

FALL 2011 VOL. 17 NO. 2

# TPJ

*Texas Paralegal Journal*



**Nondisclosure Agreements—Real Life in the Trenches**

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# PRESIDENT'S *Message*

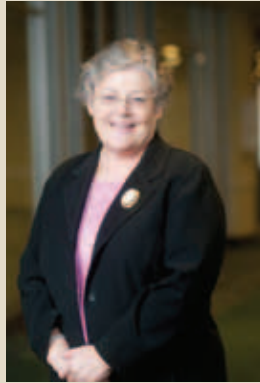
by Susan Wilen, RN, President, Paralegal Division

*"One person can make a difference, and everyone should try."* John F. Kennedy

**O**n her last day as President of the Paralegal Division, Debbie Oaks gave me this quote, beautifully encased in a lovely black frame. It sits on the credenza in my office and serves as a daily reminder that although we paralegals are individuals in a diverse organization, we have the collective ability to make an enormous difference for our communities, for each other, and for ourselves.

We are a Division with a vision. This year, I have a vision of all fifteen Districts providing support to a community service organization, at least once. Community service is a way of offering support for those in need, and a way for each of us to know that we eased another's struggle. There is a tremendous sense of personal gratification one feels when doing something for another, without expecting anything in return. There is something powerful in knowing that you have offered your hand to help another stand straighter, with more dignity. Justice is a powerful force.

Resources are also becoming scarce for many organizations, so "person"-power, alone, can make a huge difference in the ability of agencies to provide support. Small fundraisers can also alleviate the pressures many



groups are experiencing in this economically challenged time. I hope you will heed the call of your District Directors and give whatever you can...time, money, or your skills.

I envision Paralegal Division members providing Pro Bono service in ways and numbers that we have not risen to in the past. When the State Bar of Texas goes

before the legislature to request funds for Legal Aid programs all over the State, the first question that is asked is "What is the legal community doing for the indigent population?" Attorneys are asked to provide 50 hours of pro bono service each year, and I would love to see paralegals aspire to 24 hours a year. This is a great way to solidify the bonds we have with the State Bar of Texas. This is two hours of your time a month, but two hours that will make a huge difference for those in need of legal services or representation. Without your efforts, it is possible that many individuals will fall through social safety nets and will be denied justice. If you are currently serving in a pro bono capacity, it is important for you to document your hours: you can enter your hours by going to [www.txpd.org](http://www.txpd.org), choose the **Members Only**-tab, choose **Directory**, and choose either **View My Pro Bono Records** or **View My CLE Records**, and **sign-in**. To enter the hours for either *Pro Bono* or *CLE*, click on "**Add a Pro Bono (or CLE) Item to Your History**."

I see wonderful opportunities for

outstanding CLE provided by and for our members this year. This CLE is available at TAPS, in our districts, and by webinar. The Paralegal Division wants each of you to grow this year in skill, in perspective, and in appreciation for the many opportunities that are available to you in this ever challenging profession. When you think of what the profession was thirty years ago and what it is today, it is truly remarkable. But we must continue to grow; we have an obligation to broaden our skills at every possible opportunity.

I also hope that you will embrace opportunities to be with fellow members in your Districts for activities other than CLE. Although I have made many friends working on Division projects over the years, many of my deepest friendships have grown through spending time with individuals on a personal level. It is wonderful knowing that I have friends all over the State, people I enjoy and with whom I can giggle. Friendship, support and laughter are the silent benefits so eloquently expressed in the NALA article reprint by Kelly A. LaGrave, ACP in this issue. I truly couldn't have said it better myself.

As a nurse, I have been privileged to know the joys of service and I've been the beneficiary of the full spectrum of emotions associated with success and failure. It is my sincere hope that you will take the opportunities provided by the Division this year so that you, too, can enjoy the many benefits of being a paralegal today. This is truly an exciting time!

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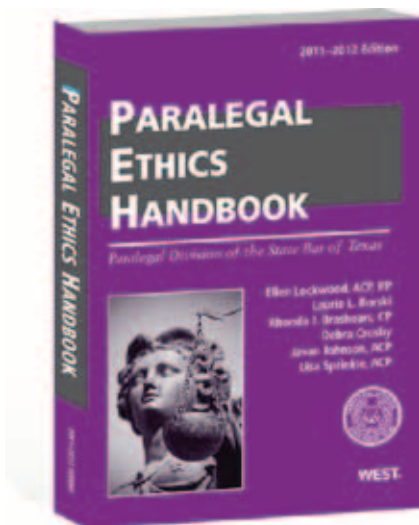
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# TPIJ

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# EDITOR'S *Note*

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

"And so, my fellow Americans, ask not what your country can do for you; ask what you can do for your country."

John F. Kennedy, Inaugural Address, January 20, 1961

John F. Kennedy's inaugural address inspired children and adults to see the importance of civic action and public service. His historic words inspire us to civic action, and consider how it applies to our own lives. His speech was intended to really make us want to do something, to contribute. But the "Ask Not" line was more direct: that was the one that made service an American imperative. President Kennedy's speech has been called the finest since President Lincoln's at Gettysburg.

Volunteerism in the United States is neither a new concept nor an uncommon activity. Historically, America has long recognized the importance of "a societal responsibility to join in, to give freely of one's time to assist or aid others." This responsibility is frequently iterated in the literature. For example, Alexis de Tocqueville, in 1831, stated in his seminal work, *Democracy in America*, that the U.S. was a "nation of joiners" that regularly formed groups to meet or accomplish common goals.<sup>1</sup>

Texas has a relatively long history of volunteerism as relates to its many state agencies and departments. For instance, in 1951 a group of women from Terrell, Texas initiated a volunteer program to support the state's mental hospitals. From this initial effort, other similar volunteer programs affiliated with state mental health facilities began to flourish. By 1958, the Volunteer Services State Council (VSSC) had come into existence, a non-profit organization that coordinated with the state's departments of mental health and mental retardation. Another example of a volunteer program connected to the state government of Texas, historically speaking, is Texas' Adopt-A-Highway program, which began in 1987. Since its inception, it has been replicated in 47 other states. Of interest is the fact that it has been estimated that the adopt-a-highway program has contributed to a total of "12.5 million hours of volunteer service valued at \$102.9 million."<sup>2</sup>

Volunteers have a tremendous impact on aiding those in need. America has a strong ethic and long history of volunteerism. The hungry are fed, those who cannot read are taught, those that are sick are cared for, and the land is protected and nurtured.

The benefits of volunteerism can be measured in dollars and cents, but more significantly, it can be felt in the pride and self-satisfaction of those who freely offer their time and efforts to volunteering. And even of greater consequence, the recipients of volunteer efforts—those who are assisted or helped in some way—are the ones that experience the greatest of humanitarian rewards.

Fifty years after JFK's inaugural address, our new President and Board of Directors are asking us to look inside ourselves and see what we can contribute to the PD. And it doesn't seem all that different from what it must have been on that day, 50 years ago.

1. Tocqueville, A. (1945). *Democracy in America*. Edited by Phillips Bradley. Vol. 1. New York, NY: Alfred A. Knopf, p. 198.

2. Rehnborg, J., Fallon, C., and Hinerfeld, B. (2002). *Investing in volunteerism: The impact of service initiatives in selected state agencies*. Austin, TX: RGK Center of the Lyndon B. Johnson School of Public Affairs and the Texas Commission on Volunteerism and Community Service, pp.3-4.

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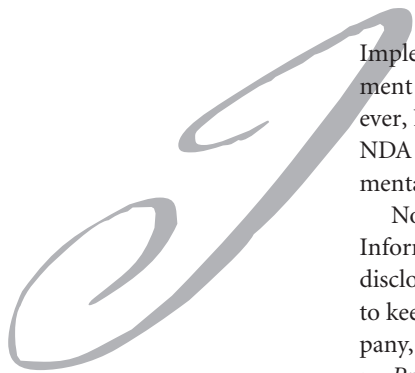






# Nondisclosure Agreements— Real Life in the Trenches

By Valerie Barker and Brian L. Burgess



Implementing and overseeing Nondisclosure Agreements (NDA's) for the legal department of a large multinational company may seem mundane—and sometimes it is. However, NDA's are essential to the bottom line of many companies, and as a result, the lowly NDA is often a key intellectual property (IP) agreement, and its negotiation and documentation deserves careful thought and attention.

Nondisclosure Agreements, sometimes called Confidentiality, Secrecy, or Proprietary Information Agreements, are contracts that are put in place when one person wants to disclose confidential information to someone else, and wants the recipient's commitment to keep that information confidential. NDA's perform an essential function for a company, including the following:

- *Protection of sensitive technical or commercial information.* If the information protected by the NDA were disclosed or threatened to be disclosed by the recipient, the disclosing party may lose a key competitive edge. By having an NDA, the disclosing party may be able to get a court to enjoin further disclosures or uses of the information by the recipient, or to award monetary damages.
- *Public disclosure of patentable inventions.* Public disclosure of a patentable idea before the patent application is filed may forfeit the right to get the patent, but disclosing an invention under an NDA is not considered a public disclosure. Therefore, NDA's can keep an idea patentable, if the inventor needs to disclose it before the patent application has been filed.
- *Compliance with laws.* Companies often use NDA's to help ensure compliance with export control laws (which prohibit certain information from being disclosed to people in certain countries, or to their citizens), and securities laws (which restrict the use of material, non-public information in trading public securities).

Because NDA's are so important, it is a mistake to think of them as boilerplate. In this article, we will examine several key issues that should be considered any time you are working on an NDA.

## 1. Overuse of mutual / bilateral NDA's

Many NDA's in common use assume that both parties to the NDA will be disclosing, and receiving, confidential information. These NDA's are usually characterized as mutual, or bilateral. Some people erroneously think of a mutual/bilateral NDA as being "fair," and believe that a unilateral NDA—which only describes a one-way flow of confidential information—would be unfair.



In fact, careful consideration should be given when determining whether to enter into a bilateral NDA. Is the flow of confidential information really bilateral? Is there an actual business need to receive the other person's confidential information? If the flow of confidential information will run in both directions, should the scope of the information being covered be the same? Should the restrictions be the same?

