partnership between counsel and information systems professionals. See, e.g., The Sedona Principles, Second Edition p. 19 (2007) ("The team approach permits an organization to leverage available resources and expertise in ensuring that the organization addresses its preservation and production obligations thoroughly, efficiently and cost-effectively").

Finally, burden objections may arise out of the added complexity of reviewing system metadata for privilege, particularly as many of these metafiles are not decodable without technical know-how or expert assistance.

However, because most of these files contain no substantive information, privilege concerns would ordinarily not be implicated. In those circumstances where actual substantive file data may be recovered, the situation may be more complicated, and the producing party may need to employ its own expert to assist in the privilege review. The burden in such situations would need to be evaluated on a case-by-case basis. See FRCP 34(a), Advisory Committee Notes to the Dec. 1, 2006 Amendment ("The requesting party has the burden of showing that its need for the discovery outweighs the burden and costs of locating, retrieving, and producing the information.")

Each operating system, file system or application may generate different system metadata that can be discovered. As an introduction to the possibilities raised by

the analysis of this type of data, below are examples of specific system metadata files that may exist in computers using the Microsoft Windows operating system.

The Windows Registry

The Windows registry is a hierarchical database containing all of the options, settings and preferences for a computer running any of the 32-bit versions of the Microsoft Windows operating system including Windows NT, 95, 98, ME, 2000, XP, and Vista. The registry is frequently and automatically updated with information generated as a result of the use of the computer, including a record of logins, network shares accessed, searches performed, applications used, files most recently opened, or connection to a wireless network. For example, an entry is created in the registry when a USB removable storage drive is connected to a computer that includes the identity of the drive and the time of connection. Other entries track opened and saved files, and those files last accessed.

The registry can be copied using the Registry Editor program (REGEDIT.EXE) already installed on all Windows-based computers.

Windows Log Files

Log files, typically identified by the *.log extension, are created by the Windows operating system or other installed programs as a means of recording events which occur during system operation which can be useful in creating a timeline of a computer's use. Log files are most often simple text files though some, like the Windows Event Log, are actually databases. Two items that you can expect to find in most log files are the description of some sort of event, such as the burning of a CDROM and the date and/or time on which it occurred. Additionally, IM conversations in some IM environments (Yahoo is one) are frequently logged by default.

Collection of log files can be accomplished via standard collection tools such as Microsoft's Robocopy. One word of caution: many E-Discovery processing tools have been configured to exclude system files. If such a tool is used, its configuration must be modified to include log files.

Temporary Data/Cache Files

Temporary and cache files, created for the purpose of conserving a computer's memory during the editing or processing of data or for recovery purposes, are intended to exist for a finite period of time, but there are many circumstances where they will remain on the hard drive indefinitely.

For example, when a Microsoft Word 2003 document is opened, a hidden temporary file will be created whose name is of the form ~wrdxxxx.tmp, which contains a copy of the viewed document. (In this example, xxxx represents a unique number generated by Word.) If Word is closed in a manner that causes it to lose track of the temporary file it has created, for example, a system crash or program error, then the temporary file remains on the hard drive permanently unless it is manually deleted. Over time many such temporary files can be "orphaned" in this manner.

As another example, Microsoft Internet Explorer uses temporary files to store items downloaded during browsing sessions in order to improve performance during revisits to web pages. If collected during discovery, the names, dates and contents of these files can be used to recreate a user's browsing history.

Most applications use the file extension ".tmp" to indicate a temporary file, and many are stored in one of several standard temporary file locations, such as C:\TEMP and C:\WINDOWS\TEMP. A simple search for all instances of hidden files with a *.tmp suffix, coupled with a normal copy operation, is all that is required for collection. It is important to note that certain types of temporary files, such as those created by Microsoft Word, contain substantive data that needs to be reviewed for privilege.

The above examples are illustrative and will not be relevant or appropriate in every situation. The requesting party should consult a forensic expert to determine what system metadata might exist that could be relevant in a particular case and the methodology for the extraction of those files.

Conclusion

Collecting system metadata in the manner described above is not without its drawbacks, as it violates the generally accepted forensic practice of making a static bit-map copy of a hard drive before harvesting metadata, thereby preserving it for future verification and protecting it from further alteration. Extracting metadata files from a live computer may have the unintended consequence of altering or destroying other metadata. See e.g., Krumwiede v. Brighton Assoc., Case No. 05 C 3003, 2006 WL 130862 at *4 (N.D. Ill. May 8, 2006) (noting that the creation of a forensically valid copy of a hard drive allowed for the examination of the contents of the laptop without "disturbing" it more than necessary). Additionally, unlike a full forensic inspection, deleted files cannot be recovered using this approach. The likelihood of recovery of deleted files decreases the longer a target computer remains active. See Linda Volonino, COMPUTER FORENSICS, PRINCIPLES AND PRACTICES 21, 93 (Pearson Education 2007). Finally, certain metadata cannot be recovered outside of a full forensic inspection. Accordingly, collecting metadata through a document request is not a preferred substitute for a proper forensic inspection when such relief is available, but is a good second choice when an inspection cannot be obtained.

