

FALL 2013 VOL. 19 NO. 2

TPIJ

Texas Paralegal Journal

Social Media in the Workplace

When You Have to Find the Right Experts



Ron Luke, JD, PhD — Economic analysis of medical and vocational damages; reasonableness of medical charges



Mary L. Hoane, CPA/CFF, MBA — Analysis of lost earnings capacity and economic damages



Brian Buck, MD — Independent medical examinations and life care planning



J. William Wellborn, MD — Independent medical examinations and life care planning



Kacy Turner, MS, CRC, CVE, CLCP — Vocational evaluation and life care planning



Donna Finkbeiner, BSN, RN, CLCP, MSCC — Medicare set aside reports and life care planning

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PRESIDENT'S *Message*

Misti Janes, TBLS-BCP, 2013–2014 President, Paralegal Division, Amarillo, TX

LEADERS. That is a word that defines the Paralegal Division. The members of the Paralegal Division are the leaders of the paralegal community. As I am serving as President of the Paralegal Division this year, I will be striving to be the best leader that I can be. I am hoping to grow into a better leader while the Paralegal Division helps others do the same. The Paralegal Division is only as strong as its members, and lucky for us, there are many great members and leaders within our organization. Stepping up to the plate can be a scary thought. I know this because it has been for me. But being a leader also means stepping out of your comfort zone. In the long run, breaking out of your safe bubble makes you a better leader and better person. As paralegals, we have special skills that make us natural leaders. We are educated, organized, and goal oriented. We are fortunate to have many great leaders that serve the Paralegal Division as committee chairs, committee sub-chairs, volunteers, district directors, and helpers behind the scenes. I would like to introduce you to the 2013-2014 Board of Directors:

Misti Janes, TBLS-BCP, President
Clara Buckland, CP, President-Elect



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Please visit the Paralegal Division website (www.txpd.org) and choose *About PD/Board of Directors* to learn more about your Board of Directors.

One of my goals as president is to help grow future leaders. The Paralegal Division has already begun to take

on this task. During TAPS 2012, a Leadership Conference was held for the first time. It was a huge success, and a Leadership Summit will be held during TAPS 2013. If you have not already signed up for TAPS, this is another great reason to attend. Debbie Oaks, Chair of the Leadership Ad Hoc Committee, is heading up this project. For those of you that are fortunate enough to know Debbie, you know that this is very dear to her heart. She loves the paralegal profession and the Paralegal Division, and growing and creating our future leaders is very important to her. TAPS 2013 is being held October 2-4, 2013 in San Antonio, Texas. Please visit www.txpd.org/taps for details.

The Paralegal Division also has a mentor program (member benefit). If you have not signed up as a mentor or protégé, please visit txpd.org, log into the Members-Only area and choose “Mentor Program” to find out more about this program. Long before the Paralegal Division had the mentor program, I was fortunate to have my own mentor, Rhonda Brashears, past president of the Paralegal Division. She was my teacher at Amarillo College (paralegal program), helped me to obtain my job at the law firm where we are both employed, and helped me to become involved in the Paralegal Division. I hope that you have the opportunity to become a mentor or protégé. I would not be as successful today if it had not been for Rhonda Brashears. I would like for each of us to either have a Rhonda or be a Rhonda.

I look forward to serving you as President this year. Feel free to contact at president@txpd.org if you have any questions or concerns.

Join the Paralegal Division at the 2013 Texas Advanced Paralegal Seminar in San Antonio on October 2–4, 2013.
Register at www.txpd.org/taps

The *Texas Paralegal Journal* (TPJ), the Paralegal Division's official magazine, is looking for student contributors to the Winter 2013 issue. We would like to know what your concerns are, as students. Please submit a question to Heidi Beginski, TPJ editor @ TPJ@txpd.org **no later than November 1, 2013** and, if selected, we will find answers from seasoned paralegals from different parts of the State of Texas. Your question and the answer will be included in the Winter 2013 issue of the TPJ.

TPJ

Texas Paralegal Journal

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EDITOR'S *Note*

By Heidi Beginski, TBLS-BCP

Social media is in the news . . . again. The fastest way to spread information - be it truthful, fantasy, harmful or helpful—social media can ignite an issue like nothing else, but what are the current laws regarding social media in the workplace? For answers, turn to the cover article by Attorney Dawn B. Finlayson (San Antonio) in this issue. Even if employment law is not your area, you'll want to read this interesting article.

There may be a lot of changes on the horizon for federal discovery procedures. Make sure you know what is being considered by reading about the proposed amendments in the article by Mariela Cawthon, CP, TBLS-BCP, on page 11, and follow the link provided to stay on top of the developments.

Changes to federal law that have already gone in effect are outlined in the Federal Law Update article by Attorney Fernando M. Bustos (Lubbock) that starts on page 13. This article covers such topics as venue and subject matter jurisdiction, authority of bankruptcy courts, personal jurisdiction, class certification, evidence, attorney-client privilege, and attorney's fees.

Is your mobile device signature in compliance? Ethics guru Ellen Lockwood, ACP, RP covers the issue better than anyone else, and gives us a primer in her regular column, on page 22 in this issue.

Got questions about healthcare reform? What does the Patient Protection and Affordable Care Act mean to you? Craig Hackler, Branch Manager / Financial Advisor for Raymond James Financial Services, Inc. sorts through the myths and facts for us in his article beginning on page 11.

With the recent conclusion of the Annual Meeting, the Division has started a new year. Read about our current representation and events from the Annual Meeting starting on page 23. Now is a great time to get involved with your Division; if you want to know more about volunteer opportunities, contact your District Director.



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DEADLINE FOR WINTER 2013–2014 IS
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Below is a highlight of a few of the benefits that can make your membership invaluable.