Imagine a scenario where a buyer of products needs to provide a lot of sensitive technical and commercial information: business forecasts, product specifications, customer identities and needs, and so forth. What the buyer wants from the seller is product that meets the buyer's specifications, is delivered on-time, and is sold at the agreed-upon price. If the buyer and seller sign a broad mutual NDA, and the seller discloses trade secrets about *how* its products meet the buyer's requirements, when the buyer buys similar products from the seller's competitor, doubts could arise in the seller's mind about whether the buyer gave the seller's trade secrets to the seller's competitor. Unless the buyer actually needs the seller's trade secret information, it will avoid a potential dispute down the road if a unilateral NDA is used to protect the buyer's information, and if as a result, the seller never gives its trade secrets to the buyer. That way, there is no question whether the buyer passed the seller's information to its competitor. Similarly, if the buyer decides to develop its own product that would compete with its seller, never agreeing to protect the seller's trade secrets in the first place will help avoid any dispute with the seller later on about whether the buyer's internal development was tainted by exposure to the seller's trade secrets.

For a large organization, signing broad mutual NDA's has an added potential concern: one division within the company may request information from a third party without realizing that another division put a mutual NDA in place that will cover that information. One way to address that issue within a big company is to specify the entry points into the company in the NDA (see item 3, below).

If it is necessary to receive confiden-

tial information and enter into an NDA, think about whether it would make sense to limit (1) the scope of the information covered by the NDA; (2) the period of time during which the information will be disclosed (see item 2, below); (3) the individuals within the Recipient to whom the information can be disclosed (see item 3, below); and/or (4) the types of restrictions imposed on that information (see item 4, below).

In our hypothetical scenario, it may make sense for the buyer to agree to keep the seller's pricing confidential, if the buyer is getting a better deal than other prospective customers. With respect to limitation (1) in the preceding paragraph, the NDA could limit the scope of the seller's information that is protected by the NDA to that pricing information. With respect to limitation (3), the NDA could specify that if the seller discloses its' pricing to Recipient employees outside of the Recipient's contracting and purchasing organizations, then it's deemed not to be confidential. With respect to limitation (4), the buyer could just agree not to disclose that pricing to third parties; agreeing not to use that pricing except to buy from that seller would not make sense, because of course the buyer would also use that pricing in determining whether to buy from the seller's competitors.

## 2. Expiration dates and time periods

In well-drafted template forms of NDA's, there are two periods of time that are defined: the disclosure period (sometimes called the "term"), and the period during which the confidentiality obligation will remain in effect (the "confidentiality period"). The disclosure period should be long enough to cover the actual disclosures necessary to facilitate the discussion or the project. If you are the Recipient, you should generally prefer for the disclosure period not to remain in effect after the project at issue is over; your personnel may request and receive information that is protected by that NDA after they have forgotten that the NDA is still in place. On the other hand, if you are the Discloser, you should want to be sure the disclosure

period does not end while your personnel are still disclosing information, and assuming that the NDA will continue to protect that information.

Many NDA's have a confidentiality period of three, five, or sometimes ten years, and after that time, the information is deemed no longer confidential. The Recipient can then use or disclose the information however it wants. But is that really long enough? If valuable trade secrets were disclosed that are likely to continue to provide a competitive edge for longer than that, then be sure the confidentiality period is long enough to protect the trade secret for as long as it has value. One approach for such long-lived trade secrets is to say that the NDA's restrictions continue to apply except to the extent the disclosed information becomes subject to one of the exceptions in the NDA—and these typically include:

- information that becomes public knowledge through no fault of the Recipient,
- information rightfully received by the Recipient from a third party without restriction,
- information independently developed by the Recipient, or
- information that was in the Recipient's possession prior to disclosure under the NDA.

## 3. Limiting the Entry Points into a Recipient

Ideally, an NDA would permit the disclosures and uses of confidential information that the business people need to happen, and would restrict all other disclosures and uses of the information. Especially in a larger organization, a broadly written NDA can have unintended legal effects, if one division puts an NDA in place, and then another division—unaware of the NDA—requests or receives information without realizing that it is subject to the NDA's restrictions.

One way to address this issue is to identify the individuals, or the business organizations, throughout the company that need to receive the information. In defining what information is restricted by the NDA,



specify that information disclosed to any other person or organization in the company is deemed not to be restricted by the NDA anymore. It is appropriate for businesses to have controls over the flow of confidential information, and such a provision in the NDA simply requires the sorts of controls that should already be in place.

#### 4. Types of Restrictions

There are two types of restrictions that are typically included in an NDA: restrictions against disclosure, and restrictions against use. (Some NDA's only impose a restriction on disclosure.) Anytime you work on an NDA, you should consider what types of restrictions are appropriate in light of the information being protected, and what the parties will do with that information.

A standard restriction against disclosure would obligate the Recipient only disclose the information to those individuals who have a "need-to-know" the information and, at least for non-employees of the Recipient, who have agreed in writing to restrictions that are at least similar to the restrictions in the NDA. You should consider whether the Recipient will need to pass the information to third parties (like down its supply chain), or to contractors (which may include individual contractors working in its facility, or separate companies contracting with the Recipient), and permit or restrict disclosures accordingly.

A restriction on the use of the information may or may not be appropriate. One common use restriction says the Recipient will only use the information to obtain goods, services, or information from the Discloser.

The Recipient also usually agrees to use reasonable efforts to keep the information secure, and agrees to use no less care than it uses to keep its own similar information secure.

NDA's should address what happens if there is a legal obligation to disclose the information, such as a Securities Exchange Commission reporting requirement, or a subpoena. You may also want to include an exception to the NDA to the extent the Recipient needs to use the information to prosecute or defend against a claim. These

exceptions are sometimes mistakenly defined as an exception to the definition of what information is covered by the NDA; instead, they should be considered exceptions to the restrictions. The NDA should require efforts to keep the information secret, by seeking protective orders or requesting confidential treatment, and usually should require advance notice to the Discloser so the Discloser can ensure appropriate steps are taken to try to prevent a public disclosure.

#### 5. Return or destruction of Confidential Information—can you actually comply?

Most NDA's require the Recipient to return or destroy the confidential information within a short period after the Discloser requests. However, give this some attention—compliance may not be easy, or even possible. What about all of the confidential information received via email? Does the provision require every Recipient employee to go through his email records to excise all confidential information? What about computer backup archives—must you go through each of those? What about information embedded in databases or other electronic tools—do you have to go through your purchase order system to remove all confidential pricing information? What if there is a claim after that request that you did not pay what you owed—can you keep key information in some sort of archive so you will have it available to prosecute or defend legal claims?

These provisions are frequently treated as boilerplate, but they serve a very important function, and it is generally unhelpful to impose contractual obligations that are impossible to meet as they are written. Consider what the Discloser really needs to have done, and what the Recipient can really do. In some cases, the information may be so sensitive that the NDA should require all confidential information to be stored on a single dedicated server, with strict protocols for how the information is sent back and forth (so that it is not spread across email archives). If you have protocols like that in place, a complete return or destruction provision may be doable. If

not, it is hard to imagine how many companies could ever comply.

#### 6. Documenting the Disclosures

Appropriate records should be kept when disclosing confidential information under an NDA. Having a signed copy of a well-written NDA is essential, of course, but if you cannot prove what information was disclosed, when it was disclosed, and to whom it was disclosed, you may not be able to obtain any relief under that NDA when you think it has been breached.

#### Conclusion

Legal departments should be proactive. Don't treat an NDA like boilerplate. Here is a quick checklist of the questions raised in this article:

- What sensitive technical or commercial information should and will actually be disclosed by your company in this transaction? What sensitive technical or commercial information should your company receive—if any? The scope of the NDA should be tailored to fit the transaction at hand.
- How long will the information be valuable? Should the NDA's restrictions expire at some set point, or do they need to remain in place for as long as the information is still confidential?
- Should you limit the entry points for someone else's confidential information into your company?
- What types of restrictions are appropriate for the information at issue? Should different restrictions apply to different information?
- Can you from a technical standpoint comply with the "return or destroy" provision as it has been written? Is there information you will need to retain for legal or accounting purposes, or that is impractical to destroy?
- How will your company document the disclosures that it actually makes? How will it document what it receives?

*Valerie Barker and Brian L. Burgess are with the Burgess Law Firm in Austin.*

"Couldn't have said this better myself..." This article written by Kelly A. LaGrave, ACP, for NALA's *Facts & Findings* magazine, speaks eloquently to one of the most important aspects of membership in any professional organization. I can only hope that this article will be an inspiration for you to find your own benefit with the Paralegal Division.

President Susan Wilen, RN, San Antonio

## The 'Silent' Benefit

By Kelly LaGrave, ACP

**D**uring the past year, I have written in this column about the many wonderful benefits of NALA membership. I have discussed the Certified Paralegal program and many of the specialty certifications available under the Advanced Paralegal Certification program. I have also discussed the various educational programs offered through NALA Campus, our annual convention, the Certified Paralegal Short Course, and NALA Campus Live!

You have read here my take on NALA team spirit and how important it is to paralegals looking for strength and support with their careers. You've heard about many additional benefits that members receive such as *Facts & Findings*, leadership training through the LEAP program, the NALA conference center, and the wealth of information available through the NALA Website. My most recent column focused on the wonderful recognition programs that NALA provides for those who are supportive to the profession and to their communities.

Reviewing this litany of topics, you might think I have covered just about everything possible to excite and inspire you about your NALA membership. There is, however, another important advantage of membership that is not traditionally identified as a "benefit." That advantage is something we often take for granted, but something that profoundly affects our professional performance as well as our personal wellbeing. That something is: friendship.



The many tangible benefits we gain from membership in NALA tend to overshadow the very real, but silent, benefits of cultivating friends through participation in NALA programs and events. The friends you make will increase exponentially if you resolve to be more than just be a passive member and become truly involved in the NALA organization. Our members are located around the globe, they work in all aspects of the legal field, and they come from diverse social and economic backgrounds.

NALA friends truly enrich your life both personally and professionally. I was reminded of this "up close and personal" a while back when I joined several para-

legals from across the nation who met, as friends, in Minneapolis to shop, see *Jersey Boys*, and watch a royal wedding. As I was flying into Minneapolis, I thought about how wonderful it was that I had the opportunity to make such a trip with such great friends.

We became friends through our mutual involvement in NALA for many years. If you had told me 15 years ago that I would be so fortunate as to be befriended by such intelligent and caring professionals from across the country, I would have thought it too good to be true. These women are true friends and mentors. It is hard to imagine what my life would be like without their support and wisdom. More than all the tangible benefits I have enjoyed, friendships are truly what involvement in NALA is all about.

The time and effort you spend becoming involved with "your" association will be repaid many times over. Besides the boost you will get with your knowledge and career enhancement, you will make lifelong friends—not just for the duration of your career, but far into your retirement years. This is a benefit well worth investing in.

