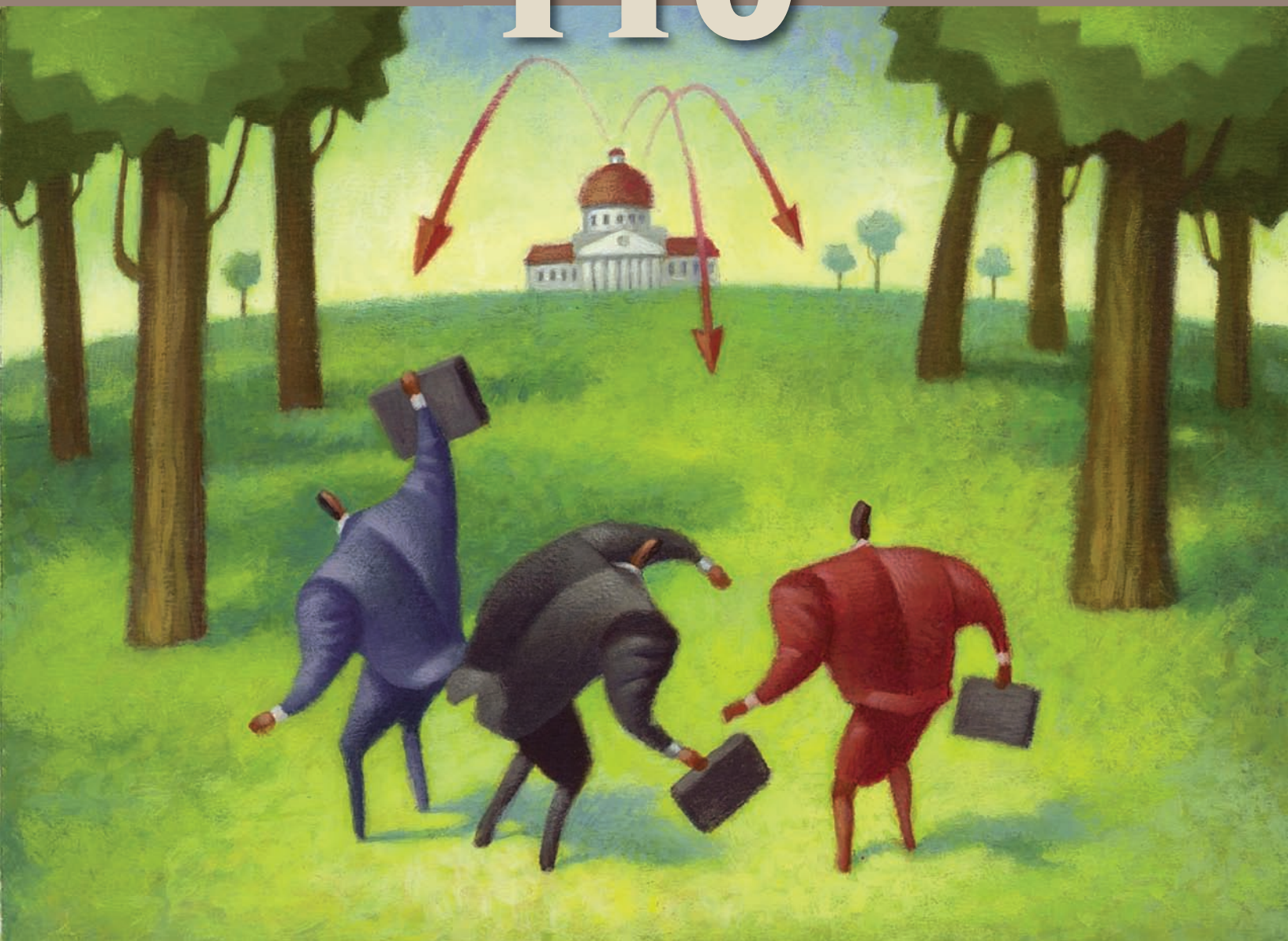


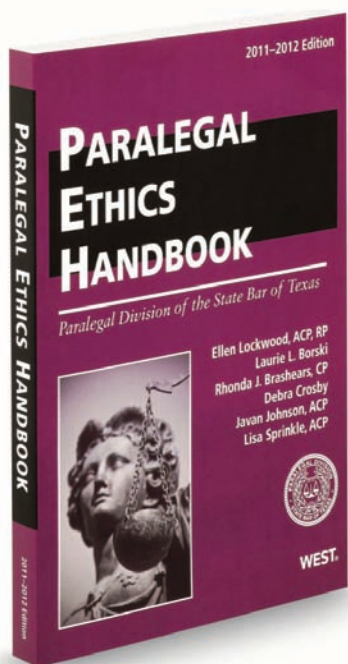
SUMMER 2012 VOL. 18 NO. 1

TPJ

Texas Paralegal Journal



Sarbanes-Oxley: 10 Years Later



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By: Ellen Lockwood, Et Al

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Paralegal Ethics Handbook discusses topics such as defining ethics and ethical obligations and remaining ethical, and addresses ethical considerations for in-house, corporate, freelance, administrative, governmental, and regulatory law paralegals as well as paralegals working in the area of alternative dispute resolution. It also covers specific ethical considerations in 17 practice areas and provides resources for state information and paralegal association ethics cannons and related information.

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PRESIDENT'S *Message*

by Susan Wilen, RN, President, Paralegal Division

"In every single moment, we have the choice to be happy or not. No matter what is going on, we can choose to focus on what is right, what is good and whole in our lives, and what options we have in any given situation. In other words, we can choose to be happy, no matter what." M. J. Ryan



After several years of work on the Legal Assistants Committee for the State Bar of Texas, the Legal Assistant's Division was established by the Board of Directors of the State Bar of Texas in 1981. It was formulated in response to the growth and development of the paralegal profession and was the first such Division created by a State Bar Association in the country. The stated purpose of the Division was "to enhance legal assistant's participation in the administration of justice, professional responsibility and public service in cooperation with the State Bar."

This year, the Paralegal Division has continued its focus on education as the path to professionalism. Being knowledgeable in our practice areas is important for our effective and efficient function in the workplace. More than 50 hours of CLE in our local districts have been provided in the last year and 60 speakers gathered at TAPS last October to expand our skill set and broaden our understanding of the changing tides of the law. We have on-line CLE and webinars available throughout the year for individuals who may not be able to attend TAPS or local presentations. We have the Mentor-Protégé program for

individuals who wish to broaden their information base in different practice areas. We encourage certification examinations and membership in the State Bar College. This, I believe, is focusing on the right things for enhancing our professional standing.

The Paralegal Division has promoted Pro Bono service, not just for the benefit of the eligible indigent population throughout the State of Texas, but also for the State Bar of Texas, who lobbies for funds to support pro bono programs from Brownsville to Amarillo and El Paso to Beaumont, and all the communities in between. It is also an opportunity for us, as individuals, to serve our fellow citizens ranging from the homeless, to the disabled, to Veterans, to the abused, and to the individuals who are trying to do the right thing for their lives. This is the right thing for our profession, our communities, and each other.

Thirdly, the Paralegal Division is fortunate to have Ellen Lockwood as our Ethics chair. She has been an invaluable source for addressing issues related to a variety of ethical questions raised by individuals accused of the Unlicensed Practice of Law (UPL) and acts by Division members that might undermine the financial stability of the Division or impugn the integrity of the Division. This is the right avenue for the Division to secure our standing with the State Bar.

The vision of the original charter members of the Paralegal Division is as relevant today as it was 31 years ago. The Division has worked to provide its

members with the tools to build our profession; we owe a debt of gratitude to all those on whose shoulders we stand.

We are a volunteer organization and this organization is only as strong as its volunteers. I know that it is easy to convince yourself that someone else will step up to the plate for a leadership role in the District, especially if you have served at an earlier time, but it is harder and harder for District Directors to find willing volunteers for Committee Chairs and sub-chairs. Those before us have dedicated themselves to build this organization; we have the responsibility to continue their work, not just enjoy the fruits of their labors. I hope you will choose to contact your District Director to find ways to assist your District, and the Division. If no one stands up, the Paralegal Division will cease to be a voice for each of us or all of us.

This year has been an amazing year for me as President. I have enjoyed meeting so many of you and I know that you will welcome Joncilee Davis as the President 2012-2013 as she embarks on her term. My deepest thanks go to Joncilee and Norma Hackler, our stalwart Program Coordinator, for all of their guidance and assistance in this past year. More importantly, words cannot express how much I have appreciated the friendship and support that has been gifted to me by past and present members of the Board of Directors. You make my heart sing and I am grateful for each and every one of you.

It is my greatest hope that each of you will find happiness in your workplace and with your fellow paralegals this coming year. You can be proud that the Division continues to do the right thing for the right reasons.

TPIJ

Texas Paralegal Journal

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EDITOR'S *Note*

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

PD. TPJ. ACP. RP. TLBS. NALA. And now, BCP.

An acronym is a word formed from the initial letters of a name or by combining initial letters of a series of words. The word "acronym" was created by Bell Laboratories in 1943.

Acronyms differ from abbreviations, which take the first letter of a longer sentence and each letter is spelled out and not read as a word (e.g., BBC [British Broadcasting Corporation] and CNN [Cable News Network].)

Above are just some examples of acronyms and abbreviations, most of which appear in the pages of this issue.