- » **E-Group Forum:** Join the members-only forum with hot topics, forms, ethics, and general questions posted and answered by paralegals. The eGroup is a way for members to share information and to obtain input to help address questions. Say you have a question and think the group would be a good resource; you could send your question to the eGroup. In a matter of minutes, you can have an answer to your question, a fresh idea about the matter, or a lead in the right direction. The amount of time that you can save with the eGroup is worth the cost of membership alone.
- » **CLE:** The Paralegal Division provides many opportunities to obtain CLE. Every year the Paralegal Division sponsors the Texas Advanced Paralegal Seminar (TAPS), a 3-day CLE seminar where you can obtain up to 14 hours of CLE for one low great price. A majority of the topics are TBLS approved for those board certified paralegals. If you are not able to attend TAPS, the Paralegal Division provides other opportunities by providing at least 3 hours of CLE in your district and online CLE. The Paralegal Division has over 60 different CLE topics available online for those paralegals that are not able to attend CLE outside of the office. You can obtain your CLE hours while at your computer.
- » **Mentor Program:** The mentor program is available to all members of the Paralegal Division. The purpose of this program is to provide support on topics such as ethics, career advancement, professionalism, and the Division. Mentors will provide support, guidance, and direction to new paralegals that will strengthen their links to the paralegal community, and contribute to their success as a paralegal. 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.

Membership criteria and additional member benefits can be found at www.txpd.org under “Membership” tab. All applications are accepted and processed online at www.txpd.org/apply. Dues payment accepted by check, money order or credit card (\$5 convenience fee is charged for all credit card payments). Questions regarding membership in the Paralegal Division can be forwarded to pd@txpd.org or memberchair@txpd.org.

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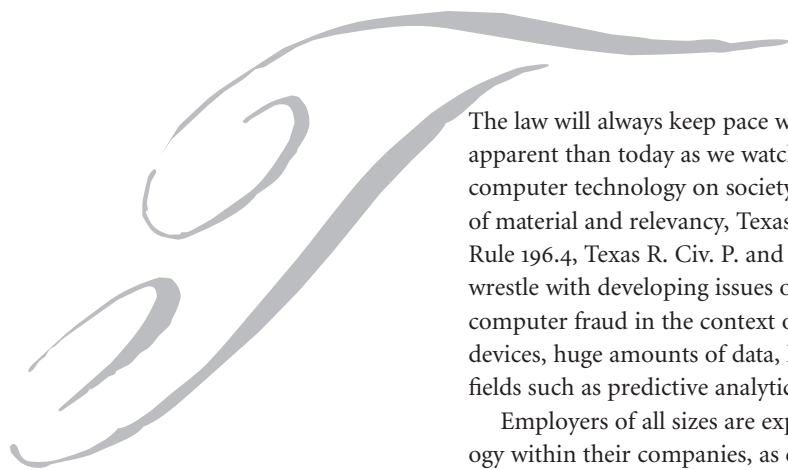




Social Media in the Workplace

How Interactive Technology is Changing Employment Law

By Dawn B. Finlayson



The law will always keep pace with changes in society. Never has that fact been more apparent than today as we watch the law rush to keep pace with the enormous impact of computer technology on society. For example, in order to address issues of cost, volume of material and relevancy, Texas and federal courts have refined new e-discovery rules in Rule 196.4, Texas R. Civ. P. and Rule 34, Fed R. Civ. P. In addition, courts and legislatures wrestle with developing issues of personal identity, intellectual property, plagiarism and computer fraud in the context of rapidly expanding technologies such as cloud, mobile devices, huge amounts of data, lighting fast transmission, and new developments in fields such as predictive analytics and artificial intelligence.

Employers of all sizes are expressing concern over how to manage interactive technology within their companies, as evidenced by IBM CEO Ginni Rometty's comments at a recent Council on Foreign Relations event, when she stated that the future of corporate decision-making hangs on how our world's "tsunami of information" is handled. She goes on to suggest that social media may even ultimately drive the value of the workplace through its employees. As Rometty puts it "your value will not be what you know, but what you share." The area of social media, she says, may come to have sway over workplace hiring and compensation practices.

The term "social media" refers to mobile and Internet-based applications that allow the creation of user-generated content for the purpose of exchanging information. And regardless of how interactive platforms such as Twitter, Facebook, and LinkedIn may affect our world's future, they already have a significant impact on both individuals and corporations alike, and necessitate new policies in the workplace, new attention to employee concerted activity, and new common law precedent on employee theft of intellectual property from the workplace.

Any discussion of the law relating to social media in the workplace must begin with an understanding of employees' social media usage and activity. For example, an employee might use Facebook to complain to her co-workers about being bullied by her supervisor. Or an employee might use Twitter to drive market share for an employer's product. Or an employee might use LinkedIn to create a following of professionals who may someday receive a marketing "pitch." Or an employee may be using Facebook, Twitter or LinkedIn to kill some time at work. Some employees are required to use social media as part of their job. Some employees are allowed by their employer to use social media while on the job. And some employees are forbidden from using social media, but use it anyway. All of these activities have legal and business consequences.



Last summer in San Antonio, Texas, while in the midst of an Immigration and Customs Enforcement (ICE) investigation, local restaurant chain Sushi Zushi experienced a startling absence of employees when the company's executive chef posted an anxious statement on his Facebook page suggesting attendance at work the next day was an immigration department "trap" for employees. Fearing the worst, about 100 employees stayed home from work causing the restaurant's eight locations in San Antonio, Austin, and Dallas to shut down for more than a week.

1. What are the New Legal Protections of the National Labor Relations Act for Employee Use of Social Media?

The National Labor Relations Act's legal protection of employees who engage in social media activity has received significant attention at the National Labor Relations Board (NLRB), and it is a hot topic of the commentators. The Board has recently created a webpage appropriately called "Protected Concerted Activity." <<http://www.nlr.gov/concerted-activity>> In addition, in May 2012, the Acting General Counsel of the NLRB issued the last of three separate documents called "Guidance" addressing employer social media policies. Scrutiny has been given to union shop social media policies, such as new company policies limiting employee use of company logos, restricting employees from disclosing confidential information, and restricting co-worker communications. See *General Motors, LLC*, Case 07-CA-53570, NLRB 2012. The policies of non-union shops are also a subject of the NLRB's Guidance, as well as the subject of general discussion.

Although not widely known, the Board also takes jurisdiction over non-union employers. This jurisdiction is asserted when their employees engage in concerted activity. "Concerted activity" is broadly seen as informal employee discussions of worker rights. A good general example of concerted activity is the 2009 case

brought by the Board against the Texas Dental Association in Austin. Although the employees of the Texas Dental Association had no Union representation, the employer was ordered to pay over \$900,000.00 in a finding that an employer may not discharge a supervisor for refusing to participate in an unlawful termination. *Texas Dental Association*, 354 NLRB No. 57.