The collection of system metadata using document requests is a natural evolution of E-Discovery, providing additional insight to the tech savvy practitioner when preferred means of access to these files are not available. Such an approach can, in the right circumstances, turn obscure bits of data that would have previously not been discovered into case determinative evidence.

Nolan M. Goldberg *is a Senior Associate in the patent group of New York-based Proskauer Rose LLP and a member of the Litigation Department's E-Discovery Task Force.* ***Scott M. Cohen*** *is the Director of Practice Support at Proskauer Rose LLP and a member of the Litigation Department's E-Discovery Task Force.*

Scruples

The Ethics of Emails, IMs, and Priviledge

By Ellen Lockwood, ACP, RP

Most employers have a policy that alerts employees that the employer may access employees' emails, texts, and instant messages. Recent case law has highlighted the issues regarding privilege and the use of emails, texts, and instant messages (IM) on employer-owned equipment such as desktop computers, laptops, cell phones, and smartphones such as those made by BlackBerry.

If the client is an individual and sends an email to her attorney from her work computer, the email may no longer be privileged as the current case law indicates courts may view that email as being distributed to third parties. This determination may be the made regardless of whether the client's employer accessed the client's email account or even that specific email.

An important point is whether the employees had an expectation of privacy regarding their email, text, and IM communications, as well as whether employees were on notice of a company policy regarding use and access or monitoring of employees' email, text, and/or IM transmissions.

In one of the first cases to address this issue, a New York bankruptcy court provided four factors to be considered in these situations:

> Does the company maintain a policy that bans personal or other objectionable use of its email system? Does the company monitor the use of the employee's computer or email?
>
> Do third parties have a right of access to the computer or emails? Did the company notify the employee or was the employee aware of the use and monitoring policies? *(In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005))*

The courts do not usually make a distinction between an email sent using a client's employer's email account or whether the email was sent using the client's personal email account such as Gmail or Yahoo!. The issue appears to be whether the email, text, or IM was sent using the employer's equipment as well as whether the four factors listed above, or something similar, were in place at the time the email, text, or IM was sent. The company's notice to employees of the company's policies may be an employee handbook that is periodically revised where it is incumbent upon the employee to check for updates, a notice on company computers to which an employee must respond by clicking "I agree" in order to log on, or any other reasonable means of notifying employees of the company's policies.

If the client is a company, then emails, texts, and IMs sent from company-owned equipment to attorneys for the company (whether in-house or outside counsel) will likely be considered privileged if the emails are sent by company employees in their capacity as employees. But what if a company employee sends an email to the company's counsel using the employee's home computer? If the email is sent after logging in to the company's email system which is password protected, then the email is likely privileged even if the employee's personal computer is used by other non-employees. However, if the email is sent using the employee's personal email account and the computer may be accessed by third parties, the claim of privilege for that email may be waived.

Paralegals should consider working with their attorneys to remind clients of these issues to hopefully avoid otherwise privileged emails, texts, and IMs becoming discoverable. Additionally, paralegals should be mindful of these issues when working on personal computer equipment, cell phones, and smartphones that may be accessed by others.

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.*

The Long or Short of It

Craig Hackler, Financial Advisor, Raymond James Financial Services

Consider Fred and Wilma. They are anxious to become the owners of a prestigious house. Naturally, they are both positively bubbling over with excitement. Wilma, in particular, can barely restrain her enthusiasm for the home of her dreams. However, she has the financial brain of the couple and wants to make the best possible choice for mortgage financing. She must choose between a 15 year mortgage at 5% and a 30 year mortgage at 5.5%. In either case, they will borrow $100,000, pay the same in closing costs and neither mortgage note has a prepayment penalty.

A quick analysis of their situation reveals that their monthly payment on the 15 year mortgage (principal and interest only) will be $791. Over the course of the mortgage they will pay $42,343 in interest. Of course, that interest is deductible. Let's assume that Fred and Wilma will be in the 25% tax bracket for the next 30 years. That means, after-tax, the interest costs them $31,757. Their total after tax payments will be $131,756. Interest on debt sure adds up over time doesn't it?

The 30 year mortgage results in monthly payments of $568. Total interest payments will be a whopping $104,404. But, thanks to the deduction Uncle Sam gives them, the after tax-cost of the interest is "only" $78,303 making their total after tax payments equal to $178,303. The 30 year mortgage gives them payments that are lower by $223 but it costs them $46,547 more, after-tax.