Acronyms and abbreviations have been around almost as long as there has been written language. Almost every written language uses abbreviations, including Chinese, Hebrew and Swahili. For example, the official name of the Roman Empire was Senatus Populusque Romanus. The ancient Romans used the abbreviation SPQR. The Latin phrase ante meridiem (before noon) became AM.

In the late 1800s, businesses began abbreviating their company names in writing to fit into places where space was limited, for example, on a barrel or crate, small print newspapers and railroad cars. For example the National Biscuit Company became NABISCO.

It wasn't until the mid-20th century that abbreviations (in all forms) became popular and now, in the 21st century, abbreviation use has reached epidemic proportions. In early 2010, Acronym Finder had more than 4,500,000 "approved" acronyms and other abbreviations in its database and had several hundred more waiting for review and approval.

The main reason we use abbreviations, including acronyms, is for convenience. The use of multiple word names favored by government agencies, science and high technology has led to the demand for shorter simpler title; for example Comlog Westpac is short for Commander, Logistic Group, Western Pacific, a department of the U.S. Navy and WSIPC is the short name for the Washington School Information Processing Cooperative.

Some businesses may use abbreviations in an attempt to retain their corporate identity while moving away from less desirable or old images. *Kentucky Fried Chicken* now promotes itself as *KFC* in an attempt to downplay the "fried" food image and its negative connotations.

With more than 82 million people texting regularly, we're seeing even more of this cryptic looking code! Commonly used wherever people get online, these abbreviations are used by people to communicate with each other.

So when you're in the mood for an alphabet soup, enjoy this issue of the TPJ, which contains articles on SOX, IP, and O&G!

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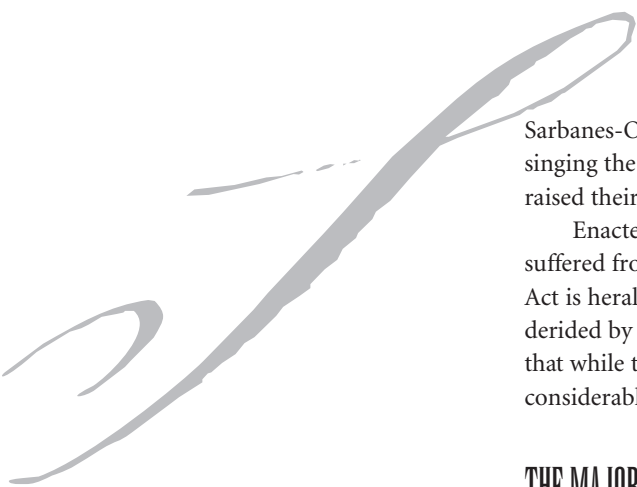
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Sarbanes-Oxley: 10 Years Later

By Steve Korotash



Sarbanes-Oxley is celebrating its tenth birthday this month, but not everyone is joyfully singing the Birthday Song; many, including presidential hopeful Mitt Romney, have raised their voices in a chorus urging that the Act's tenth birthday be its last.

Enacted with broad bi-partisan support in the aftermath of crushing investor losses suffered from the collapse of the Enron (\$67 billion) and WorldCom (\$161 billion), the Act is heralded by investor advocates for mandating improved corporate behavior, but derided by others who blame it for stifling corporate growth. What is clear, however, is that while the Act bolstered investor confidence at a critical time, it also has created a considerable financial burden for corporate America.

THE MAJOR PROVISIONS

Empowering Audit Committees

Perhaps the single most important area of reform has been the requirement that Independent Directors be accountable for the overall operation of their companies. The Act gave audit committees the responsibility for the appointment, evaluation, compensation and discharge of the independent auditor. Also, the Act permits the audit committee to retain its own experts.

As a result, there is consensus that audit committees are doing a better job today. Directors are demonstrating a higher level of technical experience and are exercising greater independence in applying scrutiny to operations and are demanding far more from the independent auditor and management. In essence, the Act brought about what many see as a radical shift in perspective, moving from a view that the corporate board serves management, to a vision where management works for the board.

Auditor Independence

Auditors are now prohibited from performing a vast array of non-audit services for their audit clients. The Act also imposes a one-year waiting period for audit firm employees who leave an accounting firm for an executive position with a former client. Moreover, the former firm is barred for one year from performing any audit services for the new



employer. Under certain circumstances, if management or the board fails to respond appropriately to reports of misconduct from independent auditors, the auditors have the obligation to inform the SEC that there has been a dispute and to resign.

Accounting Oversight Board

The Act ended self-policing in the accounting profession by creating the Public Company Accounting Oversight Board to oversee the audit of public companies. All accounting firms that audit public companies must register with the Board, which sets standards and rules for audit reports. It also inspects, investigates, and enforces compliance.

Today, almost 2,400 accounting firms are registered with the Board, and almost 40 percent of those are located outside the United States. In the last nine years, the Board has conducted more than 1,700 inspections of audit firms and has published 24 new auditing standards and practice alerts, primarily addressing riskier areas of financial reporting. The agency's enforcement staff has been active, as evidenced by its recent action against a Big Four firm that resulted in a civil penalty of \$2 million for audit failures. There's a consensus that the quality of financial reporting and auditing has improved post-Sarbanes-Oxley.

Robust Financial Disclosures

The Act requires that the CEO and CFO personally certify the accuracy of a company's financial statements and represent that management is responsible for the internal control structure and procedures for financial reporting. The Act also requires disclosure of off-balance sheet transactions and relationships that may affect a company's financial status. Personal loans from a corporation to its executives are now largely prohibited. Results of a June 2012 survey by Protiviti of 600 executives involved in corporate

compliance show that nearly 70 percent believe that internal control over financial reporting has improved because of the Act's mandates.

Attorneys' Responsibilities

In-house and outside lawyers practicing before the SEC must report evidence of a material violation to the company's chief legal officer or CEO. The legal officer must investigate and take reasonable steps to respond. If the initial reporting attorney isn't satisfied with the response, he must then report the potential misconduct to the audit committee.

These obligations sparked a change in the role of in-house counsel, transforming the position from that of an advocate for certain key individuals to an advocate for the entity as a whole. The general counsel is now viewed as a gatekeeper, obligated to be cognizant of, and report, fraud or material wrongdoing. That role requires a greater sophistication about financial reporting, compliance and internal control. Since internal reporting is confidential, it is not possible to assess how well the internal reporting requirement is working. That said, there have been no enforcement actions by the SEC, the agency to which an aggrieved party would likely turn if reported improprieties had been ignored.

Conflict of Interest Disclosures for Analysts

Research analysts must now disclose conflicts of interest about the company that is the subject of their analysis, including whether they hold any securities in the company or receive corporate compensation. Broker-dealers must disclose if the public company is a client.

Criminal Fraud Provisions

- Set imprisonment of 20 years for the destruction or falsification of docu-

ments relating to a federal investigation.

- Set imprisonment of 10 years for the willful failure of an accountant to maintain audit work papers for 5 years.
- Established a federal "securities fraud" offense with a penalty of imprisonment for up to 25 years.
- Increased penalties for mail and wire fraud to 20 years.
- Established offense of false certification of financial statements by CEO/CFO, with a penalty of imprisonment for up to 20 years.

The federal criminal authorities have responded with a coordinated effort led from the highest reaches of the Justice Department. Consequences for corporate executives have been significant. Since 2002, over 60 finance chiefs have been convicted of criminal offenses, according to official reports.

Additional SEC Authority

- Authorizes the SEC to seek, and federal courts to grant, the issuance of "penny stock bars" to prevent persons have engaged in penny stock fraud from participating in any future offering of penny stock.
- Reduced the burden of the SEC in obtaining bars against officers and directors from participating in the management of public companies.
- Authorized financial penalties collected by the SEC to be distributed to victims.
- Increased penalties and extended the statute of limitations in SEC actions.
- Authorized the SEC to "clawback" bonuses and other incentive-based compensation paid to a CEO or CFO if the company is forced to restate its financials due to misconduct. Significantly, the officer can be stripped of his remuneration even if he had no role in the misconduct. The SEC has been aggressive in its use of this remedy.



The Expense of Compliance

Compliance is costly. According to credible surveys, by their fourth year of compliance, most organizations spend in the range of \$100,000 to \$1 million annually on compliance-related activities. That doesn't include the time and focus board members and executives must spend on compliance matters.

The costliest provision of the Act is Section 404, which mandates that companies hire third-party independent auditors to assess their internal controls. The requirement took effect in 2004, and external audit fees increased 271 percent between 2001 and 2006, according to a study. However, in 2007, the SEC passed a series of helpful Section 404 reforms, one of which exempts smaller companies from the independent audit requirement.

The costs and demands that the Act put on companies are largely blamed for driving companies from public listing in the U.S., especially foreign and smaller companies. The 2000s saw a drop in U.S. initial public offering (IPO) activity while IPOs increased internationally.

In its recent passage of the Jumpstart Our Business Startups Act (JOBS Act), Congress sought to ease Sarbanes-Oxley burdens for new companies. The Act extends from two to five years, the time a new public has to comply with certain Sarbanes-Oxley auditing requirements. Moreover, its terms will permit private companies to raise substantially more capital without having to register with the Commission.