The NLRB has filed charges against employers regarding restrictions on employees' social media use that may qualify as 'concerted activity' and regarding social media policies which may be seen as limiting an employees' rights to engage in concerted activity.

The NLRB guidance memos acknowledge that an employer's social media policies can appropriately inform employees about the proper use of the company name or logo in social media posts, protect against improper dissemination of confidential business information, and guide employees in distinguishing personal views from those of the company. However, the NLRB has taken a strong stand in cases where it has perceived that otherwise appropriate policies may be also be overly broad and construed as chilling employees' rights to communicate with co-workers about workplace conditions.

In a recent decision, *Hispanics United of Buffalo, Inc. and Carlos Ortiz* (Case 03-CA-027872), December 14, 2012, the NLRB upheld an administrative law judgment ruling that the employer violated Section 8(a)(1) of the NLRA when it discharged five employees for Facebook comments they wrote in response to a coworker's criticisms of their job performance. The board found that the comments constituted protected concerted activity under Section 7 of the Act, and satisfied all other elements which establish the violation.

An example of the likely inter-relationship between social media actions and protected concerted activity can be seen in a simple comparison. For instance, (1) an employee posts on his Facebook page his opinion of the poor quality product creat-

ed in his workplace. Compare this posting with another instance of (2) an employee posts on his Facebook page his opinion of the poor quality product created in his workplace and he solicits his co-workers to post their opinions as well. The first example is an example of an employee acting on his own on a matter that is not protected by the NLRA. And the second example is an example of concerted activity most likely protected by the Act.

2. Can an Employer Ask for a Private Password?

Employees may choose to protect their personal pages on social media sites such as Facebook and LinkedIn. Realizing that information from an actual or potential employee's personal social media page may have some business relevance, some employers have asked employees to reveal their password to the business. Is this legal?

Often, the request for a personal password to a social media site will come during an employee interview. Many employers have learned that the review of a Facebook page is a helpful background check tool. In addition, employers may have concerns that current employees are disclosing confidential company information and may be interested in reviewing the user content generated by the employee on their personal social media site. Facebook officially warns employers not to follow this practice. <<https://www.facebook.com/notes/facebook-and-privacy/protecting-your-passwords-and-your-privacy/326598317390057>>

As of June 2013, legislation prohibiting requesting or requiring user name and password disclosure of personal social media accounts has been introduced or is pending in at least 36 states and has been passed during 2012 through June 2013 in fourteen states. These laws each apply to employees, students, or job applicants. In Texas, for the 2013-14 session, legislators introduced House Bill 318 to prohibit access to personal accounts of employees



and job applicants. In May 2013, the bill passed in the House but died in the Senate.

The legality of employer requests for private passwords is murky, raising questions of whether this practice violates the Stored Communications Act (18 U.S.C. 6 2701 et seq.) or the Computer Fraud and Abuse Act (8 U.S.C. 6 1030), which clearly prohibit intentional access to electronic information without authorization, and intentional access to a computer without authorization to obtain information, respectively. At issue is whether the employee or potential employee may feel coerced or threatened to comply with employer requests. At this time, employers should refrain from requesting private passwords for company use. According to the American Bar Association, we may begin to see litigation which focuses on distinguishing personal from professional social media accounts.

Because social media overlaps the issue of protection of trade secrets, another statute of peripheral interest is The Theft of Trade Secrets Clarification Act of 2012, signed into law by President Obama (Public Law 11223) in December 2012. The act amends the Economic Espionage Act of 1996 (EEA) (18 U.S.C. 6 1831-39), closing a loophole which allowed the conviction of Sergey Aleynikov, a Goldman Sachs computer programmer who transferred a proprietary high frequency trading program from his work computer to an external computer, to be overturned. While the EEA grants federal jurisdiction in misappropriation of trade secrets cases, and the possibility for injunctive relief for trade secret theft, in *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012), it became apparent that its reach applied only to trade secret theft related to products involved in interstate or foreign commerce. The Clarification expands the EEA to cover trade secrets related to all products used in commerce.

3. Can Employees Recover Overtime for Time Spent Using Social Media?

Generally, employers are required to compensate non-exempt employees with overtime pay for all hours worked over forty hours per week. This simple requirement presents significant problems when employees are engaging with social media on behalf of their employer. A recent example is *Whitlock v. FSL Management, LLC*, No. 10-cv-00562 (W.D. Ky., Aug. 10, 2012) where the court granted a class certification to non-exempt employees who claimed they worked overtime hours as they engaged in “promotional activities” for the three nightclubs owned by the defendants. Importantly, the court conditionally recognized the employees’ social media activities on Facebook and MySpace as work, where the employees promoted the nightclub business.

4. Who Owns A Social Media Account?

The question of the ownership of a social media account is a legal matter just now making its way through the court system. Several important issues are coming to the surface, including the issue of the employer’s use of an employee’s social media account after termination; whether employees engage in unfair competition when they end their employment and take their social media accounts with them; whether written policies and agreements are an effective tool for maintaining ownership and privacy of social media accounts, especially given the individuality of agreements between social media providers and the individuals who open the accounts; and even whether social media customer lists can qualify as trade secrets. Of particular interest and challenge at this time is the determination of damages, both compensatory and punitive. As these cases are resolved, they will be particularly instructive for employers and employees who are marketing with social media. A sampling of recent social media ownership decisions include the following cases:

Eagle v. Edcomm, No. 11-4303
(E.D. Penn. Filed October 4, 2012)

Employer Edcomm terminated its former president Linda Eagle, accessed her LinkedIn account, changed her password, and changed her profile to display the name and photograph of its new interim CEO. Eagle had used the LinkedIn account to both promote Edcomm’s services as well as to foster her own reputation, connect with family and friends, and to build her social and professional network. The company had recommended participation in LinkedIn to all its employees, and presumed some level of “ownership” in the employees’ accounts.