*"Copyright 2011. Reprinted with permission of NALA, The Association of Legal Assistants/Paralegals, and Kelly A. LaGrave, ACP. The article originally appeared in the July/August 2011 issue of Facts & Findings, NALA's bi-monthly magazine for paralegals. The article is reprinted here in its entirety. For further information, contact NALA at [www.nala.org](http://www.nala.org) or phone (918) 587-6828."*



# The DNA of GINA

By Katie G. Chatterton

On November 9, 2010, the Equal Employment Opportunity Commission ("EEOC") issued its anxiously awaited final rule implementing Title II of the Genetic Information Nondiscrimination Act ("GINA"). GINA applies to all employers covered by Title VII of the Civil Rights Act of 1964 ("Title VII"), namely, employers with fifteen or more employees, as well as unions, employment agencies and labor management training programs. This final rule became effective on January 10, 2011, prohibiting the use of genetic information in the employment context, restricting an employer's deliberate acquisition of genetic information, requiring employers to maintain employee genetic information as confidential, and strictly limiting employers from disclosing genetic information.

## What is Genetic Information?

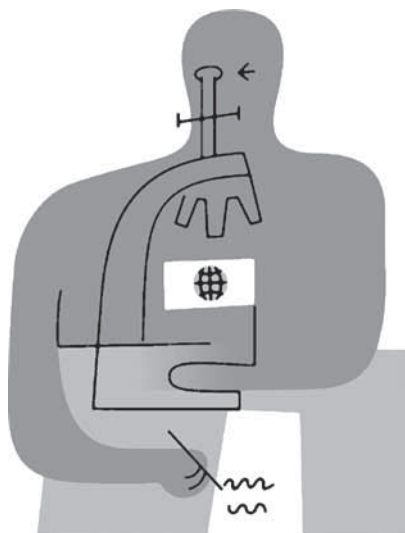
Genetic information is defined broadly to include:

- genetic tests of an individual or a family member;
- the manifestation of a disease or disorder in an individual's family medical history;
- an individual's request or receipt of genetic services;
- participation in genetic clinical research by an individual or a family member;
- the genetic information of a fetus carried by an individual or a pregnant family member; or
- the genetic information of any embryo held by an individual or a family member using assisted reproductive technology.

Information about the sex or age of an individual or a family member, however, is specifically excluded from the definition of genetic information.

## Prohibition on use of Genetic Information by Employers

According to GINA, an employer may



not discriminate against an applicant, employee or former employee on the basis of genetic information in hiring, compensation, promotion or demotion, seniority, discipline, employment termination, or any other term, condition or privilege of employment. GINA also prohibits employers from limiting, segregating, or classifying employees based on genetic information and prohibits entities from causing an employer to discriminate based on genetic information.

## Acquisition of Genetic Information Prohibited

Generally, an employer may not request, require or purchase genetic information of an individual or an individual's family members. The term "request" is interpreted broadly to include any activity in which an employer seeks genetic information by actively listening to a third party conversation, searching personal effects and conducting Internet searches. Nevertheless, the regulations carve out six exceptions to these general prohibitions:

1. Inadvertent acquisition of genetic information, including:
  - a. overhearing a conversation;
  - b. unsolicited communication;
  - c. review of publicly available sources,

such as newspapers, television or the Internet (provided that the employer is not actively searching for this information or accessing a secured social media page without permission);

- d. the result of a general inquiry about health;

The regulations draw a very narrow line between permissible general inquiries ("How are you?" or "Did they catch it early?") and impermissible inquiries ("Does cancer run in your family?" or "Have you been tested for BRAC1?").

- e. monitoring toxic substances in the workplace; or
- f. conducting DNA analysis for quality control in law enforcement situations
  1. Requests for medical data under federal or state medical leave provisions based on a reasonable accommodation (such as under the Americans with Disabilities Act ("ADA")) or under an employer wellness program—however, wellness programs may neither require an employee to provide genetic information nor penalize an employee who declines to provide genetic information;
  2. Written employee consent;
  3. A court order requiring disclosure;
  4. In connection with a government investigation of GINA compliance; and
  5. Disclosure of family medical history to a public health agency in connection with an imminently threatening and contagious disease.

GINA also provides safe harbor language for lawful employer requests concerning an employee's health-related information. To qualify for the safe harbor, the employer's request must include a statement that the employee or healthcare provider should not provide genetic information in response to the employer's request. Specifically, the request must state:

The Genetic Information Nondis-

crimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

#### Remedies for GINA Violations

GINA contains a wide range of available remedies including: reinstatement, injunc-

tive relief, back pay, compensatory and punitive damages, attorneys' fees, costs and monetary fines of up to \$100 per day, per individual. As such, an employer who takes no adverse employment action against an employee, but has received an employee's genetic information, may still be liable for a fine of up to \$100 per day.

#### The Practical Effects of GINA

As of January 2011, the EEOC had already received over 200 charges alleging violations of GINA. Understanding the scope of the new regulations is only the first step to avoiding charges based on GINA. The following guidelines are designed to help employers comply with GINA's requirements:

1. Post the revised Equal Employment Opportunity ("EEO") poster, which includes GINA information and can be found at <http://www1.eeoc.gov/employers/poster.cfm>.
2. Update medical request forms, such as Family and Medical Leave Act ("FMLA") and fitness-for-duty, to include the new safe harbor language.
3. Review and revise employee handbooks

or other EEO statements and anti-discrimination/anti-retaliation policies to include genetic information in the list of protected traits.

4. Review and revise, as necessary, social media policies to help prevent GINA liability for inadvertent acquisition of information from employee social media.
5. Train managers about casual communications with employees concerning their health or the health of their family members.
6. Maintain all genetic information in a separate and confidential medical file. However, there is no need for a separate GINA file if an ADA medical file already exists.
7. Confirm that any employer-sponsored wellness programs do not require the disclosure of family medical history and, further, that financial incentives are not conditioned on the disclosure of family medical history.

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## Planning for Incapacity

Craig Hackler, Financial Advisor, Raymond James Financial Services, Inc., Member FINRA/SIPC

**W**hat would happen if you were mentally or physically unable to take care of yourself or your day-to-day affairs? You might not be able to make sound decisions about your health or finances. You could lose the ability to pay bills, write checks, make deposits, sell assets, or otherwise conduct your affairs. Unless you're prepared, incapacity could devastate your family, exhaust your savings, and undermine your financial, tax, and estate planning strategies. Planning ahead can ensure that your health-care wishes will be carried out, and that your finances will continue to be competently managed.

#### It could happen to you

Incapacity can strike anyone at any time. Advancing age can bring senility, Alzheimer's disease, or other ailments, and a serious illness or accident can happen suddenly at any age. Even with today's medical miracles, it's a real possibility that you or your spouse could become incapable of handling your own medical or financial affairs.

#### What if you're not prepared?

Should you become incapacitated without the proper plans and documentation in place, a relative or friend will have to ask

the court to appoint a guardian for you. Petitioning the court for guardianship is a public procedure that can be emotionally draining, time consuming, and expensive. More importantly, without instructions from you, a guardian might not make the decisions you would have made.

#### Advanced medical directives

Without legal documents that express your wishes, medical care providers must prolong your life using artificial means, if necessary. With today's modern technology, physicians can sustain you for days and weeks (if not months or even years). To avoid the possibility of this happening to you, you must have an advanced medical directive.

There are three types of advanced medical directives: a living will, a durable power of attorney for health care (or health-care proxy), and a Do Not Resuscitate order

(DNR). Each type has its own purpose, benefits, and drawbacks, and may not be effective in some states. You may find that one, two, or all three types of advanced medical directives are necessary to carry out all of your wishes for medical treatment. Be sure to have an attorney prepare your medical directives to make sure that you have the ones you'll



need and that all documents are consistent.

### Living will

A living will allows you to approve or decline certain types of medical care, even if you will die as a result of the choice. However, in most states, living wills take effect only under certain circumstances, such as terminal injury or illness. Generally, a living will can be used only to decline medical treatment that "serves only to postpone the moment of death." Even if your state does not allow living wills, you may still want to have one to serve as an expression of your wishes.

### Durable power of attorney for health care

A durable power of attorney for health care (known as a health-care proxy in some states) allows you to appoint a representative to make medical decisions for you. You decide how much power your representative will have.

### Do Not Resuscitate order (DNR)

A DNR is a doctor's order that tells all other medical personnel not to perform CPR if you go into cardiac arrest. There are two types of DNRs. One is effective only while you are hospitalized. The other is used while you are outside the hospital.

### Protecting your property

Without someone to look after your financial affairs when you can't, your

property could be wasted, abused, or lost. To protect against these possibilities, consider putting in place a revocable living trust, durable power of attorney (DPOA), or joint ownership arrangement (or a combination of any or all options).

### Revocable living trust

You can transfer ownership of your property to a revocable living trust. You name yourself as trustee and retain complete control over your affairs. If you become incapacitated, your successor trustee (the person you named to run the trust if you can't) automatically steps in and takes over the management of your property. A living trust can survive your death. There are, of course, costs associated with creating and maintaining a trust.

### Durable power of attorney (DPOA)

A DPOA allows you to authorize someone else to act on your behalf. There are two types of DPOA: a standby DPOA, which is effective immediately, and a springing DPOA, which is not effective until you have become incapacitated. Both types of DPOA end at your death.

A DPOA should be fairly simple and inexpensive to implement. However, a springing DPOA is not permitted in some states, so you'll want to check with an attorney.

### Joint ownership

A joint ownership arrangement allows someone else to have immediate access to property and to use it to meet your needs. Joint ownership is simple and inexpensive to implement. However, there are some disadvantages to the joint ownership arrangement. Some examples include: (1) your co-owner has immediate access to your property regardless of incapacity, (2)

you lack the ability to direct the co-owner to use the property for your benefit, (3) naming someone who is not your spouse as co-owner may trigger gift tax consequences, and (4) if you die before the other joint owner, your property interests will pass to the other owner without regard to your own intentions, which may be different.

### How is incapacity determined?

Incapacity can be determined in one of two ways:

- **Physician certification**—You can include a provision in a durable power of attorney designating one or more physicians who will make the determination. Or, you can state that your incapacity will be determined by your attending physician at the relevant time, whomever that might be.
- **Judicial finding**—The court may be petitioned to determine incapacity. After a proceeding where medical and other testimony will be heard, a judge will decide whether you are incapacitated according to the legal standards in your state.