CONCLUSION

Much of the initial corporate outrage has dissipated over time. Corporations have adjusted over the years; they have become reconciled to more stringent and more costly compliance regimes. There is now an ever-increasing emphasis on best corporate governance practices, and the Act greatly accelerated that movement. In fact, it is not uncommon to read accounts from business executives describing how the Act's reforms have benefited their businesses and made their corporate leadership teams more effective. It seems quite likely that the Sarbanes-Oxley Act will see many more birthdays, despite the political rhetoric of the moment.

Steve Korotash is a partner at K&L Gates.

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Intellectual Property: A Transactional Overview

By Brian L. Burgess & Fiona McNally



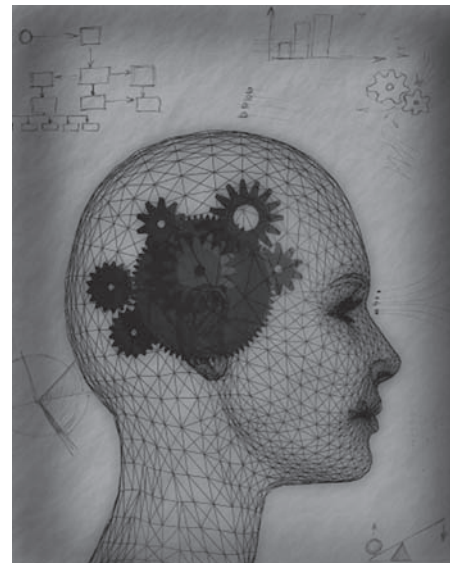
INTRODUCTION

Companies want to protect and leverage intellectual property created by their employees. Especially in a technology-based business, new employees should be required to commit in writing not to disclose to third parties any confidential information they receive or create during their employment. They should also enter into an agreement to assign to the company any rights to intellectual property that the employee develops while at the company. Employee orientations typically include a pitch that innovation, technology and the creation of intellectual property generate margin and market share essential for the company to compete. As employees turn toward crafting commercial agreements with customers and vendors, a familiar refrain for in-house lawyers is “How can we protect our intellectual property in this agreement?”

Well? As we discuss in this article, that simple question cannot be answered without first identifying what kind of intellectual property needs to be protected.

DEFINING IP

Although this article’s title uses the term “intellectual property,” and business clients often refer to “intellectual property,” the law does not recognize anything generically called “intellectual property.” Instead, the law creates and protects discrete categories of “intellectual property” rights, and those rights are extremely different from one another.¹ When dealing with intellectual property, it is essential to think about what *forms* of



intellectual property might be present, and deal with each accordingly.

In the United States, four key categories of intellectual property (IP) are recognized: utility patents, trademarks, copyright, and trade secrets.² Other jurisdictions recognize other forms of IP, or recognize similar forms but apply different definitions and rules – and that is just as important (and potentially dangerous) as recognizing the different categories commonly called IP. A multinational company must create a plan for protecting its R&D investment that takes into account both the different forms of IP and how those forms are defined in each foreign jurisdiction.

Patents

A utility patent is essentially a trade between an inventor and society: The inventor tells everyone what the invention



is and how best to use it, and in exchange, society gives the inventor a monopoly for the invention for a limited period of time. A patent granted by one country gives protection only in that country, so for a U.S. patent, this monopoly means the owner of the patent has the right to prevent anyone else from making, using, offering for sale, or selling the invention within the United States, or from importing the invention into the United States. The exclusive rights granted by the patent have a duration of around 20 years.

The U.S. Code sets out several requirements for an invention to be patentable: it must be useful,³ it must be novel,⁴ and it must not be obvious.⁵ For the utility requirement, the invention needs to have some benefit, although no particular amount of benefit is required. The requirement that the invention is novel looks at whether it is *new* – was it known or used before the patent application was filed? Was it already patented? The non-obviousness test focuses on the differences between the new invention and what was already known (the “prior art”) at the time the invention was made, and whether the invention would have been “obvious ... to a person having ordinary skill in the art to which said subject matter [of the invention] pertains.”⁶

Patent protection is especially helpful if the invention cannot be kept secret once the invention is embodied into a product and sold. If a competitor will be able to buy the invention, inspect it, and reverse engineer it (meaning figure out how it was made), then a patent is typically the only way for the inventor to prevent competitors from using the invention.

Often, the individual inventor or inventors of a patent will be employed by a corporation, and will have signed an employment agreement under which the corporation will own any patent rights in any invention. However, if for any reason there is more than one owner of a patent, then (unless otherwise agreed) each joint

owner will have the all of the rights under the patent “without the consent of and without accounting to the other owners.” In other words, each patent owner can keep any royalties, profits, or other benefits obtained from using or licensing the patent.

Finally, it is useful to note that (like copyright), patents are often the subject of license agreements. There are many details to consider in any license arrangement. For example –

- Is the license exclusive or non-exclusive? If it is exclusive, does that mean there can be no other licensee, or does it mean *only* the licensee can use the patent (even to the exclusion of the licensor)?
- Is the license limited to a field of use? Or can the licensee do with it whatever it wishes?
- Can any of the rights be sublicensed? If so, are there limits on that?
- Does the license have any geographical limits? Any time limits?
- Is the license royalty-bearing?
- Does the limited to the patents identified by number in the license, or does it include foreign counterparts?
- Is the license conditioned on anything – where if the conditions are not satisfied, the license lapses, and the patent owner would have an infringement claim (not just a breach of contract claim) if the licensee does not stop use of the invention?⁷

Trademark

Trademarks identify the source of goods, and distinguish one’s goods from the goods of others.⁸ Where patents help protect a company’s economic investment in its inventions, trademarks protect its investment in goodwill – its marketing, branding, and reputation.

There are common law marks, commonly denoted with 2 next to the mark, and federally registered marks that can be denoted with the ® symbol.⁹ Perhaps the biggest difference between

them is that while a common law mark gives protection in the geographic region where it has actually been used in commerce, a federally registered mark can lead to the exclusive right to use that mark throughout the United States, and a presumption that the mark is valid and enforceable.¹⁰ (We note in passing that Texas has its own trademark registration process, separate from the federal one.¹¹)

Marks are also generally limited to the types of goods or services (called “classes”) that they are used on or with.¹² So, for example, obtaining a mark in connection with frying pans does not necessarily mean that you will own the same mark for use on a car or a computer.

A person is liable for infringing a federally registered mark if, without consent of the mark owner, he or she uses the mark in commerce – in connection with offering to sell, selling, distributing, or advertising goods or services – in a way that is likely to cause confusion, mistake or deception.¹³ Determining infringement of a Texas-registered mark is subject to a similar standard.¹⁴ To enjoin infringement of a common law mark in Texas, a party must show “(1) the name it seeks to protect is eligible for protection; (2) it is the senior user of the name; (3) there is a likelihood of confusion between its mark and that of its competitor; and (4) the likelihood of confusion will cause irreparable injury for which there is no adequate legal remedy.”¹⁵ However, Texas also permits a party to seek an injunction without showing a likelihood of confusion, if there is an act that is likely to injure the business reputation of a party, or to dilute the distinctive quality of a Texas-registered or common-law mark.¹⁶

Copyright

Utility patents can protect an “idea” – at least in the specific ways that the idea has been claimed in the patent – and can prevent someone else from using that idea, even if that person has never heard of that patent. Copyright, on the other hand, is



quite different.

First, copyright does not protect “ideas” at all. Copyright protects a particular *expression* of an idea, in the way that expression has been “fixed in a tangible medium.” This expression is called a work of authorship.

Second, copyright does not prevent someone else from coming up with the exact same work of authorship, if it is *truly* created independently. Instead, copyright forbids:

- reproducing (copying) someone else’s work of authorship
- creating derivative works of someone else’s work of authorship
- distributing copies of someone else’s work of authorship (by sale, lease, or lending), and
- publicly performing or displaying someone else’s work of authorship.¹⁷

An action for copyright infringement in the United States must be brought in federal court.¹⁸ To bring the action, the copyright owner must first register the copyright with the U.S. Copyright Office.¹⁹ However, copyright is deemed to exist immediately and automatically, as soon as a person creates an original work of authorship – whether the copyright is ever registered or not. In our experience, many copyright owners only register copyright if and when they determine that they must file an infringement action against someone.

It is also worth noting that copyright owners may also choose to declare copyright ownership by using the © symbol. However, in the United States, this may be helpful in proving authorship, but it is not legally required to have an enforceable claim of copyright.

In general, copyright vests in the *individual* author(s) of the work. Even if an individual author was specifically paid to create a particular work of authorship for a buyer, the author will continue to own the copyright unless there is a *written* contract that expressly

assigns the copyright in the work to the buyer.²⁰ Without a written transfer of the copyright, what the buyer is purchasing from the author is a material object that embodies the work.²¹ The author would retain the exclusive right to create another copy of that work, to create a derivative work from that work, and so forth.

There is, however, a special rule for “works made for hire,” which are “work[s] prepared by an employee within the scope of his or her employment.”²² For these, the employer is deemed by statute to be the author of the work.²³ Although no written contract is necessary for the employer to own the copyright, to avoid any potential disputes about whether a work was prepared within the course and scope of employment, in our experience, careful employers require any employees who may create works of authorship in connection with their work to sign written contracts that assign all copyright to the employer.