Upon termination, Eagle was unable to access her LinkedIn account, and those searching for her profile were routed to the substitute Edcomm account. Eagle was ultimately able to regain access to her account, although it took months for her to gain total control of the account. Eagle sued for violations under the federal Computer Fraud and Abuse Act and the Lanham Act, 15 U.S.C. 6 1125 (a)(1)(A), along with claims of misappropriation of identity and publicity, identity theft, conversion, tortious interference with a contract, civil conspiracy, and civil aiding and abetting under Pennsylvania law. Edcomm counterclaimed with claims of misappropriation, unfair competition, and conversion. The judge granted Edcomm’s motion for summary judgment on the claims under the federal acts finding no evidence in support of the assertions. Then, two weeks later on the state claims found (1) against Edcomm on the counts involving misappropriation of identity, (2) against Eagle on the counts of identity theft, conversion, tortious interference, conspiracy, aiding and abetting, and (3) against Edcomm on their counterclaims. Importantly,



despite three confirmed counts of misappropriation, the court denied Eagle's claims for both compensatory and punitive damages.

PhoneDog v. Kravitz, No. C 11-03474 (N.D. Cal. filed July 15, 2011)

PhoneDog is an interactive news and reviews website, and Noah Kravitz was a former employee working as a product reviewer. PhoneDog claims that Kravitz, when he left his employer, appropriated 17,000 Twitter followers, renaming his PhoneDog Twitter account from @PhoneDog_Noah to a more personal account, @noahkravitz.

PhoneDog's claims are that Kravitz engaged in 1) misappropriation of trade secrets, 2) intentional interference with prospective economic advantage, 3) negligent interference of prospective economic advantage, and 4) conversion. PhoneDog asked for damages equal to \$2.50 per month for every Twitter follower Kravitz took with him. The case settled in December 2012, providing undisclosed damages to PhoneDog, but allowing Kravitz to maintain his Twitter account and followers under its changed name; thus avoiding a valuation of the

social media account.

Conclusion

Undoubtedly, this is one of the most interesting areas of legal development we have seen since the Supreme Court addressed Fourth Amendment rights limiting law enforcement search and seizure. Whether or not lawyers identify themselves as employment lawyers, it behooves all lawyers to be aware of these newly developing rights and remedies.

Dawn B. Finlayson is a Partner with Barton, East and Caldwell, PLLC in San Antonio.



PARALEGALS FLY TO VIENNA & PRAGUE

April 18 – April 26, 2014
(Eight Days and Seven Nights visiting Vienna, Austria & Prague, Czech Republic)

The Paralegal Division has finalized its plans for the 2014 Trip to Europe to Vienna & Prague from April 18 – 26, 2014.

Trip details can be found on the Paralegal Division's website **Home Page** under **NEWS – PD 2014 Trip to Europe** at www.txpdl.org.

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A New Era in Discovery?

Proposed Amendments to the Federal Rules of Civil Procedure

by Mariela Cawthon, CP, TLBS-BCP

The Standing Committee on Rules of Practice and Procedure is considering proposed amendments to the Federal Rules of Civil Procedure on discovery. The potential significance of these amendments is that there would be some serious overhaul to the current rules that govern the scope of discovery, numerical limits on requests and sanctions for failure to preserve discoverable evidence. Some of the most significant changes include:

- Amending Rule 26(b) which governs the scope of and limitations on discovery. The proposed amendment would add an element of proportionality to the needs of the case "considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." (The text in quotes would be new language).

Amending Rules 30 (oral depositions) and 31 (written depositions) to reduce the number of presumptive depositions from ten to five. Rule 30(d)(1) would further reduce the duration of an oral deposition from seven hours to six hours.

- Amending Rule 33 to reduce the number of interrogatories from 25 to 15.
- Amending Rule 36 to impose a limit on Requests for Admissions of 25.
- Amending Rule 34 to add a requirement that the grounds for objecting to a request for production be stated with specificity. Additionally, the proposed change would require that an objection state whether any responsive materials are being withheld from production. Finally, Rule 34 would be amended to require that a party who opts to produce documents (or electronic information) rather than permit inspection must make that production within the time stated in the request or by a later reasonable time stated in the response.

- Amending Rule 37 to provide a more uniform standard of culpability regarding the failure to preserve discoverable information. The proposal would still require a party to demonstrate good faith in its preservation endeavors, but would limit the sanctions a court could impose if the party shows that it took reasonable steps to prevent the destruction of discoverable information. In evaluating, the courts should consider whether the failure to preserve was willful or in bad faith or whether the failure to preserve denied a party a meaningful opportunity to present a claim or defense.

The proposed amendments could be open for publication and comment later this year. If approved the changes could become effective in 2014. You can find a full copy of all the proposed changes to the civil rules at: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf>.



Mariela Cawthon, CP, TLBS-BCP works at Lynn, Tillotson, Pinker & Cox LLP in Dallas and is District 2 Director for the PD.

Health-Care Reform: Replacing Myths with Facts

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

The Patient Protection and Affordable Care Act (ACA) passed in 2010 is incredibly broad in scope, so it's probably not surprising that there's a good deal of confusion about it, and a number

of inaccurate and misleading claims that have been circulated. Here's some information to help separate fact from fiction.

Myth: The health-care law cuts basic Medicare benefits and services

Fact: Just the opposite is true. The ACA mandates that no guaranteed Medicare benefits are cut. In fact, the ACA expands Medicare benefits to include a free annual wellness assessment. Many important preventive screenings and vaccines are now offered free of charge, including screenings for colorectal cancer, cholesterol, and diabetes; mammograms, flu and pneumonia vaccines; and counseling for smoking cessation and nutrition therapy.

The ACA also attempts to slow the increasing cost of Medicare premiums and ensure that Medicare will not run out of funds. To help achieve these goals, the health-care reform law specifically targets Medicare fraud and wasteful overpayments

to insurance companies, coupled with some cuts in Medicare spending.

If you're a participant in the Medicare Part D (prescription drug) plan, the ACA attempts to close the "donut hole" in which plan beneficiaries pay full price for prescription drugs after exceeding a gap in the annual coverage. The ACA provides a \$250 rebate and offers a variety of discounts and federal subsidies through 2020, at which time participants will pay no more than 25% out of pocket for most prescriptions.

Myth: You'll have to give up your current health insurance

Fact: If you have health insurance through your employer, or you have private insurance, you'll most likely be able to keep your present coverage. In fact, plans in existence on March 23, 2010, that haven't changed significantly are considered "grandfathered," meaning that those plans are treated as qualifying health insurance. But even if your plan is grandfathered, you'll benefit from some of the provisions of the health-care law. For instance, all plans, including grandfathered plans, must allow coverage for adult dependents to age 26 and remove any lifetime dollar cost limits. Moreover, your insurance can't be cancelled if you become sick, and your plan cannot refuse to insure you if you have a pre-existing medical condition.