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# What Every Litigation War Room Needs to be Successful

## *The Paralegal's Role*

by Keith Slyter

Your attorney announces that your case will be going to trial and that you will be in charge of arranging a war room for trial. With eyes as big as saucers and a look that closely resembles that of a deer caught in the headlights of a car, you quickly Google *War Rooms-R-Us*. Your attorney adds that this case does not justify hiring a company that specializes in setting up and staffing trial war rooms.

As visions of stern looking military chiefs sitting around a large conference table in a secret underground bunker, similar to the War Room at the Pentagon from Stanley Kubrick's *Dr. Strangelove*, swirl around in your head you

realize that you may be getting in over your head, but you are a paralegal and you will not let this challenge defeat you.

Reality kicks in as it dawns on you that War Room #3 in your office looks nothing like what you imagine a war room should look like. The wall is lined with boxes of documents from your case. There is a folding table against one wall and a shelf full of case notebooks and hearing binders on another. The supplies have long been pilfered as you look at two pens, a couple of post-it pads and some paper clips strewn across the table. There is a printer, but that is the one that always jams and you suspect it was put in the war room just to get it out of the way. This type of war room will not be sufficient during trial.

**What do you need in a litigation war room at trial?**

*Location, location, location...*

Location may be the most important

aspect of having a successful litigation war room during trial. Having a war room five blocks away from the courthouse may limit the usefulness of the war room during the actual trial. Many trial teams get a conference room and/or adjoining rooms



to their hotel room/suite for use as a war room. This allows the team to work as long and late as they can and then turn in for some well-deserved rest before battling the next day.

Finding a suitable location requires some advanced planning and reconnaissance as hotels near the courthouse may be full due to a convention or special event that

is occurring near the courthouse. Ideally, you want to be as close as possible to the courthouse. This allows you to run to the war room to do last minute changes to a presentation.

You also want to reserve one of the attorney break-out rooms at the courthouse as early in advance as possible so you have someplace to quickly duck into a room to have a private conversation with the team or with a witness.

In picking a location, you will also want to note where the closest office supply, copy shop, exhibit store, restaurant, dry cleaners and most importantly a coffee shop/Starbucks are located.

Also, try to find out where the other side is staying so you don't stay at the same location or have your war room next to theirs. You don't really want the other side listening to your conversations in the elevator or lobby or even seeing your witnesses come and go.

### Setup

After 2 locations have been determined (you need a back-up), you need to develop a war room plan.

- What exactly is the war room going to be used for during trial?
- Will the war room be used to work with witnesses, plan the next day's events, strategize, copy and scan documents, prepare exhibits and eat lunch?
- Will it need to be big enough to walk around and practice rehearsing opening and closing statements or direct/cross examinations?
- How many people will be in the war room at any given point?
- How many workstations and power supplies will you need?
- Will you have a dedicated person, whether trial consultant or a courtroom technologist staff the war room and courtroom?
- Will you as the paralegal be running both the war room and the courtroom?
- How will you refer to documents when presenting in trial?

The war room is a great place to discuss and practice how documents will be referred to as you are in the courtroom. You don't want to go into the courtroom cold and have your attorney refer to deposition Exhibit 6 and have a blank look cross your face as you only remembered the trial exhibit and Bates numbers on each document.

Arrange transportation and check flight schedules for the closest airport. This will help with planning going home for the weekend and getting back to the court by Monday morning. Be sure to arrange for cars/transportation back and forth from the courthouse and hotel/war room.

I always find checklists to be helpful so you don't forget something and here is a good starting point from which you can add additional items (see Table 1).

### War Room List

#### *Litigation War Room Supply List*

The easiest way to deal with the supply list is to number the boxes and put a description of the items in each box (see Table 2).

Supplies should include the following:



Table 1

Check	Description	Details
Setup		
✓	Furniture/Workstations	Folding Tables/Chairs brought from office
✓	Shelves (for notebooks and office supplies)	Brought from Office
✓	Conference Table	At Hotel
Technology		
✓	High Speed Color Printer/Copier/Scanner	Rental or Bring from Office?
	Scanner (if separate from Printer/Copier)	Rental or Bring from Office?
✓	Back-up copier/scanner	Rental or Bring from Office?
	E-Fax on everyone's computer	Have It Load and test
	On-site Server with entire database and mirror of firm drive, exhibits and productions	IT to set up and arrange
✓	Laptops	IT to set up and arrange
	Internet access	Broadband cellular wireless network? T-1 line through hotel?
	USB Thumb drives and storage devices	IT
	Arrange and understand how to use VPN or remote access to log-in to the firms network when away from the office	IT
	Phones	Cell phones or dedicated line through hotel?
Vendor/Contact List		
	Local copy/scanning vendor	Phone, address and email
	Local restaurants	Phone, address, email and website
	Dry Cleaner	Phone and address
	Pharmacy	Phone and address
	Back-up support (attorneys, paralegals, staff)	Phone and email

Table 2

## Litigation War Room Supply List

The easiest way to deal with the supply list is to number the boxes and put a description of the items in each box, for example:

Box No.	Description
1	Trial Supply List A to Z Tabs
2	Tab 1-50 Collated tabs 1-100

- Assorted labels and tabbies
- A-Z Tabs
- Batteries
- Binders with vinyl window (1", 1.5", 2", 3" and 4")
- Box Cutters
- Bubble Wrap
- Calculators
- CD Cases
- CDs
- Clips (Alligator)
- Coffee Pot/Maker (very important!)
- Collated Tabs 1-800
- Cork Board
- Dorm Style refrigerator
- DVDs
- Easels (more than one), Easel Pads, colored markers
- Envelopes
- Favorite pens and pencils
- FedEx/Overnight shipping supplies
- Folding tables and chairs
- Individual Tabs 1-50
- Label Dividers
- Legal Pads
- Light bulbs for any desk lamps
- Manilla Folders
- Mouse Pads
- Packing Tape
- Paper 3-Hole
- Paper—Color Copy
- Paper—Regular Copy
- Paper Cutter
- Paper hole punch (2 hole and 3 hole)
- Pen/Pencil cups
- Post it notes of all sizes
- Red Wells (small and large sizes)
- Regular Paper
- Sharpie Markers
- Small fan and possibly small heater
- Snacks
- Soda flavors that everyone enjoys
- Staplers
- Staples
- Super Glue
- Surge Protectors
- Toner for any printers
- Water
- White board with dry erase markers
- Wipes

## • Technology

Technology is wonderful when it runs smoothly. It is always better to be prepared for a mishap and not have one than to have a mishap and not be prepared. In fact, just plan on Murphy making a visit sometime during trial. Even with redundant systems and back-ups, something will go wrong. If you have a plan b and c already in place, it is easier to shift gears under-pressure to make things run smoothly again.

Make sure the war room has the same or substantially similar presentation technology as you will use in the court room.

- Will you be using an Elmo?
- Monitors
- Projector and screen
- Audio equipment

Whether you hire a trial consultant or technologist or are tech savvy enough to do it yourself, someone needs to be designated as the go to person for technology in the court room and in the war room. That same person will most likely be in charge of sitting in the "hot seat" to present evidence, highlight portions of exhibits and do video clip editing on the fly.

You also need to be able to scan, copy and convert documents in the war room. New exhibits are sometimes introduced or rulings on other documents require changes to existing exhibits.

The ability to convert, change, synchronize and edit both images and videos is essential to keep the flow of the trial presentation seamless. Most of this work will take place in the war room.

Internet access is crucial in the war room. Having access to the office, the web and email is essential for communication during trial. A secure wireless network in the war room will allow everyone to have access to the firm, email and the web for grabbing documents.

Mark all equipment brought from the office so nothing gets left behind. Make a list of all equipment and serial numbers so it can be checked back in after the trial is over. You don't really want equipment growing legs and walking off during or after trial.

The biggest thing a litigation war room needs to be successful is planning and organization. Planning and organization

will make or break your war room.

You may feel like you are scrambling and going crazy at times, but to others you may look like a duck gracefully gliding across the water of a glass-like pond. Nobody sees the ducks feet frantically paddling under the water while trying to get away from the alligator. And so it is with

the litigation trial paralegal. If you have planned and organized correctly, you too will look graceful as you are knee deep in alligators.

*A special thank you to Joanna Walls, Senior Paralegal at McKool Smith, PC in Dallas for double checking my information and mak-*

*ing sure I did not leave anything off the list (another very important thing about planning a successful war room is having a colleague or peer review your list(s)).*

*Keith Slyter is the Principal at Litigation Paralegals, LLC.*

## The Art & Importance of Filing Cap— Exempt H-1B Petitions for School Teachers

By: Mehron Azarmehr and Marcela Evans

To this day the school year calendar influences my life. While having left school for several years, I have friends who are teachers, colleagues who are pursuing higher education, and many acquaintances who share about their children's activities. I can track certain life events based on whether they occurred during finals, or over the summer. August signals the beginning of a new year, not January, or October.

October as the beginning of a new year may sound odd. However, for the purpose of H-1B visas, October 1 is the beginning of the fiscal year, and this creates problems when schools and school districts seek to employ foreign nationals as members of the schools' teams of educators. A classroom cannot go unstaffed until October 1, which is why the submission of cap exempt H-1B petitions becomes beneficial.

The H-1B visa is a temporary nonimmigrant visa for persons working in a specialty occupation, fashion model of distinguished merit and ability or person providing a service related to Department of Defense cooperative research and development project or co-production project.<sup>1</sup> A specialty occupation is one that requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum

for entry into the occupation in the U.S.<sup>2</sup> Employers (petitioners) file H-1B petitions on behalf of their foreign national employee (beneficiary).

A statutory limit of 65,000 has been set for H-1B visas for each fiscal year.<sup>3</sup> Subtracted from this number are free trade visas for individuals from Chile and Singapore resulting in an available 58,200 H-1B visas for employers to utilize to bring highly qualified foreign nationals to work in the U.S. each year.<sup>4</sup> The numerical cap is filled in the order that the petitions are filed.

In addition to the cap, there are other limits on the H-1B visa. An H-1B visa is valid for three years with the possibility of an extension for an additional three years.<sup>5</sup> Additionally, the employer is limited as to when it can petition for the foreign national, and when it can have the foreign national begin work. April 1 is the first day that an H-1B petition may be filed for the fiscal year that begins on October 1.<sup>6</sup> Historically more H-1B petitions are filed than available visas. In the early 2000s the cap was reached on the first day of filing.<sup>7</sup> The first date that an employee may begin work is the next October 1.