In general, copyright protection for works of authorship created after 1978 lasts for the life of the author, plus 70 years.²⁴ However, copyright for a work made for hire endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.²⁵

There are detailed statutory and common law exceptions to and limitations on these exclusive rights that are granted to the copyright holder, such as “fair use,” but these details are beyond the scope of this general article.²⁶ For our purposes, the important thing to remember is what copyright generally protects. For that purpose, we believe the following hypothetical may help:

Imagine a real estate broker who specializes in reselling homes in a new planned community, where all of the homes are originally built and sold by one builder. The community is not fully built out yet, so the builder would prefer to sell new homes to prospective buyers without competing with resales of already-built

homes in the same community. All of the homes are limited to just a handful of designs / floorplans.

The real estate broker finds a brochure from the builder that has photographs and diagrams that show all of the variations in use within the community, and decides to copy those photographs and floorplans into his ads. There is nothing artistic about any of them; the photographs could be easily taken by driving by each home and snapping a shot with a camera phone, and the floorplans are extremely simplistic. The builder sues the broker for copyright infringement.

The real estate broker may have defensive arguments he can assert,²⁷ but he is certainly behind the eight ball. More importantly, the claim could have been *easily* avoided. All he needed to do to avoid a claim was to *not copy*. The broker could have taken his own photographs and drawn his own floorplans for his ads. His photos and drawings might have ended up similar to the ones he had copied, but *similar* does not mean *copied*, and therefore would not have constituted infringement.

Finally, we note that copyright is very often the subject of licensing arrangements. Computer software, in particular, provides numerous examples of copyright licenses. Please see the discussion in this article about patent licensing to see some of the issues that would need to be addressed in any well drawn copyright license.

Trade Secrets

A trade secret is defined in the Uniform Trade Secrets Act (“*UTSA*”) as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper



means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²⁸

The UTSA authorizes an action for an injunction to prevent misappropriation or threatened misappropriation, and authorizes an action for damages for misappropriation.²⁹ “Misappropriation” has a lengthy definition in the UTSA, but at its heart, it is acquiring a trade secret by improper means, or disclosing or using a trade secret when you know or have reason to know it was acquired by improper means.³⁰ In certain cases, the court is authorized to award attorney’s fees and/or exemplary damages.³¹

Texas, along with four other states,³² has not enacted the UTSA. Theft of trade secrets has been criminalized in Texas by statute,³³ but on the civil side, Texas relies on common law to define and protect trade secrets. The Texas Supreme Court has defined a trade secret as

any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.

In re Bass, 113 S.W.3d 735, 739 (Tex. 2002) (orig. proceeding). The *Bass* Court used a six-factor test in evaluating whether certain information constituted a trade secret for purposes of the trade secret evidentiary privilege.³⁴

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value

of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Bass, 113 S.W.3d at 740. The Court noted that a trade secret does not have to satisfy all six factors, and that “other circumstances” could be relevant to the trade secret analysis. *Id.*

In Texas, the elements of misappropriation of trade secrets are “(1) existence of a trade secret, (2) breach of a confidential relationship or improper discovery of a trade secret, (3) use of the trade secret, and (4) damages.” *Moncrief Oil Int’l, Inc. v. Oao Gazprom*, 332 S.W.3d 1, 14 (Tex. App.—Fort Worth 2010, pet. filed).

Trade secrets can be an excellent way to protect a company’s R&D investment when the company can in fact keep the resulting invention or other information a secret. A classic example is the formula for Coca-Cola®, which the Coca-Cola Company claims was invented in 1886.³⁵ Assuming that the formula *could* have been patented,³⁶ that patent would have expired over 100 years ago, *and*, more importantly, because the patent would have had to reveal all of the details of the formula, everyone in the world would have been able to duplicate the taste of Coca-Cola exactly. Because Coca-Cola protected the formula as a trade secret, the formula remains unknown today, and competitors have to create their own recipes through experimentation, reverse engineering, and other methods.

A trade secret is poor protection when selling your goods or providing your services will effectively disclose the secret. If your competition can with relative ease inspect your product and figure out your “secret sauce,” a patent may be the only way to prevent your competitors from copying your approach. Alternatively,

you might simply race your competitors to market, and try to secure a great reputation and brand recognition— and build value through your *trademark* instead of through protection of your invention itself.

Most owners of trade secrets find that to derive economic value from their trade secrets, they have to disclose their trade secrets to others. That is where a non-disclosure agreement (NDA) is essential. Anyone outside of a company who will receive or have access to a trade secret needs to be required to sign an NDA first. Requiring NDA’s shows that the trade secret owner took reasonable steps to protect the secrecy of the trade secrets, and will enable that owner to establish the elements of a trade secret misappropriation claim (as well as a breach of contract claim) in the event the trade secret is used or disclosed in violation of the NDA.

Although a company’s employees owe a fiduciary duty to their employers to protect the employer’s trade secrets,³⁷ in our experience, every employer should also require its employees who will have access to (or who will create) trade secrets to sign an NDA.

[table – see end of article]

A REAL-WORLD EXAMPLE – YOU MUST UNDERSTAND THE IP CATEGORIES TO PROTECT YOUR IP

Your client has just returned from a tour of a customer’s manufacturing facility. The customer uses the company’s products as component parts to manufacture its own goods. Your client is clearly agitated. He explains that some of the company’s products he saw in the customer’s manufacturing bins did not have the company’s logo. In fact, even though all those products looked alike, several units were stamped with the logo of the company’s vendor, which has been making products for the company for the past two years. Your client is convinced that the vendor has stolen the company’s intellectual property, and is getting sales



(and profits) that should be the company's. What guidance can you provide? As discussed in this article, identifying the forms of intellectual property that may be involved is the critical first step before you can analyze this situation and give good advice.

Is there a patent infringement? First, does the company have a patent on the product that has been separately made and sold by the company's vendor? As discussed earlier in this article, companies often choose to patent products that are susceptible to reverse engineering. If the company does have a patent, in what countries is this patent valid and enforceable? If, for example, the vendor is making and selling an infringing product in China, and the company only has a U.S. patent on the product, the U.S. patent will not help you stop the vendor. (You may be able to use the U.S. patent to stop the infringing product from being brought into the U.S., however.³⁸) In this situation, your client confirms that there is no issued patent on the product in any jurisdiction.

Is there trademark infringement? No. In this situation, the vendor applied its own mark (logo) to the product, and did not use the company's mark.

Is there copyright infringement? Not necessarily. The question would be whether the vendor copied or made a derivative work

of the company's written specifications and drawings in creating the specifications and manufacturing instructions for its own competing product. If the vendor did not use the company's documentation, there would be no copyright infringement.

Is there trade secret misappropriation? If a product has an innovative feature that is not readily discernable once the product is manufactured, preserving this feature as a trade secret is often a more permanent form of protection than a patent. (Recall the Coca-Cola example earlier in this article.) Your client confirms that the product has a secret, proprietary chemical coating that enables the product to withstand rapid changes in temperature, and that detailed specifications describing the secret chemical formula of the coating, as well as drawings depicting the proprietary coating application process, were first disclosed to the vendor after the company and vendor signed an NDA. Your client shows you a copy of the NDA and you confirm that the coating specifications and application drawings are included in the definition of confidential information protected by the NDA. You verify that the vendor had an obligation to protect this information until such time as the information became public. You also confirm that in addition to the prohibition against disclosing the information to any third party, the NDA

contains a use restriction prohibiting the vendor from using the information for any purpose other than providing products to your company. Your task is now to work with the client to determine (a) if the vendor's product has the same coating as the company's product; and (b) whether the vendor could have created its version of the product without using any of the information your company provided to the vendor. (Other confidential information conveyed to the vendor could be implicated, too – for example, the identity and needs of the customer, or pricing, if the vendor knew the company's prices.) You also want to review your supply agreement with your vendor, too; some supply agreements specifically prohibit vendors from making a product that competes with the company's product, whether the company's confidential information is used or not. Although similar in effect to IP protection, this inquiry is really focused on whether the vendor simply breached its contractual commitments to the company.

As discussed throughout this article, knowing how to protect your company's intellectual property begins with identifying the types of intellectual property involved.

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Table:

The following table is guilty of gross generalizations, and it glosses over the differences between jurisdictions and many details; however, it is intended to provide a broad overview of the four major categories of IP in the United States.

	U.S. (Utility) Patent	U.S. Trademark	U.S. Copyright	U.S. Trade Secret
What is protected?	Specific claims about an "invention" (idea)	Mark used to identify and distinguish source of goods or services	Work of authorship (specific expression of an idea)	Information (like know-how) that is valuable because it is not known to others, and that is subject to reasonable efforts to keep secret
What is prohibited (unless you have the owner's consent)?	Making, using, selling or importing the invention within/into the U.S.	Causing confusion in the relevant market by using the mark or something too similar	Copying, creating derivative works, distributing copies, or publicly performing or displaying	Using or disclosing the trade secret if you know or should know it was obtained by improper means
Is a filing required?	Yes	No, but registration of a mark provides better protection	Not initially, but registration is required before filing an infringement action	No
Duration of the protection?	20 years	For as long as the mark is used in commerce and qualifies as a protectable mark	Life of the author + 70 years (if created after Jan. 1, 1978) However, if anonymous work, pseudonymous work, or work made for hire, 95 years from first publication or 120 years from creation, whichever expires first	For as long as the information qualifies as a trade secret Note: if a trade secret is disclosed under an NDA that expires in 5 years, that NDA may have the practical effect of limiting the duration of that trade secret
Where can an action be brought?	Federal court (not state court) Can also seek to block imports of infringing goods through the U.S. International Trade Commission (ITC) under 19 U.S.C. § 1337	State or federal court, depending on circumstances Can also seek to block imports of infringing goods through the ITC	Federal court (not state court) Can also seek to block imports of infringing works through the ITC	State court (unless federal court has diversity jurisdiction)



¹As the U.S. Patent & Trademark Office has written in a pamphlet available on its web site,

Trademarks, copyrights, and patents protect different types of intellectual property. A trademark typically protects brand names and logos used on goods and services. A copyright protects an original artistic or literary work. A patent protects an invention. For example, if you invent a new kind of vacuum cleaner, you would apply for a patent to protect the invention itself. You would apply to register a trademark to protect the brand name of the vacuum cleaner. And you might register a copyright for the TV commercial that you use to market the product.