Myth: All small businesses have to provide insurance to their employees

Fact: If you are a small business owner (meaning you employ fewer than 50 full-time equivalent employees), you are not required to provide health insurance to your employees. The "insurance mandate" applies only to large employers having at least 50 full-time employees.

On the other hand, if you're a small employer and you do offer health insurance coverage to your employees, you may be eligible for a tax credit. The credit is available to employers that have 25 or fewer full-time equivalent employees with annual wages averaging less than \$50,000 per employee, and that pay at least 50% of the health plan costs.

Myth: The ACA provides subsidies to

illegal immigrants

Fact: The ACA specifically defines who is eligible for federal payments, credits, and subsidies. Only U.S. citizens or nationals, and aliens lawfully present in the United States may receive federal payments, credits, or cost-sharing reductions applicable toward the purchase of health insurance. Undocumented immigrants in the United States may not acquire insurance through a state-based Exchange or Medicaid, nor are they eligible for federal subsidies for health insurance.

Myth: Individuals have to pay taxes on their health benefits

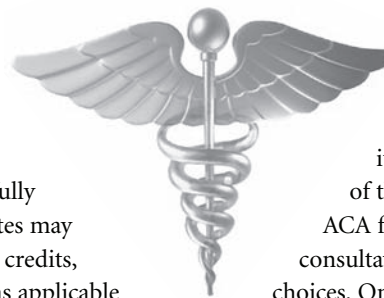
Fact: Nothing in the health-care law requires individuals to pay income taxes on their health-care benefits. Starting in 2018, an excise tax is assessed to insurers of high-cost, employer-sponsored health plans with aggregate expenses exceeding \$10,200 for individual coverage and \$27,500 for family coverage. The tax does not apply to insured plan participants.

Other taxes that are part of the ACA include:

- A tax of 10% on the amount paid for indoor training services
- A 20% tax (increased from 10%) on distributions from a health savings account or an Archer medical savings account that are not used for qualified medical expenses
- An increase in the Medicare Part A tax rate on wages by 0.9% (from 1.45% to 2.35%) on high-income individuals
- An excise tax of 2.3% on the sale of certain medical devices
- A tax on large employers (more than 50 full-time equivalent employees) that do not offer affordable health insurance to employees, and
- A tax on individuals who do not have qualifying health insurance (many exceptions apply).

Myth: The ACA promotes end-of-life decisions for seniors

Fact: While early drafts of the law



allowed Medicare to reimburse doctors for talking to older patients about advance-care planning, no such provisions made it into the final version of the law. Nothing in the ACA forces seniors to have consultations about end-of-life choices. On the other hand, the

Medicare Modernization Act of 2003 allows Medicare to pay for doctor's visits with seniors in the first year of joining the program, during which time patients may voluntarily discuss end-of-life planning as part of their visit. The ACA does provide Medicare participants with free annual wellness visits and personalized prevention plan services. These provisions afford Medicare participants an opportunity to discuss important issues such as hospice, home care, and additional services available to seniors. However, the ACA does not mandate these discussions, nor does it tell doctors what options to discuss with their patients.

Myth: The ACA taxes all real estate sales

Fact: This misstatement is somewhat understandable based on the applicable part of the law. Beginning in 2013, the ACA imposes a tax of 3.8% on certain net investment income of individuals, estates, and trusts that have income above the statutory amounts. As it relates specifically to home sales, the tax applies only if you have modified adjusted income over \$200,000 (individual), or \$250,000 (married filing jointly), or \$125,000 (married filing separately), and it would apply only to any taxable gain that results from the sale of your home. Since most people are able to exclude \$250,000 (\$500,000 in the case of a married couple) in gain from sale of a personal residence, the application of the tax is limited.

Myth: The health-care law will lead to government takeover of health care

Fact: While provisions of the health-care law place some responsibility on the government to ensure that qualified insurance is available to most individuals, there

is nothing in the law that directly promotes government takeover of our health-care system. For instance, many mistakenly believe that state-based health insurance Exchanges sponsor only government-provided health insurance. In fact, these Exchanges are intended to provide a marketplace that brings together consumers looking to buy health insurance with insurance companies looking to sell health insurance.

Beware of health-care scams

Probably due to the complexity of the law, many unscrupulous individuals are trying to scam people based on the uncertainty of some of the law's provisions. For instance, you may get a call, e-mail, or visit from someone claiming that if you don't have health insurance, you'll go to jail. These same scammers may claim to be government officials and offer to sell

you qualifying health insurance. Their goal is to get unsuspecting and frightened individuals, particularly seniors, to divulge personal information. To protect yourself, never buy insurance without checking with your state insurance department to be sure the seller is licensed and the policy is legitimate. Don't give out your credit card or bank card information, and don't give your Social Security number to anyone you don't know.

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Federal Law Update

By Fernando M. Bustos

While the past year has brought with it several attempts to clarify the law, such as the Federal Courts Jurisdiction and Venue Clarification Act of 2011, the Removal Clarification Act of 2011, H.R. 368, Public Law No. 112-51, and the restyling of the FRE, many more areas of law have become muddled and even more difficult to understand, such as the pleading standard that is to be applied to affirmative defenses, and what authority an Article I judge has over a case.

In some of these areas, it is only a matter of time until a higher court clarifies the issue and offers guidance so that court outcomes become more predictable for both attorneys and their clients. In other areas, however, it is only a matter of time until the lower courts attempt to apply the rule of law handed down to them by the Supreme Court, thus showing litigants the extent to which the law has actually been changed.

The most significant developments in federal practice this past year involve jurisdiction and venue issues.

I. VENUE AND SUBJECT MATTER JURISDICTION

A. Federal Courts Jurisdiction and Venue Clarification Act of 2011 . The Act amends Title 28 governing diversity jurisdiction, venue, removal, and remand.

The amended provisions are 28 U.S.C. ___ 1332, 1391, 1404,

1441, 1446, and 1453. Additionally, ___ 1455 and 1390 were added, while _ 1392 was repealed.