However, some positions that qualify as H-1B specialty occupations are exempt from the numerical cap. Cap exempt positions include the first 20,000 approvals of individuals who have earned a U.S. master's degree or higher; and

foreign nationals who are beneficiaries of employment offers at institutions of higher education or related or affiliated nonprofit entities, or nonprofit research organizations, or governmental research organizations.<sup>8</sup> A petition submitted by a qualified petitioner should not be subject to the numerical cap if the offered position is a part of a collaboration between the petitioner and an institution of higher education that is exempt under the numerical cap.<sup>9</sup>

An institution of higher education is defined as an educational institution in any state that admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certification.<sup>10</sup>

A petitioner who seeks to file a cap exempt petition must show that it has an affiliation or relation to an institution of higher education. The entity must meet a three-prong test which includes showing (1) shared ownership by the same board or federation; (2) operation by an institution of higher education; or (3) attachment to an institution of higher education as a member, branch, cooperative, or subsidiary.<sup>11</sup>

Exemption from the numerical cap has a double benefit; first even if the cap is exceeded, petitions that qualify for an exemption can be approved, and second the start date for employment does not have to coincide with the beginning of the fiscal year. Petitioners who have an affiliation with an institution of higher education can hire teachers with start dates corresponding to the school calendar rather than the fiscal year set by the United States Customs and Immigration Service (USCIS). Additionally, qualifying petitioners have more certainty as

employers. Whether H-1B visas are available at the time when a classroom needs to be staffed is not a concern. When students need a qualified teacher, a teacher can be hired.

The most appropriate term to describe the approval of numerical cap exempt H-1B visas for schools and school districts is "uncertain". While many times petitions are approved, frequently USCIS sends Requests for Evidence (RFE), and sometimes petitions that seem identical receive different treatment.<sup>12</sup>

The best practice to prevent RFEs and denials is to submit petitions with evidence showing that the petitioner precisely meets the requirements for exemption from the numerical cap. Evidence correlating to each element must be submitted.

A recent decision denying the cap exempt status of a petition sought by a teaching hospital notes that the petitioner failed to demonstrate that the institution with which it is claimed affiliation qualifies as an institution of higher education.<sup>13</sup> In that case, the institution was a state university. Although it seems apparent

that this institution would qualify under the definition of an institution of higher education, the Administrative Appeals Office (AAO) wanted demonstrative evidence. Evidence to this effect could be obtained from the institution's website.

The same decision also states that the place of performance of the job duties is the paramount factor in determining whether a petitioner qualifies for an exemption from the numerical cap.<sup>14</sup> Job duties must be performed at a qualifying nonprofit organization. Evidence submitted with the petitions should emphasize the school or school district is connected or associated with an institution of higher education through shared ownership or control by the same board or federation, that it is operated by an institution of higher education or attached to an institution of higher education as a member, branch cooperative, or subsidiary. As evidence, petitioner should provide a copy of an affiliation agreement between the institution of higher education and the qualifying entity outlining each party's duties and responsibilities; or

documentation that the institution of higher education and the qualifying entity are jointly managed and controlled.

The recent decision speaks to a complication in the interpretation of the law regarding cap exempt positions. In the same decision the AAO states that there is no requirement that a beneficiary work in the actual program that is administered and managed jointly by the institution of higher education<sup>15</sup> and that the analysis of program participation will only take place when it has been determined that the beneficiary will be employed at an institution of higher education or an affiliated nonprofit entity<sup>16</sup>. The language regarding the analysis of program participation comes from a memo from Michael Aytes, Associate Director for Domestic Operations of USCIS<sup>17</sup> that was aimed at providing guidance on the proper handling of cap exempt H-1B petitions. In the memo a discussion of the Congressional intent to exempt from the H-1B cap certain alien workers who could provide direct contributions to the U.S. through their

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work on behalf of institutions of higher education and related nonprofit entities, and the effect corresponding effect that qualifying institutions would have access to continuous supply of H-1B workers without numerical limitation.<sup>18</sup> The Aytes Memo also indicated that whether a position qualified as cap exempt was not just based on where the position was located, but whether the beneficiary was working in the jointly administered program.<sup>19</sup> Although the Aytes Memo is widely used for guidance, the language regarding direct involvement in the jointly administered program is not part of the law itself.

Regardless, for petitions to have a higher level of success it seems to be the safest practice for petitions to include evidence that addresses the most stringent requirement – the evidence that the teacher is directly involved in the program which affiliates the school or school district with the institution of higher education. Evidence of this could include brochures about joint program, information from both the institution of higher education's and the petitioner's websites. Additional potential exhibits to include are copies

of enrollment records for the program, receipts from enrolled parties, and a completed registration form for the program.

Educators are talented and often undervalued professionals. For better or worse, the education that a student receives colors their perception of the world and influences their preparedness for the future. Students deserve to have qualified professionals at the head of their classrooms, and schools and school districts need to have the certainty that they will be able to secure staff that meets their highest standards. Using the cap exempt H-1B petitions schools and school districts can hire foreign national educational professionals without concern for the number of visas available or restrictions on the beneficiary's start date. Many schools and school districts have existing relationships with institutions of higher education that make the school or school district eligible to pursue this course of action.

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1. 8 U.S.C. 6 1101(a)(15)(H)(i)(b) (2006).
2. 8 USC 6 1184(i)(1) (2006).
3. 8 USC 66 1184(g)(1)(A) (2006).
4. 8 USC 6 1184(g)(8)(B)(iv) (2006).
5. 8 CFR 6 214.2(h)(9)(iii)(A)(1) (2009).
6. <http://www.uscis.gov/portal/site/uscis/menuitem-em.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=4bcdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnextchannel=7356681126443210VgnVCM100000b92ca60aRCRD>.
7. Ira J. Kurzban, Kurzban's Immigration Law Sourcebook, 743 (American Immigration Council, 2010) (1999).
8. Immigration and Nationality Act 6 214(g)(5) (A) & (B).
9. See Matter of \_\_\_\_\_, EAC-06-216-52028 (AAO September 8, 2006).
10. 20 U.S.C. 6 1001(a) (2006).
11. See Kurzban, supra note 7 at 743.
12. On the American Immigration Lawyers Association message board members can post questions, concerns, outcomes and experiences with cases. The discussions about cap exempt H-1B visas are full of conflicting outcomes, and exasperated comments from the members dealing with the inconsistencies.
13. In Re Petitioner \_\_\_\_\_ Beneficiary \_\_\_\_\_, WAC-09-059-50704 (AAO October 05, 2010).
14. Id. page 8.
15. Id. page 3.
16. Id. page 7.
17. Memorandum from Michael Aytes, Assoc. Dir. For Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Dept. Homeland Sec., to Reg. Dirs. & Serv. Ctr. Dirs., Guidance Regarding Eligibility for Exemptions from the H-1B Cap Based on S 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313 at 3) (June 6, 2006) (hereinafter referred to as "Aytes Memo").
18. Id. page 3.
19. Id. page 3.



## Paralegal Division, State Bar of Texas

NALA's 36th Annual Convention and Institutes in Dallas/Plano was a huge success in large measure due to warm Texas hospitality and involvement by the Paralegal Division, State Bar of Texas. The July convention enjoyed record attendance at the seven institutes as well as in vendor participation at the exhibition.

CLE by NALA doesn't end with the convention. Look into the following:

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Go to [www.nala.org/cle-guide.aspx](http://www.nala.org/cle-guide.aspx) for a "Quick Guide to NALA CLE Courses and Subjects."



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# TEXAS PARALEGAL DAY CELEBRATIONS

Texas Paralegals across the State will be celebrating Texas Paralegal Day – October 23, 2011, the anniversary of the date the Paralegal Division of the State Bar of Texas was created. If you are close by, please join in our celebrations.

**District 2 (Dallas)** of the Paralegal Division of the State Bar of Texas, North Texas Paralegal Association, Dallas Area Paralegal Association, and JL Turner Legal Association Paralegal Section are jointly sponsoring a celebration of Texas Paralegal Day on Thursday, October 20 at the Avanti Restaurant, Dallas, TX from 6:00 pm – 8:00 pm. For details on this celebration, please contact Jay Williams at [litplegal@yahoo.com](mailto:litplegal@yahoo.com).



**District 3 (Fort Worth/Arlington)** of the Paralegal Division of the State Bar of Texas is sponsoring a Texas Paralegal Career Day on Thursday, October 20 at the Tarrant County Family Law Center, 200 E. Weatherford Street, Fort Worth, TX from 8:00 am – 2:00 pm. For details on this career day, please contact Michele Rayburn at [m.rayburn@wallach-law.com](mailto:m.rayburn@wallach-law.com)

**District 4 (Austin/Central Texas)** of the Paralegal Division of the State Bar of Texas and Capital Area Paralegal Association are jointly sponsoring a celebration of Texas Paralegal Day on Thursday, October 20 at Maggiano's Little Italy, Austin, TX from 6:00 pm – 8:00 pm. For details on this celebration, please contact Michele Brooks at [District4@txpd.org](mailto:District4@txpd.org). For sponsorship opportunity, contact Stephanie Sterling [sustaining@capatx.org](mailto:sustaining@capatx.org).

**District 5 (San Antonio)** of the Paralegal Division of the State Bar of Texas, Alamo Area Paralegal Association, South Texas Organization of Paralegals are jointly sponsoring a celebration of Texas Paralegal Day on Friday, October 21 at The Bright Shawl, San Antonio, TX from 11:30 am – 1:30 pm. For details on this celebration, please contact Patti Giuliano at [pgiulian@coxsmith.com](mailto:pgiulian@coxsmith.com).

**District 7 (Corpus Christi)** of the Paralegal Division of the State Bar of Texas will be sponsoring a Texas Paralegal Day Celebration and Mixer on October 27 at Cassidy's Irish Pub, 601 N. Water Street, Corpus Christi from 5:30 p.m. to 8:30 p.m. For details in regard to this celebration, please contact Laura L. Rogers at [laura@wbwpc.com](mailto:laura@wbwpc.com).

**District 11 (Midland/Odessa)** of the Paralegal Division of the State Bar of Texas (SBOT) will host a luncheon in connection with the Midland County Bar Association on October 20th at the Midland Country. The luncheon will begin at 11:30 am. Our keynote speaker is Senior US District Judge Royal Furgeson. The SBOT MCLE Department has approved the program for 1 hour Ethics. For details, contact Darla Fisher at [dfisher@lcalawfirm.com](mailto:dfisher@lcalawfirm.com)

# 2011 Legislative Update

By Kristina Kennedy, ACP

With appreciation and credit to Norma A. Bazan and Gary L. Nickelson from the Law Office of Gary Nickelson for allowing her to summarize their paper entitled "Legislative Issues and Resources—What to Expect and Where to Look" presented at the 34th Annual Marriage Dissolution Institute.