Basic Facts About Trademarks at 1 (USPTO 2010).

²These are the forms of IP that in our experience have the greatest impact on our clients. Other forms of IP are recognized in the U.S., however. For example, the U.S. recognizes “mask work” rights to protect the design layout for semiconductor chip products. *See* 17 U.S.C. 6 901 *et seq.* Mask work rights are similar in certain respects to copyright, and are found in the same title of the United States Code as copyright law. The U.S. also recognizes a narrow form of “moral right,” which is generically a right for a work’s creator to have the work attributed to him or her, and a right to prevent changes to the work that might negatively impact that creator’s reputation. In the U.S., the right is limited to works of visual arts. *See* 17 U.S.C. 6 106A. Finally, while this article focuses on utility patents, there are also “design patents.” The United States Patent & Trademark Office has summarized the difference this way:

In general terms, a “utility patent” protects the way an article is used and works (35 U.S.C. 101), while a “design patent” protects the way an article looks (35 U.S.C. 171). Both design and utility patents may be obtained on an article if invention resides both in its utility and ornamental appearance.

See <http://www.uspto.gov/web/offices/pac/design/definition.html#difference>.

³*See* 35 U.S.C. 6 101.

⁴*See* 35 U.S.C. 6 101 - 02.

⁵*See* 35 U.S.C. 6 103.

⁶*Id.*

⁷This is just a sample of the issues that must be considered in any patent license.

⁸“Service marks” identify the source of services.

⁹15 U.S.C. 6 1111.

¹⁰15 U.S.C. 66 1114 – 1115.

¹¹Texas Bus. & Com. Code 6 16.01 *et seq.*

¹²*See* 15 U.S.C. 6 1112.

¹³15 U.S.C. 6 1114.

¹⁴Texas Bus. & Com. Code 6 16.26.

¹⁵*All Am. Builders, Inc. v. All Am. Siding of Dallas, Inc.*, 991 S.W.2d 484, 488 (Tex. App.—Fort Worth 1999, no pet.).

¹⁶Texas Bus. & Com. Code 6 16.29.

¹⁷17 U.S.C. 6 106.

¹⁸28 U.S.C. 6 1338(a).

¹⁹17 U.S.C. 6 411(a).

²⁰17 U.S.C. 6 204(a).

²¹17 U.S.C. 6 202 (“Ownership of a copyright ... is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object ... does not of itself convey any rights in the copyrighted work embodied in the object”).

²²17 U.S.C. 6 101.

²³17 U.S.C. 6 201(b).

²⁴17 U.S.C. 6 302(a).

²⁵17 U.S.C. 6 302(c).

²⁶One example of fair use would be quoting a short passage of a book in the context of a book review. These statutory exceptions and limitations are found here: 17 U.S.C. 66 107 – 122.

²⁷For example, at least as to the floorplans, he might assert a “scenes a faire” defense – essentially arguing that there is no other way to draw a diagram of the house except in the way that these floorplans were drawn. *See Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1344 (5th Cir.1994) (“Copyright protects the expression of ideas, not the ideas themselves, and it does not protect processes, methods or scientific discoveries. Other materials not subject to copyright include facts, information in the public domain, and *scenes a faire*, i.e., expressions that are standard, stock or common to a particular subject matter or are dictated by external factors.”).

²⁸*See* Uniform Trade Secrets Act, 6 1(4), as linked from the Uniform Law Commission’s official web site, at <http://www.nccusl.org/Act.aspx?title=Trade%20Secrets%20Act>.

²⁹UTSA 66 2 – 3.

³⁰Misappropriation is defined by the UTSA as follows:

- (i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (ii) disclosure or use of a trade secret of another without express or implied consent by a person who
 - (A) used improper means to acquire knowledge of the trade secret; or
 - (B) at the time of disclosure or use knew or

had reason to know that his knowledge of the trade secret was

- (I) derived from or through a person who has utilized improper means to acquire it;
- (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
- (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- (C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

UTSA 6 1(2).

³¹UTSA 6 3(b), 4.

³²The following states have not enacted a version of the UTSA: Massachusetts, New Jersey, New York, North Carolina, and Texas. *See* <http://www.nccusl.org/Act.aspx?title=Trade%20Secrets%20Act>.

³³Texas Penal Code 6 31.05.

³⁴Texas R. Evid. 507 (“A person has a privilege ... to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.”).

³⁵*See* <http://heritage.coca-cola.com>.

³⁶The formula would have had to be novel, useful, and non-obvious, as discussed earlier in this article.

³⁷Many cases stand for this proposition, but this case summarizes the point well:

[I]t is well established that even without an enforceable contractual restriction a former employee is precluded from using for his own advantage, and to the detriment of his former employer, confidential information or trade secrets acquired by or imparted to him in the course of his employment.

Rugen v. Interactive Bus. Sys., Inc., 864 S.W.2d 548, 551 (Tex. App.—Dallas 1993, no writ) (citations and quotation marks omitted). *See also American Derringer Corp. v. Bond*, 924 S.W.2d 773, 777 (Tex. App.—Waco 1996, no writ).

³⁸The U.S. International Trade Commission (ITC) under 19 U.S.C. 6 1337 permits in rem actions to block imports of infringing goods.

Myths and Facts about Social Security

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

Myth: Social Security will provide most of the income you need in retirement.

Fact: It's likely that Social Security will provide a smaller portion of retirement income than you expect.

There's no doubt about it—Social Security is an important source of retirement income for most Americans. According to the Social Security Administration, more than nine out of ten individuals age 65 and older receive Social Security benefits.

But it may be unwise to rely too heavily on Social Security, because to keep the system solvent, some changes will have to be made to it. The younger and wealthier you are, the more likely these changes will affect you. But whether retirement is years away or just around the corner, keep in mind that Social Security was never meant to be the sole source of income for retirees. As President Dwight D. Eisenhower said, "The system is not intended as a substitute for private savings, pension plans, and insurance protection. It is, rather, intended as the foundation upon which these other forms of protection can be soundly built."

No matter what the future holds for Social Security, focus on saving as much for retirement as possible. You can do so by contributing to tax-deferred vehicles such as IRAs, 401(k)s, and other employer-sponsored plans, and by investing in stocks, bonds, and mutual funds. When combined with your future Social Security benefits, your retirement savings and pension benefits can help ensure that you'll have enough income to see you through retirement.

Myth: Social Security is only a retirement program.

Fact: Social Security also offers disability

and survivor's benefits.

With all the focus on retirement benefits, it's easy to overlook the fact that Social Security also offers protection against long-term disability. And when you receive retirement or disability benefits, your family members may be eligible to receive benefits, too.

Another valuable source of support for your family is Social Security survivor's insurance. If you were to die, certain members of your family, including your spouse, children, and dependent parents, may be eligible for monthly survivor's benefits that can help replace lost income.

For specific information about the benefits you and your family members may receive, visit the SSA's website at www.socialsecurity.gov, or call 800-772-1213 if you have questions.

Major Sources of Retirement Income



Note: Data may not total 100% due to rounding. Source: Fast Facts & Figures About Social Security, 2011, Social Security Administration

Myth: If you earn money after you retire, you'll lose your Social Security benefit.

Fact: Money you earn after you retire will only affect your Social Security benefit if you're under full retirement age.

Once you reach full retirement age, you can earn as much as you want without affecting your Social Security retirement benefit. But if you're under full retirement age, any income that you earn may affect the amount of benefit you receive:

- If you're under full retirement age, \$1 in benefits will be deducted for every \$2 you earn above a certain annual limit. For 2012, that limit is \$14,640.
- In the year you reach full retirement age, \$1 in benefits will be deducted for every \$3 you earn above a certain annual limit until the month you reach full retirement age. If you reach full retirement age in 2012, that limit is \$37,880.

Myth: Social Security benefits are not taxable.

Fact: You may have to pay taxes on your Social Security benefits if you have other income.

If the only income you had during the year was Social Security income, then your benefit generally isn't taxable. But if you earned income during the year (either from a job or from self-employment) or had substantial investment income, then you might have to pay federal income tax on a portion of your benefit.

Up to 85% of your benefit may be taxable, depending on your tax filing status (e.g., single, married filing jointly) and the total amount of income you have.

For more information on this subject, see IRS Publication 915, *Social Security and Equivalent Railroad Retirement Benefits*.

What Is Your Full Retirement Age?

If you were born in	Your full retirement age is:
1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

Note: If you were born on January 1 of any year, refer to the previous year to determine your full retirement age.