These changes, previously known as H.R. 394, Public Law No. 112-63, were signed into law on December 7, 2011, and took effect on January 6, 2012. The changed provisions apply to all cases filed after the effective date, and, to the extent possible, to proceedings already filed.

1. Removal Amendments

(a) New "Last Served Defendant" Removal Deadline. The Act resolved a circuit split on the issue of deadlines for defendants to file a notice of removal. Prior to the change, some circuits applied the 30-day deadline to the date that the last defendant was served; others, including the Fifth Circuit, applied it to the date the first defendant was served; and still others applied an individual deadline to each individual defendant.

New rule: Each defendant has 30 days from the date he or she was served to file a notice of removal. Earlier-served defendants may join in the removal or consent to the removal by another defendant. 6 1446(b)(2)(B) & (C).

Unanimity: The changes also codified the rule that all defendants must consent to removal of the case. 6 1441(a).

(b) Removal Amount in Controversy Calculation. The Act also amended how the amount of controversy for purposes of removal is ascertained, alleged, and proved.

(i) When the pleading does not state amount in controversy : If a defendant is facing a state

pleading that does not specifically allege an amount in controversy, the defendant may remove based on discovery received from the plaintiff indicating that the jurisdictional amount in controversy is met. 6 1446(c)(2).

- (ii) **When the pleadings seek non-monetary relief, or it is not allowed** : Additionally, a defendant may allege the amount in controversy in the notice of removal even when the initial pleading seeks non-monetary relief and state practice does not permit a specific monetary demand or where recovery may be in excess of the demand. 6 1446(c)(2)(A)(i).
- (iii) **Standard of Proof:** The amount in controversy shown must be proved by a preponderance of the evidence. 6 1446(c)(2)(B).

(c) **New Residency/Citizenship Rule.** The federal general venue statutes found in 28 U.S.C. __ 1390 et seq. were also amended to resolve a circuit split on the issue of residency for venue purposes.

New rule: The residency inquiry for venue is the same as the residency inquiry for diversity jurisdiction. For both, residency is a natural person's state of domicile. 6 1391(c)(1). Thus, venue now cannot be proper at the location of a party's vacation home, for example.

2. Alienage Diversity Jurisdiction

Section 1332(a)(2) contains a new restriction on diversity jurisdiction related to lawful permanent residents. It states that district courts do not have diversity jurisdiction over an action between citizens of a state and citizens of a foreign state who are lawful permanent residents of the United States who are domiciled in the same state. For example, a French national who is a lawful permanent resident cannot remove a lawsuit filed against him by a Texas citizen, if the French national resides in Texas.

Amended Section 1391(c)(3) also permits a lawful permanent resident who established domicile in the United States to raise a venue defense under Rule 12(b)(3). This defense was not previously permitted under old Section 1391(d), because the statute focused on citizenship, and not residence, of the alien.

3. Independent State Law Claims

Amended Section 1441(c) compels district courts to sever and remand claims to state court that are not within the original or supplemental jurisdiction of the federal court. Under prior practice, a case with one federal claim that had potentially numerous unrelated state law claims could be removed, and the court would retain jurisdiction over all such claims. Now, courts cannot extend supplemental jurisdiction over such claims. Independent state law claims now must be remanded to state court.

4. General Venue Provisions

- (a) New Section 1391(b) sets forth a single set of venue rules for both federal question and diversity cases. Previously, venue rules were different between these two types of jurisdiction.
- (b) New Section 1391(a)(2) abolishes separate venue for Alocal@ and Atransitory@ actions, repealing Section 1392. Now, plaintiffs can file actions such as trespass on real property anywhere personal jurisdiction over the defendant can be found, even if that is different from the venue where the property is located.
- (c) Parties can also now agree to transfer venue to a court where the action could not have originally been brought. This amendment legislatively overrules *Hoffman v. Blaski*, 363 U.S. 335 (1960). 6 1404(a).
- (d) A new fallback provision now exists on venue, abrogating the prior fallback provisions that were separate for federal question or diversity jurisdiction, 66 1391(a)(3), 1391(b)(3). The unified fallback provision now states that when other venue provisions do not apply, venue is proper in Aany judicial district in which any defendant is subject to the court's personal jurisdiction. 6 1391(b)(3).
- (e) New Section 1390(b) clarifies that general venue provisions do not apply to admiralty cases, codifying *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).
- (f) Under amended Section 1404(d), a district court cannot transfer a case for convenience to the district courts of Guam, Northern Mariana Islands, or the Virgin Islands.

B. Removal Clarification Act of 2011 . The changes made to Title 28 regarding the removal of cases against the United States or its agencies, officers, or employees, were intended to clarify the procedure used to remove these cases, and when that procedure is available.

The amended provisions are 28 U.S.C. __ 1442, 1446, and 1447. The amendments, H.R. 368, Public Law No. 112-51, were signed into law and took effect on November 9, 2011.

1.Relevant Changes

- (a) **New Criminal Removal Statutes.** This Act explicitly provides that any case, civil or criminal, that is commenced against the United States, its agencies or officers, in a state court may be removed to an appropriate federal district court. 6 1442. Former Section 1446 applied to removal of civil and criminal cases. New Section 1455 applies only to removal of appropriate criminal cases to federal court.
- (i) **What is a case?** : Under this statute, a Acivil action or criminal prosecution@ means any proceeding where a judicial order, including a subpoena for testimony or documents, is sought or issued either before or after a petition has been filed, regardless of whether the subpoena is directly or indirectly related to the

proceeding. 6 1442(c).

- (ii) **Limitation** : The statute limits this removal procedure to only the specific proceeding or issue that deals with the United States; the remainder of the civil action or criminal prosecution must remain in state court. *Id.*

(b) The amendments changed the deadline for a defendant to file a notice of removal. A defendant's notice of removal is now timely if filed within 30 days of service. 6 1446(g).

(c) The statute also permits habeas corpus relief in support of removal of criminal cases against federal agents. 6 1455(c).

C. Amendments to Federal Rules of Appellate Procedure

(FRAP) . FRAP 4 and FRAP 40 were amended and took effect on December 1, 2011. The amendments clarified what entities are included under the umbrella term *Athe United States@* in certain circumstances.

1. **FRAP 4:** This rule governs the deadline for filing a notice of appeal. The amendment outlined which parties benefit from the 60 day filing deadline applied to the United States.