## Texas Probate, Guardianship and Trust Legislation

**Section 4D Update**—Permits the judge of a constitutional county court to assign a statutory probate judge to hear the entire probate proceeding and not just the contested portion of the proceeding.

**Section 4H and 6D**—Amended to ensure a statutory probate court has concurrent jurisdiction with the district court in an action involving a charitable trust as defined by Section 123.001 of the Property Code and that venue of charitable trust proceedings is determined under Section 123.005 of the Property Code.

**Section 11B (New)**—Exempts the estates of law enforcement officers and firefighters killed in the line of duty from the requirement to pay probate fees.

**Section 12 Update**—Adds adult incapacitated children to the list of persons whom may benefit from the family allowance, exempt property and allowance in lieu of exempt property.

**Section 59 Update**—Permits combining the execution of the will and the self-proving affidavit so that the testator and the witnesses only have to sign once (optional).

**Section 64 Update**—"Probable" cause changed to "just" cause.

**Section 83 Update**—If competing wills are offered for probate, the court may not sever or bifurcate the proceeding on the applications.

**Section 128A Update**—Notice not necessary to beneficiaries receiving \$2000 or less worth of property or who has received all gifts to which he/she is entitled within 60 days of the order admitting the will to probate.

**Section 145A (New)**—Permits the distributees of an estate to give the independent administrator the power of sale in cases

where there is no will or where the will does not contain language authorizing him/her to sell real property.

**Section 145C (New)**—Confirms that an independent executor has the power to sell real property if that power is expressly given to him or her in the will, and, unless limited by the terms of a will, both independent executors and independent administrators have the same power of sale for the same purposes as a personal representative has in a dependent administration, but without the necessity of court approval and without the need to comply with procedural requirements applicable to dependent administrations.

**Section 146**—Makes it clear that Section 294(d) notices may be used in an independent administration, however, the notice also must include a statement that a claim may be effectively presented by only one of the methods prescribed in Section 146.

**Section 250 Update**—Probate inventory may be kept private.

**Section 452 Update**—Adds "A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated JT TEN, Joint Tenancy, joint, or other similar abbreviation." (Parallel language added to Section 439).

**Section 646 Update**—Provides that an attorney ad litem continues to serve after the court appoints a temporary guardian unless the court orders otherwise.

**Section 646A (New)**—Permits a ward who retains the power to enter into a contract or a proposed ward with the capacity to contract to retain an attorney meeting the ad litem certification requirements of Section 647A to represent him/her instead of being represented by the attorney ad litem.

**Section 652 (New)**—Permits a hearing on a guardianship matter anywhere in the county in which the guardianship matter is pending, so long as the ward or proposed ward does not object.

**Section 670 Update**—Permits the guardian for a recipient of governmental medical assistance to treat guardianship compensation not exceeding \$175/mo and costs not exceeding \$1000 that are directly related to establishing or terminating the guardianship during any three-year period to be deducted as an additional personal needs allowance when computing the recipient's applied income.

**Section 682A Update**—Makes it easier for the conservator of an adult disabled child to obtain a guardianship of that child.

## 2011 Legislative Update—Litigation Government Code:

**Sec. 22.004(g)**—Requires adoption of rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. (The rules shall not apply to actions under the Family Code).

**Sec. 22.004(h)**—Requires rules to promote the prompt, efficient, and cost-effective resolution of civil actions. However, these rules may not conflict with provisions of Chp 74—CPRC; Family Code; Property Code; Tax Code.

## Civil Practices and Remedies Code:

**CPRC Sec. 30.021**—Award of Attorney's Fees in Relation to Certain Motions to Dismiss

**CPRC Sec. 33.004(d)**—Added requirements regarding designation of responsible third parties

**CPRC Sec. 33.004(3)**—Repealed

**CPRC Sec. 42.001 (5) and (6)**—Amended regarding allocation of litigation costs

**CPRC Sec 51.014(d), (e), and (f)**—Changes regarding appeal of controlling question of law

## 2011 Legislative Update—Family Law Texas Family Code:

**Sec. 33.003(f)**—amended: The reference of the "Department of Protective and

Regulatory Services" is the Texas Family Code to its new departmental name "Department of Family and Protective Services."

Sections 8.051; 8.052; 8.053(a); 8.054; 8.055; 8.056; 8.057 (c) and (d); and 8.059 (a), (b) and (d) amended: Modifies spousal maintenance as follows: 1) the duration of maintenance depending on whether a marriage lasted at least 10, 20, or 30 years; 2) increase the limit of spousal maintenance from \$2,500.00 to \$5,000.00 [and clarify "Gross" income]; and 3) the court's ability to enforce maintenance by contempt if the maintenance was agreed to by the parties [specifically, "the court may not enforce by contempt any provision of an agreed order for maintenance for any period of maintenance beyond the period of maintenance the court could have ordered under this chapter."]

Section 8.0591—added: Requires an obligor to return excess payments and allow an obligor to file to recover excess payments.

Subchapter B, Chapter 8—amended

Sections 8.053(b); 8.055(b), (c) and (d); and 8.059(e)—repealed

Section 84.006—added: Provides that, in a hearing on a protective order application, the statement from a child over 12 years of age or younger alleging to be the victim of family violence is admissible as evidence in the same manner that a child's statement regarding alleged abuse is admissible under Section 104.006 (SAPCR).

Sections 107.013; Part 1, Subchapter B, Chapter 107; 109.002(a); 263.405(a), (b) and (c)—amended: If a court determines a party to be indigent, that party will be presumed to remain indigent during the pendency of the suit unless the court determines in a motion filed by the attorney ad litem for the parent or attorney representing a governmental entity that party is no longer indigent. Also appeals in suits regarding termination of parental rights shall be given precedence over other civil cases and shall be accelerated. A final order rendered under this subchapter must contain this statement (boldfaced, capitalized, or underlined): A PARTY AFFECTED BY THIS ORDER HAS THE RIGHT TO APPEAL. AN APPEAL IN A

SUIT IN WHICH TERMINATION OF THE PARENT-CHILD RELATIONSHIP IS SOUGHT IS GOVERNED BY THE PROCEDURES FOR ACCELERATED APPEALS IN CIVIL CASES UNDER THE TEXAS RULES OF APPELLATE PROCEDURE. FAILURE TO FOLLOW THE TEXAS RULES OF APPELLATE PROCEDURE FOR ACCELERATED APPEALS MAY RESULT IN THE DISMISSAL OF THE APPEAL.

Sections 107.014—added: Provided that duration of attorney appointed as an ad litem would continue until 1) the date the suit is dismissed; 2) the date all appeals are exhausted or waived; or 3) the date the attorney is relieved of the attorney's duties and replaced by another attorney after a finding of good cause is rendered by the court on the record.

Sections 263.405(b-1), (d), (e), (f), (g), (h), and (i)—repealed

Sec. 7.009—added: Provides definitions for "fraud on the community" (meaning improper conduct by a spouse to the detriment of the community estate) and "reconstituted estate" (meaning that the total amount of money that would have been in the community estate if the fraud on the community had not occurred). Before dividing the community estate, the trier of fact must determine whether a spouse has committed fraud on the community and if such trier of fact determined that a spouse has committed fraud on the community, it will make certain calculations to determine any award made to the innocent spouse.

Sections 153.702(a) and 153.703(b)—amended: In temporary cases involving military deployment, there is not requirement of proof of a material and substantial change of circumstances, other than the deployment. The person designated to exercised the rights of the deployed spouse cannot be ordered to pay child support. Section 153.703(b) refers to a *nonparent*.

Section 153.706—repealed

Sections 154.006(a) and 161.005(a)—amended and Sections 161.005(c), (d), (e), (e-1), (f), (g), (h), (i), (j), (k), (l), (m), (n), and (o)—added: Essentially a final order does not affect a petitioner's obligation for support of child incurred before that date [final order date] or to

pay interest that accrued after that date on the basis of child support arrearages existing after that date. A termination suit may be brought by a man who signed an acknowledgement of paternity without first obtaining genetic testing. An adjudicated father in a prior proceeding under Title 5, where genetic testing did not occur, may also bring a suit for termination. A termination suit must be verified and allege facts that 1) he is not the child's genetic father; and 2) signed the acknowledgement of paternity or failed to contest parentage because of the mistaken belief that he was the child's genetic father based on misrepresentations that led him to that conclusion. There is a one year statute of limitations for cases filed after September 1, 2012 and no statute of limitations regarding suits for termination filed before September 1, 2012.

Sections 85.001, 85.025, and 87.002—amended: Requires that "if the court renders a protective order for a period of more than two years, the court must include in the order a finding described by Section 85.025(a-1)." The court may render a protective order that exceeds two years. The person seeking to shorten the duration of a protective order has the burden of showing there is no need for continuing the protective order.

Sections 81.010, 82.002(b), 82.009, 83.006, 85.026(a), 261.001(1)—amended: An application for a protective order may be filed by a member of the dating relationship, regarding of whether the member is an adult or a child. A minor must verify an application for an ex parte protective order. The "abuse" definition will include dating violence against a child.

Sections 83.007, 85.026(b), and 85.065(a)—repealed

Section 153.254—amended: Sets out relevant factors for the court to consider when awarding a possession and access schedule for a child under three years of age. A court is required to make findings in support of its order if a party so requests within 10 days after the date of the hearing.

*Kristina Kennedy, ACP is a paralegal at the Law Office of Robert E. Raesz, Jr. in Austin.*

## Houston Paralegal Elected to National Office

**R**uth S. Conley, ACP, a paralegal with Andrews Kurth LLP in Houston, has been elected Region IV Director of the National Association of Legal Assistants/Paralegals during the association's 36th annual meeting July 29 in Dallas, TX. She will serve on the NALA Board of

Directors for 2011–12, representing Texas, Oklahoma, Arkansas, and Louisiana.

A paralegal since 1989, Ruth became a Certified Paralegal (CP) in 1993 and an Advanced Certified Paralegal (ACP) in Discovery in 2011. She has served in a number of leadership positions for NALA, including Chair of the NALA Campus LIVE! Committee and service on the Continuing Education Council and Convention Committee.