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Legal Translation:

How to choose the right vendor, improve efficiency and reduce costs

By Chanin Ballance

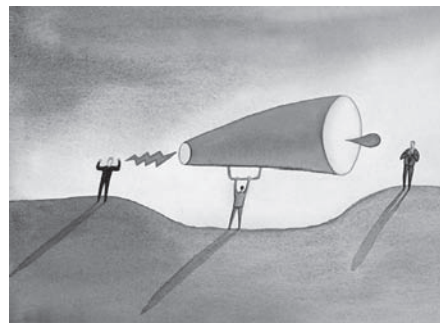
Facilitating contract, compliance, IP and litigation services across global regions, distributors and partners is critical to supporting today's business goals. Multilingual requirements persist and the demand for accurate, low cost translation and legal review is on the rise.

Today, corporations and firms spend large amounts of money using highly paid attorneys to perform both legal translations and proofreading/review. If you're a law firm, your pain point might be inefficiencies caused by redundant work, incomplete or inconsistent translation, delays and/or poor quality feedback. If you're an in-house legal department, those same issues might be further compounded by limited budgets and resources to manage content review with expert legal staff. This leaves the company open for risk.

How do you go about choosing a translation agency? What are the key considerations and expectations and how do you ensure quality translations while saving on costs?

What to Consider

If you don't speak the target language(s), how can you be sure what you're getting? Factors to consider when selecting a translator or agency include experience in the target languages - such as having lived in that country, special skills relevant to your topic, and an established methodology of best practices.



When evaluating prospective agencies or individuals, the approach should be similar to the selection of a valued employee, since the translators can have a big influence on how you are perceived in the target languages. The best and most reliable way to find a good translator is to use the reference of a trusted colleague. Additionally, in the U.S., the American Translator's Association (www.atanet.org) can provide valuable information and references for companies and individuals in your area. Other factors to consider include:

Language Experience

Go native. By native, I mean a native speaker of the target language. Native speakers have the advantage of linguistic intuition that makes it possible to say things so that they sound right to the target audience. However, just because someone speaks the target language, it doesn't mean that they understand the source

language, in this case English. Ideally, your translator will have as much fluency in English as in his or her native language. That includes experience living and working in the U.S. or in England.

Get References

Get references. This is perhaps the most important way to ensure a quality job. Clients typically don't speak the target language(s) and cannot make a first-hand assessment of the finished product. For this reason, agencies and individuals in the translation industry place a lot of importance on their reputation. A good agency will be happy to provide solid references. Companies that bid on large translation contracts are often required to provide resumes for translators with specific qualifications. A review of individual translators' resumes is an effective way to predict how your project will turn out.

Match Skills and Services to Topic

A translator with background in the legal and/or compliance market is key. Many translators have strong backgrounds in particular specialties. The more specialized your translator, the better the quality of the translation. Small, specialized translation agencies can often provide better service: (a) their translator recruiting can be more focused than that of general-purpose agencies; (b) they often enjoy better and more up-to-date training and experience, as they operate in a more finely-tuned market.

Additionally, make certain that the translator offers a certified attorney review for highly sensitive documents to ensure cultural appropriateness and legal accuracy within the country/jurisdiction. Lastly, ensure they are able to provide sworn

translators, notarization and attestations when needed.

Project Management, Methodology, Cost Savings

Since translation is very labor intensive, poorly designed translation projects can be very expensive to fix. Big savings result by getting it right the first time. There are several things you can do to ensure a quality job:

- **Use Translator-Attorney teams.** Legal translator hourly rates are a small fraction of an attorney's. Have the bulk of the content processed by a translator trained in legal content and the subject domain to cut costs. Use attorney time for final reviews only to account for country-specific content.
- **Use Translation Memory.** Translation memory is a databank that captures previously translated text so you can recycle translation, allowing companies to realize a 20-40% savings depending on their content. This is especially useful for recurring documents such as global contracts, manuals and forms that carry a high percentage of similar content. The more files that are input to the system, the more the system learns about the translation decisions made in the past and recycles. Content is then proofread and edited by legal translators at a fraction of cost and time.
- **Centralize your multilingual legal content.** By establishing your own multilingual content system or working with a vendor, further encourage and increase your content reservoir. This eliminates redundant translation of similar content and encourages sharing across regions. In addition, centralized content management improves translation memory savings.
- **Design and template documents with formatting in mind.** Consider decreasing the amount of formatting or desktop publishing (DTP) by simplifying document layout in common file types and standardizing style sheets. Translating and modifying charts, graphs and tables for text expansion can add 25-50% to the cost of your translation in order to adjust templates for text expansion/contraction by language.
- **Establish multilingual style guides and glossaries.** Reduce revisions, corrections and stylistic agreement internally by creating glossaries of key words, phrases and term per language. Further establish a style guide to standardize style sheets, tense, literacy level and web/document standards per language/country.
- **Prioritize and plan.** Remember, translation services are typically based on the number of words translated and attorney review rates by the hour. Legal documents can be dense with words resulting in higher page/hourly rates. Reuse content wherever possible through centralization and translation memory. Legal translators often

charge rush fees for overnight/weekend work. Plan ahead to avoid rush fees and ensure quality work. Every legal translation should include:

File preparation and translation memory setup
Translation editing, proofreading and attorney review
Quality assurance check
Attorney review and attestation

- **Eliminate rush fees.** If your organization typically requires 24-hour turnaround on translations, set up a separate contract with your translation partner to accommodate this level of workflow. Doing so will enable you to settle on a workflow process that takes into account your turnaround needs in the context of your available translation budget. Consider using machine translation to gist your content to help you determine your most important material to be translated. This will help isolate the parts you need turned around quickly.

By ensuring that you keep the above points in mind, you can surely select the right translation services provider for your translation requirements and improve your efficiencies and reduce your overall costs.

Chanin Balance is CEO of viaLanguage.

O&G a real opportunity, but no lottery ticket . . .

By Jim Hollerbach

It's hard to open a newspaper these days without reading about the natural gas boom. Not many economic or business-related conversations take place without some reference to "O&G" (Oil and Gas) exploration. And why not? The energy boom sweeping the state is driving the economy, creating jobs, presenting oppor-

tunities and generating revenue. Indeed, there is plenty of work to go around. But O&G work is not necessarily a lottery ticket. Determining the ownership of the mineral rights is a complex process that must be done—and done well—before the drilling and money-making really begins. While some have successfully positioned

their businesses to harness this huge new opportunity, others are learning (some the hard way) that O&G work begins and ends with due diligence, especially in the land research department. Notes Sue McMullan, a paralegal with The Nunley Firm in Boerne, "The most important part of oil and gas work is the underlying title research. Without getting a complete understanding of who truly owns the mineral and royalty interests to begin with—in a recorded document—then you can get yourself into a jam very quickly."

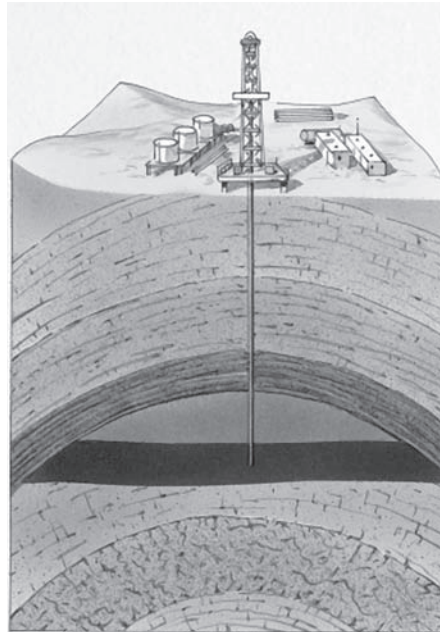
What does it take?

Unlike other kinds of land or title research, mineral rights searches tend to be fairly complex most of the time. McMullan describes the critical role of the paralegal in the process. "Paralegals work to gather the title information and begin a basic review of the title to the property that is involved in the oil and gas matter. We interface with the title companies and title service providers early on. In extreme cases, on short deadline matters, we actually go to the county clerk's offices and do the stand-up title review ourselves. This often takes days, depending on how many heirs are involved and what reservations have been placed on the real property. Many of the documents and/or reservations we are looking for are very old and buried within other documents."

Diane Parisi, a paralegal with Baucum Steed Barker in San Antonio, agrees. "A paralegal working in the O&G field needs to have a working knowledge of various areas of the law. This may include real estate, litigation, bankruptcy and securities, as well as contact with various county, state and federal agencies. In addition to the title review and mineral right searches as described by McMullan above, an O&G paralegal may be required to do any number of the following activities when it comes to the due diligence process. A paralegal may be required to research regulatory information and oil prices; summarize leases, assignments and related documents; calculate mineral, royalty and revenue interests and prepare tract, unity and other tables relating to mineral, royalty and working interests. And that's really only the starting point."

Most agree that O&G due diligence requires a strong understanding of this unique field—experience truly helps. Secondly, a solid due diligence process simply takes time. Finally, the best O&G professionals demonstrate patience, and pay special attention to the details. According to Teresa Ereon Giltner, an attorney with Cox Smith in Dallas, "In matters of O&G due diligence, the devil (and the profit) is in the details. Without strong due diligence, clients will get the wrong answers."

Oops.



O&G is not for everyone. But when opportunity arises, many rush to meet it. Not all are qualified.