Who's included?: The rule explicitly includes the (1) United States; (2) a United States agency; (3) a United States officer or employee sued in an official capacity; or (4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

2. **FRAP 40:** This rule governs the deadline for filing a petition for panel rehearing. The amendment to this rule was intended to make it compatible with the changes made to FRAP 4. Parties have 45 days from the date the judgment is entered to file a petition when one of the parties is the United States. The amendment outlined what entities fall under this term so that the provisions are identical to the ones in FRAP 4. The term *AUnited States@* encompasses the same entities whether in FRAP 4 or 40.

II. ARTICLE III

A. *Stern v. Marshall* , __ U.S. __, 131 S.Ct. 2594 (2011).

This past summer, the Supreme Court issued the most important decision regarding a bankruptcy court's authority since *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). This case has far-reaching effects regarding the authority of Article I courts, however, and is not limited to the bankruptcy realm.

1. Facts.

Chief Justice Roberts's opening reference to Charles

Dickens's *Bleak House* is well-founded, as the original parties of this suit had passed out of it, leaving the estates of the individuals to fight over the scraps that were left.

Vickie Lynn Marshall (aka Anna Nicole Smith) was married to J. Howard Marshall II when he died a very wealthy man. His will left all of his estate to one of his sons, E. Pierce Marshall. Pierce submitted his father's will for probate in a Texas probate court. Anna Nicole contested the will, and soon after doing so she filed for bankruptcy in California.

2. Procedural History

Pierce filed a proof of claim against Anna Nicole's bankruptcy estate, alleging that she defamed him when, after his father's death, she and her attorneys made statements that Pierce had committed fraud, forgery, and overreaching to gain control over his father's estate so that he could interfere with the making of an inter vivos trust that J. Howard would not otherwise created for her. Anna Nicole answered by filing a compulsory counterclaim against Pierce in her bankruptcy estate, alleging Pierce's tortious interference with J. Howard's inter vivos gift to her.

The bankruptcy court granted summary judgment in favor of Anna Nicole on Pierce's claim, and after hearing evidence, also found in favor of Anna Nicole also for her counterclaim. Meanwhile, the probate court in Texas found J. Howard's will to be valid and controlling.

Pierce appealed to the California District Court, which treated the bankruptcy court's judgment as proposed rather than final, and it found in favor of Anna Nicole. Pierce appealed to the Court of Appeals for the Ninth Circuit, and it reversed. The Supreme Court granted certiorari, decided the case based on the probate exception to federal jurisdiction, and remanded.

The case was then heard by the Ninth Circuit again, this time to determine whether the bankruptcy court's judgment was final and controlling, or if the Texas probate court's judgment was final. It held that the probate court's judgment was controlling because the bankruptcy court lacked the authority to enter a final judgment in the case. The Supreme Court again granted certiorari to determine the bankruptcy court's authority, or lack thereof, in this case.

3. Issue

Whether a bankruptcy court has the authority to enter a final judgment on a common law tort claim when the bankruptcy judge enjoys neither life tenure nor salary protection.

4. Holding

No. While the bankruptcy court had the statutory authority to enter a final judgment in this case, it did not have the constitutional authority to do so because it is not an Article III court.

Concurrence: Justice Scalia noted that the majority's

reasoning was not clear because it cited at least 7 different reasons for why the bankruptcy court could not enter a final judgment in this case. Justice Scalia concluded that an Article III judge is required in all federal adjudications unless there is a firmly established historical practice that is contrary, such as with territorial courts, courts-martial, or public rights cases.

Dissent: Justice Breyer wrote the dissent with Justices Ginsburg, Kagan, and Sotomayor joining. Justice Breyer argued that while the majority noted throughout its opinion that this was a narrow holding and would not change much at all, this decision will drastically change how certain disputes are resolved because a district court judge, and not a bankruptcy judge will have to decide them.

This is so even though the Bankruptcy Code explicitly allows for the bankruptcy judge to enter a final judgment in these cases, and bankruptcy judges have been deciding these issues for years. The efficiency of the bankruptcy system will be negatively impacted, and consequently the district court dockets will be flooded with cases that would otherwise fall under the bankruptcy court's authority.

B. *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640 (5th Cir. March 5, 2012). After the Supreme Court's decision in *Stern v. Marshall* came out, the Court of Appeals for the Fifth Circuit did something unexpected in a case involving a magistrate judge.

1. Facts

The parties in this case consented to trial and entry of judgment by a federal magistrate judge. Technical Automation moved the court for summary judgment.

2. Procedural History

The magistrate judge granted summary judgment for Technical Automation's by applying the Aeight corners@ rule of contract interpretation. It held that Liberty had a duty to defend Technical Automation in an underlying lawsuit, and looked only to the complaint in that lawsuit and the insurance policy to make this determination.

Liberty appealed from the magistrate judge's decision granting summary judgment, and the Court of Appeals for the Fifth Circuit reversed on that issue. The Fifth Circuit, however, raised *sua sponte* a jurisdictional question based on *Stern v. Marshall*.

Liberty appealed from the magistrate judge's decision granting summary judgment, and the Court of Appeals for the Fifth Circuit reversed on that issue. The Fifth Circuit, however, raised *sua sponte* a jurisdictional question based on *Stern v. Marshall*.

3. Issue

Whether, in light of *Stern v. Marshall*, the magistrate judge had the authority under Article III of the Constitution to try and enter judgment in the state law

counterclaim in this case when the parties consented.

4. Holding

Yes. Applying Fifth Circuit precedent, the court concluded that a magistrate judge may decide the types of claims that were found to be outside of a bankruptcy judge's authority in *Stern. Puryear v. Ede's, Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984) (explaining that the Magistrates Act is Asaved from any constitutional infirmity by its requirement that all parties consent to such transfer and by the power of the district court to vacate the reference to the magistrate on its own motion.@). This precedent is binding unless there has been a change in the law such as an amendment to the statute or the Supreme Court has issued an opinion that directly overrules it. *Stern* did not directly overrule *Puryear*, and therefore it is still good law.

III. PERSONAL JURISDICTION

A. *Goodyear Dunlop Opers., S.A. v. Brown*, __ U.S. __, 131 S.Ct. 2846 (2011). The Supreme Court decided this case on the same day as *Nicastro* (below). Both cases deal with personal jurisdiction based on the Astream of commerce@ doctrine.