She was a member of the Southeast Texas Association of Paralegals, Houston Legal Assistants Association and was a founding member and first president of the Houston Paralegal Association. She has been a member of the State Bar of Texas

Paralegal Division since 1993 and served on the Professional Development Committee representing District 1 for 2010–2011.

## Remembering a Charter Member

by Penny Grawunder  
Contributed to by retired Chief Justice  
Linda Thomas, 5th District Court of  
Appeals

**C**arlé Smith was a legal assistant before being a legal assistant was even an aspiration. She saw the potential for the need for the level of expertise that the legal assistant could provide not only the attorneys they work with but, more importantly, the clients. Carlé's area of concentration was family law and she was instrumental in communicating with the client's in her husband's family law prac-



tice. Carlé had the loyalty of clients as she was far more concerned about the welfare of others than of herself. Carlé lobbied for the recognition for legal assistants even before the creation of the Paralegal Division. When the Paralegal Division was formed, she became a charter member and continued to be a force for the advancement of the profession. As many of us know, in the 1970's, the promotion of legal assistants was an uphill effort.

According to retired Chief Justice Linda Thomas from the 5th District Court of Appeals, Carlé convinced one particular judge who had a long standing rule about who could be on which side of the rail in his courtroom, that to be effective, the legal assistant needed to be on the side of the rail in the courtroom with the attor-

ney and not relegated to the peanut gallery. Justice Thomas went on to say that in that particular case, trial judge determined after the first morning of trial with the attorney having to go to the back of the courtroom to get exhibits from Carlé, to make an exception to his own long-standing rule and Carlé moved to the other side of the rail.

Carlé authored numerous articles and was a frequent speaker at State Bar programs in the area of family law. Her innovations set the standard for paralegals and helped implement many of the practices used in the legal profession today. Carlé passed away on July 14, 2011. On this the celebration of the 30th anniversary of the Paralegal Division, let us be ever grateful to pioneers like Carlé who had the wisdom to pave the way for those who have and will follow.



## The Ethics of Community Service

Ellen Lockwood, ACP, RP

*(No, not that kind of community service.)*

**A**s members of our communities, we have an obligation to give back. Perhaps you volunteer with your child's school, serve on the board of a non-profit, or devote your time and talents to other organizations in your community. Generally, those activities do not have the potential for conflicts of interest or the unauthorized practice of law (UPL). However, issues may arise if your fellow volunteers look to you for assistance with situations that, however remotely, are legal matters.

It is possible that in some circumstances you may be asked to serve on a committee or board primarily because of your legal training and experience. If that is the case, you may want to consider declining the position. If the group or organization has sought you out because you are a paralegal they will likely give your opinion on legal matters undue weight which may cause them to make decisions and take actions based on your statements. This may be the case even if you preface your statements with the reminder that you are not an attorney and are not providing legal advice.

Paralegals certainly may serve on community boards and committees and may recommend the board or committee seek legal counsel when appropriate. However, paralegals may not draft documents and should not review legal documents in any capacity other than as a member of the board or committee.



A paralegal recently contacted the Paralegal Division to inquire whether she could serve on her church's board of directors.

The church was taking steps to incorporate and she had been asked to serve on the founding board. Once she confirmed she is an active member of the church and was not recruited to serve on the board because she is a paralegal, we discussed ways she could help prevent the board from relying on her legal education and experience. For example, the church wanted to enter into a lease agreement. The paralegal found a few online forms and recommended the

board consult an attorney regarding which one to use. She also was insisting that the entire board be involved in drafting the bylaws and related documents. The board was reviewing several examples of those documents and discussing together what types of provisions they would like to see included. The plan is that the board will take their draft to an attorney to have the documents reviewed and finalized prior to filing. We also discussed that she may occasionally need to remind her fellow board members that she is not wearing her paralegal hat during their meetings, especially if it appears they are looking to her for information regarding legal matters.

Becoming involved with committees and board is a wonderful way to give back to our communities,

but paralegals should make every effort to distance themselves from any attempt by the board or committee to involve them in situations which may cause others to rely too heavily on their opinions regarding legal issues.

*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. You may follow her at [www.twitter.com/paralegalethics](http://www.twitter.com/paralegalethics). She may be contacted at [ethics@txpd.org](mailto:ethics@txpd.org).*



# Meet Your New Board of Directors

The officers installed for 2011–2012 Board of Directors included:

## President

Susan Wilen, RN



Susan Wilen is a Nurse Paralegal for Brin & Brin, LP in San Antonio, and has been involved in healthcare litigation since 1992. She

graduated in

1970 from Kings County Hospital School of Nursing in Brooklyn, New York and received a B.A. degree in Philosophy from Trinity University in 1983.

Susan has been a member of the Paralegal Division since 2004 and was elected by its Board of Directors to serve as the President Elect of the Paralegal Division for 2010–2011. She was appointed as Director of District 5 for the 2007–2009 term and elected for a second term in 2009. She has served on several Paralegal Division Ad Hoc Committees and was a past Board Advisor to the Membership and Elections Committee. In San Antonio, Susan has served as the chair of Paralegal Day activities from 2006 through 2010.

She currently serves as the Paralegal Division's Board Liaison to the American Association of Legal Nurse Consultants for 2010–2011 and as an advisor to the Pro Bono Ad Hoc Committee; she is the Annual Meeting Committee Chair for 2011 in San Antonio. She will also serve as the 2010–2011 Vendor Liaison of the Paralegal Division.

Volunteer and *pro bono* activities have been a major source of personal growth and a vehicle for community involvement for Susan with children at risk and adults with special needs. She recently provided testimony to the Public Health Committee of the Texas House of Representatives, sup-



porting legislation for harm reduction and needle exchange programs in the State.

She has two sons and a daughter. Her major interests are cooking, art, and travel. She climbed the Great Wall of China with her son in 2004 and Mount Kilimanjaro on her own in 2007. The Great Wall of China was easier.

As President Elect, her goals include expanding membership and promoting new skill development and opportunities for existing members.

## President-Elect

Joncilee M. Davis, ACP



Joncilee M. Davis, ACP has been a member of the Paralegal Division since 1998. She has previously served the Division as District Two Membership Committee

Subchair, Membership Committee Chair, District Two Director, and Public Relations Committee Chair.

Joncilee is employed full time as a paralegal for Fee Smith Sharp & Vitullo in Dallas. Her civil litigation practice areas

include insurance defense, including wrongful death cases. She has previously worked in the fields of intellectual property, appellate, family, criminal, commercial litigation, and toxic tort.

Joncilee attended Texas A&M University and obtained her degree in Political Science, with a double minor in History and Sociology. Following her graduation, Joncilee worked as an assistant probation office in Dallas County. Some of the attorneys at the courthouse discussed with her becoming a paralegal, and she loved the idea. She attended Southeastern Paralegal Institute and obtained her Paralegal Certificate with Honors. She also received her Master of Science degree Magna Cum Laude from Amberton University in Human Relations and Business.

Joncilee received certification as a Certified Paralegal from NALA in 1998 and the Advanced Paralegal Certification in Trial Practice in 2007.

Joncilee is a charter member of the North Texas Paralegal Association. Having been a member since 2001, she has served in the following capacities: President (2003–2005), First Vice President—Membership (2001–2002), Second Vice President—Education and Elections (2009–2011), Ethics Committee Chair (2003–2006), Publications Committee Chair (2008–2009), and Parliamentarian (2006). She is also a charter member of the

College of the State Bar of Texas, Paralegal Division. In 2005, Joncilee was honored with being elected to the Kaplan Education Alumni Hall of Fame.

As President-Elect, Joncilee's passion is to energize and rejuvenate Division members by re-igniting their passion for their paralegal career. A substantial portion of our lives are spent at work, so it is very important to find professionally rewarding activities. She would like to do so by promoting new skill development and opportunities for existing members.

When Joncilee is not preparing for trial or busy with the Paralegal Division, she enjoys spending time with her "fur children," two wire-haired Dachshunds named Daisy Mae and Dougal McDog! She also loves to travel and read, as time permits. Her favorite places to visit, so far, are France and Italy. In the fall months, you will find her either attending football games in Aggieland or watching her beloved Aggies play on television.

## Secretary

### Linda Gonzalez, CP



Linda is pleased to serve as District 16 Director and Secretary for the Paralegal Division of the State Bar of Texas. This is her first term as District 16 Director and has truly

enjoyed it. She has been employed with the law firm of Ray, Valdez, McChristian & Jeans, P.C. since 1993, and is the paralegal for the senior partner, Jeff Ray. Linda has also been a part-time instructor in the paralegal program at El Paso Community College since 2006, and is also on the college's Advisory Board.

Linda graduated from the University of Texas at El Paso with a B.A. degree in Languages. She obtained her NALA certification in 1997. She has been a member of the Paralegal Division since 1997. Linda has also been a NALA member since 1997, and is actively involved in her local associa-

tion, the El Paso Paralegal Association, and served as past President for two years, and as a past board member in various other positions.

Linda is from El Paso and is single, but has a niece and nephew that she adores and will do anything for.

## Treasurer

### Cheryl A. Bryan, CP



For the 2011–2012 term, Cheryl Bryan is pleased to serve the Paralegal Division of the State Bar of Texas in her fourth term as its Treasurer and, also, as

Director of District 10. She is a paralegal with the law firm of Orgain Bell & Tucker, LLP in Beaumont, and just celebrated her 29th anniversary with the firm.

Cheryl attended Northern Illinois University in DeKalb, Illinois for two years. She began working as a paralegal in the late 1980's. In 1992, she took and passed the CLA exam sponsored by NALA. In 1997, she took and passed the board certification exam in personal injury trial law sponsored by the Texas Board of Legal Specialization.

Cheryl has been a member of the Paralegal Division since 1993. She actively pursued CLE through the seminars sponsored annually by the Division, and decided to become more actively involved in the Paralegal Division after she met Nancy McLaughlin at a PD seminar. Nancy was a great supporter of the profession and the Division, and she passed along her passions to Cheryl. Cheryl began by volunteering at TAPS, and now she is Director of District 10 as well as the PD Treasurer.

Cheryl is also actively involved in her local association, the Southeast Texas Association of Paralegals. Over the last several years, she has served on event planning committees (including the TAPA 2010 Planning Committee), and has been elected to serve her second term as SETAP's Treasurer for 2011–2012.

Cheryl has been married to her husband, George, for almost 19 years. They have no children but do have two wonderful Labs, Jake and Samantha, and three saltwater aquariums.