McMullan makes it clear that the biggest mistake for any professional seeking to get into O&G work, especially with regard to due diligence, is to assume it's quick and easy money. "It is not as simple as logging in to the official public records to get a complete picture of the mineral estate. The all-too-common misperception is that the due diligence process is fast. It's not. It takes time and must be done carefully."

While most agree that experience and expertise are critical to the due diligence process for O&G, Parisi notes that even the best need teamwork and help sometimes. "The biggest mistake anyone can make is to assume he or she 'knows enough' O&G to do it, or that everything there is to know about O&G can be learned overnight. The second mistake they make is failing to call the right people when he/she realizes he/she doesn't actually know it all. O&G requires tact, discretion and teamwork. The team is not necessarily all from the same firm. Outside vendors are a big part of knowing what you need to get done in O&G."

It is not just realizing one needs outside expertise that matters. It's finding the right people. Giltner agrees with Parisi, pointing out that working with the right professionals (whether attorney, paralegal or

land researcher) is necessary to hone one's O&G skills. "Having the right team is critical," she says.

The consequences of rushing in recklessly or going it alone? According to McMullan, "There is a great deal of money at stake in these matters. Taking the time to be very certain of the title and other work related to the project is the most important aspect of what we do."

The bottom line.

So what do the professionals that enter—and stay in—the O&G field have in common? They work with the right people, growing their connections, asking around and checking references. They get help, no matter how long they've been in the practice. They understand and plan for a time-consuming and painstaking due diligence process, with the knowledge that anything less could have disastrous financial repercussions.

They also communicate with all team members involved. As Ereon Giltner asserts, "It's about collaboration. For the newbies to the field, it's imperative to understand that this is an ever-changing industry with extreme highs and lows. It can be profitable when done well."

McMullan expounds on the thought. "Attorneys, lenders and clients that have title information on hand, like past title policies, copies of exception documents and/or title opinions, can help the paralegals tremendously by providing them up front." Even then, the client must realize that we have to start from the beginning to ensure there are no mistakes. Nonetheless, that backup documentation can tremendously speed the process. The earlier they get involved, the better."

O&G is a powerful economic driver in Texas right now, and will likely remain so for some time. The amount of work available certainly invites new entrées to the field. Like any worthwhile endeavor, however, it invites the prudent and the thoughtful. O&G is not a get-rich-quick venture, but rather, a long term opportunity for those who take the right steps.

Jim Hollerbach is President and CEO of Hollerbach & Associates in San Antonio.

Pregnant workers need law on fairness

By John A. Wenke

In May, the Pregnant Workers Fairness Act was introduced in Congress. If passed, this law will require greater flexibility from employers in providing accommodations often associated with pregnancy.

One might ask whether another law is needed when pregnancy anti-discrimination laws already exist. The simple answer is yes.

Pregnancy stereotypes still abound in the workplace. Some believe that pregnant women and new mothers should be at home. Others believe that pregnant workers create unnecessary interruptions in the workplace with matters such as appointments, maternity leave and physical restrictions.

The unfortunate reality is that some employers are resistant to accommodating the needs of pregnant workers.

Depending on the type of job, many pregnant employees will need some type of accommodation during their pregnancy. It may be a change in the work schedule, or limits on physical activities such as lift-

H.R. 5647

Pregnant Workers Fairness Act. To eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth or a related medical condition.

ing, standing or bending.

Rather than provide these reasonable accommodations, some employers are quick to place pregnant employees on unpaid medical or personal leave. This not only denies the pregnant worker of her salary but also deprives her of much needed medical or family leave after childbirth.

For example, if a pregnant employee is qualified under the Family and Medical Leave Act, she is entitled to take up to 12 weeks of unpaid leave.

Expectant moms will often save this leave until one or two weeks before delivery and then use the rest post-partum. If, however, an employer refuses to allow a pregnant employee to work with light-duty restrictions, this worker will be forced to use all of her available medical leave before delivery, and have no available leave to care for her new born. Once Family and Medical Leave is expired, an employer is no longer required to keep her job open and can terminate the worker.

Some employers also have policies that permit light-duty work only for workers who suffer on-the-job injuries, but not for pregnant workers or workers with non-work injuries or medical conditions. One federal court of appeals has held that such policies do not violate pregnancy discrimination laws as long as policies are uniformly applied.

The Pregnant Workers Fairness Act would fill this gap. Specifically, employers would be required to reasonably accommodate "the known limitations related to the pregnancy, childbirth, or related medical conditions" unless they could demonstrate an undue hardship. This law is long overdue.

John A. Wenke is an attorney in El Paso.

UPDATE YOUR CONTACT INFORMATION

Not receiving mail or email messages from the Paralegal Division?

UPDATE NOW!

Update work address, home mailing address, revise email address, and/or phone numbers on the

State Bar of Texas master membership roster via the State Bar of Texas website.

- Go to www.texasbar.com
- Choose on MyBarPage (top home page)
- Enter your membership (Bar) number and password
- Choose Update My Profile

If you have never visited this page, you will need to set up a pin (password) number. Your password to set up your NEW Pin/password is the last four digits of your social security number (if the State Bar does NOT have your social security number on file, you will not be able to use this area nor will you have access to MyBarPage); once you set up the new pin number, you will be able to enter this section of the website to update your member records. If you are having a problem with accessing this page on the State Bar of Texas website, please contact the Membership

Department at 1-800-204-2222, ext. 1383. Note: If you have a name change, you must contact the State Bar of Texas by phone.

Don't forget to change the option for "preferred" mailing address.

Scruples

The Ethics of Using Firm or Company Letterhead and Email Addresses

Ellen Lockwood, ACP, RP

Many paralegals spend much of their time sending correspondence on firm or company letterhead or from their work email address. As long as a paralegal's title is included in the signature line, use of company letterhead and email address for business correspondence is permitted. Paralegals may also use work email for personal emails as permitted by their employers. It is often more convenient to send and receive personal email correspondence at work because we spend so much time there. However, using company letterhead or email for a personal matter such as a dispute with another company or individual can be an issue.

I was recently contacted by a paralegal about a problem her friend was having. Her friend was involved in a minor traffic accident with a person who happens to be a paralegal. Her friend had received a letter from the paralegal on the letterhead of the personal injury firm where she works. The firm isn't representing the paralegal in the matter but just receiving a letter on law firm letterhead was intimidating to her friend. The letter was even more intimidating because the law firm letterhead includes the firm's trademark that makes reference to how hard-hitting the firm is.

While it may be tempting to use company letterhead or your work email address to intimidate the other party or make them take you more seriously, it is unethical. Using company letterhead or



your work email address implies, at least at first glance, that you are writing in your capacity as employee of firm or company or that one of the attorneys is representing you. If that is not the case, the correspondence should be on your personal letterhead or from your personal email address.

If your supervising attorney has agreed to assist you with a personal matter, correspondence should either come from the attorney on firm letterhead or from you on your personal letterhead with information on contacting your attorney. It would still be inappropriate for you to send correspondence from your work email address or on firm letterhead.

Freelance paralegals should also avoid using their work letterhead or email for

personal matters involving a complaint or dispute. Although they do not work for a law firm, sending correspondence from their business email or using their business stationery for a matter not related to their business could give the impression that the issue has escalated and attorneys are now involved.

Correspondence involving personal matters such as a dispute, complaint, or similar issue should not be on company letterhead or from a work email address. While this rule applies to everyone regardless of whether they work in the legal field, it is especially important for paralegals as use of firm stationery or work email addresses for personal issues implies that the firm is also involved in the matter or that the matter has now become a legal dispute.



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/paralegaletics. She may be contacted at ethics@txpd.org.

PD 2012 TRIP TO SORRENTO AND ROME, ITALY

On April 21, the PD Travel Group (29 persons) departed the US to begin its week-long trip to Italy. The group arrived exhausted from a long flight, but excited to begin the journey to Sorrento (southern area of Italy). Arriving in Sorrento, the views were fantastic. Lemon trees everywhere; tall pines lined the steep climbing winding road; and below the Bay of Naples. From our hillside hotel, set above the Bay of Naples, the view of Mount Vesuvius was breathtaking. Welcome to Italy....

The Group began its venture on a day long trip to Pompeii. The city of Pompeii is a partially buried Roman town-city near modern Naples in the Italian region of Campania. Pompeii was partially destroyed and buried under 4 to 6 m (13 to 20 ft.) of volcanic ash in the eruption of Mount Vesuvius in AD 79. Pompeii was lost for nearly 1700 years before its rediscovery in 1748. Since then, its excavation has provided an extraordinarily detailed insight into the life of a city during the Pax Romana. Today, this is one of the most popular tourist attractions of Italy, with approximately 2,500,000 visitors every year. The group was led by a local guide through the ruins followed by a visit to the National Archeological Museum in Naples, where the treasures of Pompeii are on display. This day trip will long be remembered by all those who visited.

Touring Sorrento by foot, the group discovered the wonders of this village. Situated on a terrace overlooking the splendid Amalfi coastline, Sorrento is imbued with charm and echoes of the ancient past. Parks, villas, narrow streets, and groves of oranges, lemons, and olives, welcomed our group as we enjoyed the beautiful 70 degree sunny weather. The walking tour included Sorrento's cathedral, Piazza Tasso, and its 13th century architecture. Following the historical walking tour of Sorrento, the group visited a limoncello shop (I am sure the shop owner



really misses us!) to taste the local treat. Limoncello is an Italian lemon liqueur produced in Southern Italy, especially in the region around the Gulf of Naples. The afternoon was spent strolling through the many parks, shops and restaurants embedded on the narrow streets of Sorrento. Did I forget to mention that Sorrento is a shopper's paradise?