One answer would be to take the sure

State Bar of Texas, Paralegal Division—Sustaining Membership Roster

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thing, borrow for 15 years and run. But, consider the flexibility of the 30 year mortgage. If they were to invest the $223 per month in common stocks that returned 6%, after tax, for 15 years they would have over $65,177. The balance due on their 30 year mortgage after 15 years is about $69,490. Within the next 8 months, they will actually have more saved than their balance due on their mortgage. The key to this strategy is Fred and Wilma *must* actually save the $223 each and every month. If they don't, they may have been better off with the "forced savings" imposed by the 15 year mortgage. Investing involves risk and you may incur a profit or a loss. The examples provided are hypothetical and do not suggest or guarantee particular rates of return for any investment. The examples do not include transaction costs and tax considerations that would reduce an investor's return.

How about these three alternative strategies that take advantage of the inherent flexibility of a 30 year mortgage with no prepayment penalty. If Fred and Wilma make 13 payments every year, starting in the first year, the extra $567.79 will reduce their after-tax interest cost to $63,478 and pay off the mortgage about 5 years ahead of schedule.

As an alternative, they might pay the next month's principal along with each payment. For example, with their first payment, they would also pay the $110 in principal that would otherwise have been due on their second payment. Every month they would pay a little more in extra principal. This strategy results in after-tax interest costs of $44,529 and a pay-off in year 18, a little over 13 years ahead of schedule.

A simpler alternative would be to send a flat amount along with each month's mortgage payment. Sending $100 per month would reduce their after-tax interest cost to $51,990 and pay off the mortgage about 8 years early. Each of these alternatives requires discipline. If one does not have the discipline to actually send the mortgage lender the additional funds then the forced savings of the 15 year mortgage might be the best bet.

Of course, this brief article is no substitute for a careful consideration of all of the advantages and disadvantages of this matter in light of your unique personal circumstances. Before implementing any significant tax or financial planning strategy, contact your financial planner, attorney or tax advisor as appropriate.

raig 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.

TO THE *Editor*

WOW!! I don't know what else to say.

I had the pleasure of attending a PD Board of Directors meeting in Dallas. What an eye-opener! Mere words cannot explain what an experience it was. If you ever have an opportunity to attend a Board meeting, you better go prepared. The week prior to the meeting do absolutely nothing but sleep. Tell your boss that you're taking a week of vacation after the meeting because believe me, you're going to need it. Attending a Board meeting of the PD is similar to running a 50-mile marathon, so be prepared. If they offer training I would sign up in advance.

The real fun began at the conclusion of Texas Forum when I was placed in a vehicle with women I'd just met and whisked away to a destination which I believed was known only by the driver. (Hello – kidnapping ring a bell with anyone?) Upon arrival I was told the meeting would be held in the Willow Room and they pointed in a general direction down the main hall. I was given about 45 minutes to change clothes and take a quick potty break. The meeting began around 5:00 and continued until at least 10:00 p.m. (Yes that's right – P.M. as in dark outside.) These ladies returned at 8:00 the next morning ready to take off yet again. I think the meeting finally adjourned around 3:00. All I know is I walked out of the Willow Room totally exhausted and I didn't even do anything. I don't know how they do it.

Although I've been a member of the PD since 1989, I never took time to learn what all the organization had to offer me. I just hung my beautifully framed certificate on the wall, signed my name on the renewal form and mailed it in every year. I never knew what was involved in being a District Director. Let me tell you – these ladies are amazing. I've never seen anything like it. Unfortunately their true dedication and hard work is unknown to the general membership but we reap the benefit of it. You have to be there and see it for yourself to truly appreciate all they do for us.

I know you've all seen the name – Norma Hackler. You need to know this woman and make her your new BFF!! You're going to need her at some point in your career. If you've got a PD question, Norma has the PD answer.

The next time you see your Director, please tell her how very much you appreciate all the work and time she dedicates for your benefit. Please take a few minutes and browse around the website and see for yourselves what is offered to you as a member of the PD. Encourage your colleagues to join. Encourage all of your vendors to become members of the PD. It's well worth the membership fee.

Thanks ladies. I had a ball and left with a great appreciation for each and every one of you. Now go get some rest. The next meeting is in June.

Very truly yours,
Darla J. Fisher, Senior Paralegal
LYNCH, CHAPPELL & ALSUP, P.C.
Midland

PARALEGAL DIVISION ANNOUNCES TAPS 2009 SCHOLARSHIP

For the upcoming 2009 TAPS seminar (Texas Advanced Paralegal Seminar, a three-day CLE seminar), the Paralegal Division of the State Bar of Texas will award up to two (2) scholarships for the registration fee to attend the TAPS 2009 seminar. Below please find the guidelines and application for applying for this scholarship.