## Parliamentarian

### Kristie Ritchie



Kristy Ritchie is a paralegal in the San Antonio office of Winstead PC. After working 10 years in the litigation arena, she now

works for outside counsel to Verizon Wireless, building their telecommunications network. Kristy holds a Bachelors of Social Science Degree in Criminal Justice from the University of Texas at San Antonio and Associates of Applied Sciences in Paralegal Studies from San Antonio College. Her undergraduate focus and volunteer work has been in the field of juvenile justice.

Kristy has been actively involved with the Paralegal Division since the beginning of her career in 1990. Kristy has served on the Ethics Committee, Public Relations Committee, Continuing Education Committee, the Texas Advanced Paralegal Seminar (TAPS) Planning Committee, Annual Meeting Committee, and Texas Paralegal Day as Co-Chair for District 5. She has served in the past and is currently serving as District 5 Director of the Paralegal Division Board of Directors.



# The 2011 Annual Meeting

The 2011 Annual Meeting of the Paralegal Division of the State Bar of Texas was held on June 24, 2011 at the Henry B. Gonzalez Convention Center in San Antonio, Texas. The Annual Meeting Committee was chaired by Susan Wilen with assistance from Kristy Ritchie, Board Advisor, and Patti Giuliano, member of the Committee. The day's activities included four CLE presentations and a luncheon with more than eighty attendees.

The Paralegal Division (PD) hosted a number of CLE seminars by various presenters. More particularly, the Honorable Judge Ron Rangel, Justice of the 379 District Court of Bexar County, Texas presented on the topic, "*The Real Skinny on Grand Juries and Ham Sandwiches: Can a Grand Jury Really Indict a Ham Sandwich?*". Judge Rangel captured the attention of the audience by first giving the history of the United States Constitutional Foundation and the need for laws and the concept of due process. He gave a vivid depiction of the early English grand juries and how the separation of the grand jury and the trial jury began, with the separation being finalized in the year 1352. He said that the grand jury serves not only as an "investigative and prosecutorial arm of the state," but also a procedural safeguard for the defendant. Sara S. Beal, et al., *Grand Jury Law and Practice* 61:1 (2d ed.2010). He noted that the grand jury is supposed to be selected without discriminating against any class of people. Judge Rangel navigated us through the qualifications to be considered as a prospective grand juror, the duties and powers of the grand jury. He pointed out that after all available testimony is given, the grand jury must either indict ("true bill") or refuse to indict ("no bill"), and thereafter, the attorney representing the state then prepares the indictment which the foreman signs. Judge Rangel concluded his presentation with discussing the criticism that grand juries face. Some critics say that grand juries merely serve as a "rubber stamp" of the prosecution. *Id.* Lastly, Judge Rangel told us the story of Sol



Hon. Ron Rangel



Pam Horn and Debbie Oaks



Shannon Watts, Michele Brooks, Toya Walker



Ellen Lockwood



Cezy Collins





Debbie Oaks

Wachtler, an attorney and former Chief Justice of the New York Court of Appeals who said that a grand jury can really indict a ham sandwich! Mr. Wachtler made his comment after he was indicted for threatening his former lover's daughter. [http://articles.nydailynews.com/2004-02-19/news/18259567\\_1\\_hynes-cop-street-crime-unit](http://articles.nydailynews.com/2004-02-19/news/18259567_1_hynes-cop-street-crime-unit). There are several other cases that refer to Wachtler's comment in regards to grand jury procedure and the skepticism surrounding the grand jury, due, in part, to claims that the grand jury has lost its independence and merely serves the desires or prosecutors. Judge Rangel reminded us that despite the criticism facing grand juries, the investigative grand jury still holds important powers, namely the subpoena power and the grant of immunity to grand jury witnesses, which makes it "an effective tool for discovering evidence in cases involving organized crime, business crime, and political corruption." *Id.* 61:1.

Ellen Lockwood, ACP, RP is a certified paralegal and Intellectual Property Specialist of Law and Government Affairs at Clear Channel Communications, Inc. in San Antonio, Texas. Ellen is a past president of the Paralegal Division of the State Bar of Texas. She is currently the Chair of the Professional Ethics Committee of the Division, and is the lead author of the *Paralegal Ethics Handbook* published by West Legalworks. Because of Ellen's knowledge and expertise of legal ethics, it was an easy task for Ellen to deliver an outstanding CLE presentation on a topic



Gloria Porter and Sunnie Palmer



Debbie Oaks and Susan Wilen

that benefits paralegals and attorneys alike, "*Paralegal Ethics for Attorneys*" during the 2011 State Bar of Texas Annual Meeting. Ellen discussed the Texas Disciplinary Rules of Professional Conduct in depth. She mentioned the importance of conflicts checks and ethical walls regarding paralegals at their respective firms/organizations in which they are employed. Ellen noted that precautions should be taken prior to the paralegal's first day on the job. She provided case law that supports the position that in Texas it is presumed that a paralegal receives confidential information while working on a case, and that the burden is not on the prior firm for which the paralegal worked, but on the new firm to overcome the presumption that confidential information about the case was disclosed. *Phoenix Founders, Inc. v. Marshall*, 887 S.W. 2d 831, 834 (Tex. 1994). Other areas that Ellen discussed were Certificates of Service where she emphasized that although it may seem reasonable for the paralegal or legal secretary to sign the Certificate of Service,



Allen Mihecoby and Debbie Oaks

Texas rules specify only an attorney or the party may sign. Tex. R. Civ. P.21. She also covered the best practices that attorneys should implement with their paralegals with respect to e-Filing, business cards and letterhead, confidentiality, and the importance of supporting their paralegals with continuing legal education (CLE). Ellen ended the presentation by reminding attorneys and paralegals the definition of a paralegal, and how the attorneys can support and encourage their paralegals which would make for a better, productive paralegal and firm.

Meagan Gillette, attorney with Cox Smith in San Antonio, presented a topic entitled *Handling the Patchwork of Privacy & Security Law*. This presentation provided an overview of the existing patchwork of legal requirements associated with the handling of personal consumer, marketing, and employee data. We reviewed the contrasting privacy paradigms of the United States and Europe, as well as the major U.S. federal regulatory agencies that enforce the relevant federal privacy laws. We also discussed the legal requirements of various federal and state privacy laws, and discussed how such requirements affect clients and their business on a daily basis.

Pam Huff, attorney with Cox Smith in San Antonio, presented, *Protecting Your Trademark Beyond U.S. Borders*, provided an overview of the practice of trademark law, with an emphasis on managing international trademark portfolios. Ms. Huff discussed use requirements in the US

and internationally, counseling clients on evaluating global interests and creating a branding strategy, OFAC and its effect on obtaining global protection, and creating a global trademark portfolio on a budget.

The 2011 Annual Meeting luncheon, celebrating the 30th Anniversary of the Paralegal Division (PD), was called to order by Debbie Oaks [Guerra], 2010-2011 President of the Paralegal Division. There were more than eighty attendees, including past PD Presidents Michele Boerder, CP (Dallas), Rhonda Brashears, CP (Amarillo), Ellen Lockwood, ACP, RP (San Antonio), and Patti Giuliano (San Antonio). Also in attendance was current President, Beth Rosin-Dietert, of the Alamo Area Paralegal Association. After sharing a meal together, the attendees enjoyed a presentation, *Practicing Accessible Justice*, presented by Cezy Collins, an attorney with the El Paso law firm of Kemp Smith and a member of the Texas Access to Justice Commission. The keynote address offered by Ms. Collins included an overview of the current state of pro bono work in Texas and a challenge to the Paralegal Division to create a definition for Paralegal Pro Bono Service. Since the State Bar of Texas has an aspirational goal of fifty pro bono hours a year for attorneys, she encouraged a similar goal for Paralegal pro bono service, as well. She also emphasized that when the State Bar of Texas goes before the Texas legislature to request funding for legal aid programs all over the State, pro bono hours are used as evidence that the legal community supports these services. Documentation of paralegal's pro bono hours is critical for the future of these programs and for the protection of those who need assistance.

Following the luncheon keynote speaker presentation, President Oaks [Guerra] recognized the following deserving recipients for their contributions to the Paralegal Division:

- The Exceptional Pro Bono Service Award: Pam Horn (Austin)
- The Outstanding Committee Chairs:

Gloria Porter (Denton), Elections Committee Chair and Allen Mihecoby, CLAS, RP (Fort Worth), Professional Development Committee Chair

- Special Recognition Award: Rhonda Brashears, CP (Amarillo) for her work as co-Chair of the TAPS 2010 Planning Committee
- Special Recognition Award: Patti Giuliano (San Antonio) for her work as co-Chair of the TAPS 2010 Planning Committee
- Special Recognition Award: Lisa Pittman (Denton) for her work as Chair of the Public Relations Committee with special recognition of the Mentor/Protégé Program

The officers of the 2011–2012 Board of Directors were installed. They are:

President: Susan Wilen, RN  
 President-Elect: Joncilee Davis, ACP  
 Secretary: Linda Gonzales, CP  
 Treasurer: Cheryl Bryan, CP  
 Parliamentarian: Kristy Ritchie

The Incoming District Directors were installed and are:

District 1: Cindy Powell  
 District 2: Toya Walker  
 District 3: Allen Mihecoby, CLAS, RP  
 District 4: Michele Flowers Brooks  
 District 5: Kristy Ritchie  
 District 6: Sheila M. Veach, CP  
 District 7: Erica Anderson, ACP  
 District 8: Laura Rogers, PLS  
 District 10: Cheryl A. Bryan, CP  
 District 11: Darla Fisher  
 District 12: Sunnie Palmer  
 District 13: Sonya Peres  
 District 14: Shannon Watts, CP  
 District 15: Cindy Curry, ACP  
 District 16: Linda Gonzales, CP

Outgoing Directors Nan Gibson, District 1, Michele Rayburn, CP, PLS, District 3, Misti Janes, District 7, and Kimberly Hennessy, CP were also recognized for their service to the Board of Directors. The final recognition was presented to Debbie Oaks, 2010-2011 President; a special plaque presented by incoming 2011–2012 President Susan Wilen. Ms. Wilen talked about Debbie's dedication to the paralegal profession and the many hours of service she expended in the position as PD President.

Last, but certainly not least, the Paralegal Division would like to extend its sincere appreciation to our wonderful event sponsors:

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Michele Rayburn, Debbie Oaks, Kim Hennessy, Nan Gibson

This Annual Meeting was a wonderful opportunity to make new friends, rekindle old friendships, and to expand our understanding of our profession and the law. We hope to see you next year at the Annual Meeting in Houston. Mark your calendars for Friday, June 15, 2012!

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