On the trip to Capri, the group traveled by boat. Of course, it had to be a day when the seas were rough so some of us were unable to actually enjoy the scenery. But upon landing in Capri, the view is up, up, and up!! Capri is an island off the coast of Italy where the rich and famous come to shop and sit in the sun. It is surrounded by beautiful water and its streets are cobblestone. The views are, again, breathtaking. Visitors of the island can stroll through the many designer shops, take a trip across the island on buses on narrow roads, visit museums, sit in a trattoria watching the crowds, or visit the magical Blue Grotto (closed on our visit because of high water). A couple of the travelers spent the day on the bus and ascended to the top of Capri via an aerial tram while others

toured around the island by boat. What a glorious day.

Departing on the 4th day to travel to Rome, the group leaves behind the beautiful Mediterranean views, limoncello, shopping, etc. But onward, we must go. Chris Relton, the tour manager and solicitor from England, provided 2.5 hours of CLE on the topic of Vatican Law vs. Civil Law. It was quite interesting to learn that the Vatican is self-sustained and is governed by separate law.

Upon arrival in Rome, an enormous city with enormous buildings, the group spent the afternoon visiting the Roman Coliseum. The Roman Coliseum or Colosseum, originally known as the Flavian Amphitheatre, was commissioned in AD 72 by Emperor Vespasian. It was completed by his son, Titus, in AD 80, with later improvements by Domitian. The Coliseum is located just east of the Roman Forum (also visited by the group). It was built in practical design and includes 80 arched entrances allowing easy access to 55,000 spectators. The Coliseum is huge. Emperor Vespasian ordered the Coliseum to be built on the site of Nero's palace, the

Domus Aurea, to dissociate himself from the hated tyrant. His aim was to gain popularity by staging deadly combats of gladiators and wild animal fights for public viewing. Following a historical introduction to the Coliseum, the group was free to wander around the building taking in the history and its enormity.

The next and last day in Italy (sigh), the group visited the Vatican and St. Peter's Basilica. Of course, as many of you know, the Vatican is a vast museum housing the famous Sistine Chapel. The group was led by a local guide along the halls of the Vatican. Instruction was given on the many paintings, sculptors, tapestries, and artistic ceilings. The actual Sistine Chapel visit is at the end of the Vatican tour. A limited number of visitors are allowed in the chapel at one time due to its small size (it measures 134 ft. x 43 ft.); silence is mandatory in the Chapel. On the inside, the chapel is divided into two

by a fence made from marble. The part facing the altar is only accessible to priests. Each of the two long walls has six large arched windows. The walls are covered by three virtual rings with decorations at floor level; a tapestry designed by Raphael showing scenes from the gospels and the Acts; middle: frescoes with scenes from the lives of Moses and Jesus; and the top row, next to and between the windows, showing images of popes. The paintings on the walls and on the ceiling are widely considered to be the peak of Renaissance art. Most praise goes to Michelangelo's ceiling and Last Judgment on the wall behind the altar.

Following the tour of the Vatican, the group was led to the Basilica of Saint Peter (Basilica di San Pietro) which dominates the Vatican. The Dome of the Basilica was designed by Michelangelo. Inside, St. Peter's dome is almost as big as the Pantheon. Saint Peter's tomb is said to be

found below the altar, but over 100 others are buried in the Basilica, including 91 popes. The indigenous St Peter's Basilica, nowadays forgotten, was constructed by will of Emperor Constantine around 320 AD in the area where Saint Peter had been martyred (together with other Christians) close to the circus of Nero that, in fact, rose in the vicinity. The St Peter's Basilica was consecrated in 1626. Inside the Basilica, are numerous and priceless art pieces kept in the forty five altars and eleven chapels including Michelangelo's Pieta.

Last, but not least, the group gathered on its last night for dinner to bid farewell to Italy. Travelers enjoyed an Italian dinner, wine, shared stories, and took many photos. All to say arrivederci!

Note: Join PD in 2013...traveling to Scotland. All detailed information can be found at www.txpd.org NEWS/PD 2013 Trip to Europe.

JOIN THE PARALEGAL DIVISION ON LINKEDIN TO EXTEND YOUR PROFESSIONAL NETWORK TODAY!

www.txpd.org

Did you know that the Paralegal Division (PD) is on **LinkedIn**? This is very useful tool for you to share information and resources, network with other paralegals, and find new job opportunities. Access the PD group on the Home page of the PD website at www.txpd.org.

About LinkedIn: "Your professional network of trusted contacts gives you an advantage in your career, and is one of your most valuable assets. LinkedIn exists to help you make better use of your professional network and help the people you trust in return."

To learn more about LinkedIn and its uses, visit: <http://press.linkedin.com/about>

Instructions:

1. If you do not have a LinkedIn profile you will need to set this up first. Remember to include your contact and work information so you can begin networking with other LinkedIn users. To register, visit www.linkedin.com and start by filling out the form on the home page.
2. Go to the Texas Paralegal Division (tab at bottom of PD website) group page and send a request to join the group.

Paralegal Division Standing Committees

Each year the Paralegal Division Board of Directors appoints members to serve on the various committees of the Paralegal Division. The Paralegal Division sends a call to each member of PD and asks for their assistance in serving this great organization. The list below details the Standing Committees of the Paralegal Division. If you are interested in serving on a committee, please contact your District Director (see email addresses on page 1 of this publication). **OR** you may go to www.txpd.org; sign into the Members-Only Area of the PD website and choose "Volunteer."

1. **Annual Meeting.** This committee shall plan the Annual Meeting of the general membership of the Division. The Chair and Board Advisor of this committee each year shall be from the District in which the Annual Meeting will be held the following year.
2. **Continuing Education.** This committee shall be composed of at least one eligible (Active) member from each District who shall chair a subcommittee of three to five eligible members of the Division in the respective District. This committee shall be responsible for planning and presenting at least three hours of continuing legal education in each district per year. The committee shall also implement and manage an online continuing legal education program. The Continuing Education Committee shall also implement and monitor compliance with the six-hour mandatory continuing legal education require-

ment in conjunction with the Membership Committee.

3. **Elections.** This committee shall be composed of at least one active member from each District and shall fulfill the responsibilities set forth in these Standing Rules and the Bylaws. This committee will be concerned with the process of elections for Directors and with the process of balloting on proposed amendments to the Bylaws and shall assure compliance with the guidelines for each such process.
4. **Membership.** This committee shall be composed of at least one active member from each District and shall fulfill the responsibilities set forth in Section II of these Standing Rules. This committee will be concerned with qualifications for membership and the criteria to be used in determining eligibility, and shall promote membership and growth within the Division.
5. **Professional Development.** This committee will assist in various projects for enhancing the professional development of Paralegals. This committee shall also monitor any bills introduced in the Texas legislature which would affect the paralegal profession and members of the Division, and shall be prepared to inform the general membership of the pros and cons of any such bills. This committee shall also monitor nationally the following: (a) articles published regarding the activities and profession of Paralegals; (b) legisla-

tive action regarding the activities and profession of Paralegals; and (c) court cases relative to the ethical considerations in the use of Paralegals and any other relevant information regarding the activities and profession of Paralegals. This committee shall recommend to the Board any legislation which it deems to be in the best interest of the general membership of the Division; and it shall recommend to the Board the dissemination to the general membership of the Division of any national articles, legislative action or court cases which it deems appropriate.

6. **Public Relations.** This committee shall be composed of at least one eligible (Active) member from each District. This committee shall study and develop various means to better inform the legal profession and the general public about the Paralegal Division, Paralegal profession, and shall nurture positive relationships with local and national associations of paralegals and other associations throughout the country.
7. **Publications.** This committee shall be responsible for reviewing and submitting various items for publication in the *Texas Paralegal Journal*. It shall also study and recommend to the Board any other publications which will be beneficial to members of the Division and shall also be responsible for soliciting articles from as many members as possible.



State Bar of Texas Paralegal Division



PD Mentor / Protégé Program

Are you studying to be a paralegal, or are you new to the field?

Have you recently changed the type of law that you work in?

The Paralegal Division offers a mentor program to help you get started!

Participants receive direction and support on topics such as ethics, career advancement, and professionalism. Protégés also have access to valuable networking opportunities with other paralegals and the legal community through their mentor, as well as at state-wide and district Paralegal Division events.

Eligible PD members include:

- Student members
- Active and Associate members with less than 3 years' work experience as a paralegal
- PD members changing the area of law on which they focus



The mentor / protégé relationship can be very rewarding, with benefits extending long past the official end of the relationship.

All of the PD mentors are Division members who have at least 7 years' experience working as a paralegal. Many of our mentors are also Division leaders and liaisons.

Mentors are located across the state and work in many areas of law.

Protégés may be matched with a mentor who is not geographically close by; meetings may be held electronically based on the mentor and protégé's preferences.

The mentoring program is a **free benefit** available to Paralegal Division members.

Join the PD today and let us match you with a mentor in your area of legal interest!

Visit **www.txpd.org** to learn more about membership and the Mentor/Protégé program.



How Do We Serve The Gazillions of Clients That Come to Our Web Site? One at a Time.



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