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

Other

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

The Paralegal Division of the State Bar of Texas will award scholarships for TAPS 2009 which will cover the cost of registration in accordance with the TAPS scholarship guidelines.

TAPS 2009 SCHOLARSHIP APPLICATION

IMPORTANT: ALL APPLICATIONS FOR A SCHOLARSHIP FOR TAPS 2009 MUST BE *RECEIVED* BY Monday, August 31, 2009.
DATE OF **TAPS 2009**: ***October 14-16, 2009, League City, TX***

Name _____ PD Membership No. _____

Home Address _____

Home Telephone _____ E-mail Address _____

Work Address _____

Work Telephone _____ Fax Number _____

Employer _____

Are you a member of a local paralegal organization that offers a scholarship award?
Give a detailed description of your reason for seeking a scholarship to TAPS 2009:

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

Attach two (2) personal references and your written essay to this application. Applications should be mailed to: Rhonda Brashears, Chair of the TAPS Planning Committee, Underwood Law Firm, P. O. Box 9158, Amarillo, TX 79105-9158. *Scholarship recipients will be notified by letter or email by September 4, 2009.*

_____ **Attach any additional explanations**

Applicant's Signature

REGISTER ONLINE AT WWW.TXPD.ORG

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One-day registration price (**$99 PD member/$199 non-member**) includes one day of CLE and seminar materials (socials and luncheon at additional price). As a one-day attendee, you can attend any session during the day you register to attend TAPS. Pick and choose the classes you want to attend.)

2009 KEYNOTE LUNCHEON SPEAKER

ORDER IN THE COURT…OR NOT

The Friday Luncheon speaker will be **Judge Ken Wise**. Judge Wise is currently a partner in the law firm of Fridge, Resendez & Wise LLC. Judge Wise specializes in civil trials and appeals, mediation and arbitration, and government relations. Judge Wise was appointed Judge of the 152nd District Court by Governor Rick Perry in 2002. He presided over that court through 2008. During his judicial career, Judge Wise chaired many committees and served as the Civil Administrative Judge for Harris County. Judge Wise is currently chairing the State Bar of Texas Task Force on Court Organization which is undertaking a top-to-bottom assessment of the organization of the Texas court system. Judge Wise served three years on the Harris County Juvenile Probation Board. He was also chairman of the Harris County District Judges Facilities Committee which oversaw the completion of the new Harris County Civil Courthouse.

WHY YOU SHOULD ATTEND:

Craig Ball, Attorney and Forensic Technologist, Certified Computer Forensic Examiner, Austin, TX (TAPS 2008 Speaker). TAPS is TOPS…in breadth of coverage, practical relevance and, above all, educational value. Every hour is jam-packed with useful tips from thoughtful leaders, helpful advice from peers and valuable takeaways. How do they deliver so much top-notch content and fun at such low cost?

J. Todd Hedgepeth, Chief, Air Force Regional Labor & Employment Law Office, San Antonio, TX (TAPS 2008 Speaker). Wow, I've both attended and spoke at numerous "attorney" continuing legal education courses, but the TAPS course goes to the head of the class! Never before have I seen the overwhelming majority of the participants paying such close, keen attention to the lectures and engaging in such substantive Q &A's with the presenters during and after each presentation. I, too, was in awe of the quality of my fellow guest speakers: judges, managing partners, etc. Lastly, the interchange between the attendees makes it clear that not only was this course a great learning experience for them, but an awesome networking opportunity as well. I would encourage all paralegals to make an effort to attend the next course.

NETWORK, NETWORK, NETWORK

(Additional cost to attend socials – Wednesday Social @ $15 attendee/$25 guest; Thursday Social @ $35 attendee/$45 guest)

Lounge by the Bay - Come Network and Play! - Grab your comfy PJ's (tasteful please) and slippers, and join us at the Wednesday Night Social "pajama party" at the hotel. It will be a casual evening full of fun and games guaranteed to make you laugh. Come see old friends and meet new ones! It's going to be "yachts" of fun overlooking the beautiful South Shore Marina!!

Anchors Aweigh – We're Cruisin' the Bay! –Come Aboard the FantaSea luxury yacht and enjoy a dinner cruise in the beautiful South Shore Harbour bay! We will set sail Thursday evening from the hotel for a memorable evening on the water. Space is limited on the yacht, so make your decision early to join us for the one-of-a-kind evening. Put on your favorite "cruise wear" and "boat shoes" and we'll float through the evening! If you want to check it out go to www.thebigwhiteboat.com.

SCHOLARSHIPS AVAILABLE! Scholarships are available to attend TAPS if you need financial assistance. For information regarding taps visit the website at WWW.TXPD.ORG **under CLE/EVENTS/TAPS 2009/SCHOLARSHIP.**

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