1. Facts

Two 13-year-old boys from North Carolina were killed in a bus accident outside of Paris, France. The boys' parents attributed the accident to a tire manufactured in Turkey at the plant of a foreign subsidiary of the Goodyear Tire & Rubber Company.

2. Procedural History

The parents brought suit in North Carolina state court against the Goodyear Tire & Rubber Company (an Ohio corporation), and three of its subsidiaries. The three subsidiaries are organized and operate in Turkey, France, and Luxembourg.

The foreign subsidiaries argued that the North Carolina state court lacked adjudicatory authority over them because they did not have a place of business, employees, or bank accounts in North Carolina. Additionally, they did not design, manufacture, or advertise their products in North Carolina. Finally, the subsidiaries had never solicited business in North Carolina, and had never directly sold or shipped tires to customers in North Carolina.

The North Carolina state court disagreed with the foreign subsidiaries and concluded that it had general jurisdiction over the subsidiaries based on the stream of commerce doctrine.

3. Issue

Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum state? Essentially, can a court exercise general jurisdiction over a

foreign subsidiary based on the stream of commerce doctrine?

4. Holding

General jurisdiction: No, a stream of commerce connection is too limited to support a court exercising general jurisdiction. In order to exercise general jurisdiction over a party, a court must find that the party's contacts are Acontinuous and systematic contacts.@ These contacts were lacking in this case, and therefore the North Carolina state court could not exercise general jurisdiction over the foreign subsidiaries.

Specific jurisdiction: The Court clarified that the stream of commerce doctrine might be used to support specific jurisdiction, but in this case the court did not have specific jurisdiction because all relevant events and injuries occurred abroad.

B. *J. McIntyre Mach., Ltd. v. Nicastro*, ___ U.S. ___, 131 S.Ct. 2780 (2011). The Supreme Court decided this case on the same day as *Goodyear* (above). This case also deals with personal jurisdiction based on the stream of commerce doctrine, but focuses solely on specific jurisdiction instead of general jurisdiction as in *Goodyear*. *Nicastro* did not result in a majority opinion.

1. Facts

An employee of a New Jersey scrap-metal company severed four of his fingers using a J. McIntyre scrap-metal baler. The owner of the New Jersey scrap-metal company had purchased the baler from the UK-based J. McIntyre's American distributor at a trade show in Las Vegas.

2. Procedural History

The injured employee filed suit in a New Jersey state court against J. McIntyre and its American distributor. The New Jersey trial court dismissed the claims against J. McIntyre for lack of personal jurisdiction. The case was remanded back to the trial court in order to proceed with jurisdictional discovery. Discovery revealed that no more than four J. McIntyre machines had ever entered New Jersey, J. McIntyre's distributor focused on nation-wide sales efforts, and although J. McIntyre personnel attended several trade shows in the United States, they had never visited New Jersey. On this record, the trial court found that J. McIntyre had insufficient minimum contacts with New Jersey.

A New Jersey intermediate appellate court reversed the trial court's decision under the stream-of-commerce-plus test. The New Jersey Supreme Court affirmed that decision, but held so under the mere foreseeability test.

The Supreme Court granted certiorari in an attempt to finally resolve the uncertainty in specific personal jurisdiction analysis that resulted from the Court's plurality opin-

ions in *Asahi Metal Inds. v. Sup. Court of Cal., Solano Cnty.*, 480 U.S. 102 (1987). In *Asahi*, Justice O'Connor's plurality enunciated the stream-of-commerce-plus test that requires more than placement of a product into the Astream of commerce@ to create the constitutionally sufficient level of minimum contacts to exercise jurisdiction over a non-resident defendant. Justice Brennan's plurality reasoned that because foreign manufacturers receive a benefit from the sale of their product in any state, so long as it is foreseeable that the manufacturer's product could be sold in a state where the injury occurred, then the state could exercise personal jurisdiction.

3. Issue

Is a State's exercise of jurisdiction barred when a foreign manufacturer's product was not manufactured, sold, or marketed in that state? Essentially, does the stream of commerce doctrine require purposefully directed activities towards a forum state?

4. Holding Plurality opinion.

Yes. Personal jurisdiction analysis protects an individual's liberty interest by not forcing the individual to submit to a foreign sovereign that lacks the authority to compel one's actions. Purposefully directed activities towards a State represent a defendant's intention to submit to the State's authority for the purpose of conducting the defendant's activities in the State. Through that purposeful availment, States gain the authority to exercise jurisdiction over non-residents based on the relationship the defendant's activity forms with the State.

Concurrence: No case in the Court's history had ever authorized a State's exercise of jurisdiction over a non-resident defendant based on an isolated sale that occurred in another State. Justices Breyer and Alito, however, expressed concern about how e-commerce affects the Court's personal jurisdiction jurisprudence. Because this case implicated none of those concerns, they did not wish to go further than simply reversing the lower court's opinion.

Dissent: Fairness and reasonableness should control personal jurisdiction analysis. When a manufacturer targets the United States as a whole to sell its products, it should come as no surprise to that manufacturer that it could be haled into any of the States' courts to account for an injury its product caused. It would be unfair and unreasonable to allow foreign manufacturers to be insulated from jurisdiction through complex distribution schemes that force plaintiffs to travel out of state to litigate their claims.

C. *INTL Int'l v. Constenia*, S.A., No. 10-60892 (5th Cir. Jan. 31, 2012). This was the first time that the Court of Appeals for the Fifth Circuit addressed a personal jurisdiction issue since the Supreme Court filed its opinions in *Goodyear* and *Nicastro*.

The case focused on specific jurisdiction, therefore, the Fifth Circuit did not need to directly engage the *Goodyear* decision.

1. Facts

ITL, a subsidiary for Mars, Inc. (the candy manufacturer), filed for a declaratory judgment in a Mississippi federal district court against its Costa Rican distributor, Constenla. The dispute arose from the exclusive distribution agreement between Mars, ITL, and Constenla.

2. Procedural History

Since 2009, Plaintiffs had delivered 91 shipments of goods for distribution in Costa Rica by Constenla. On 55 of these occasions, Constenla requested to take possession of the goods in Mississippi, where Plaintiffs had shipped the goods. This was the extent of Constenla's contacts with Mississippi.

The district court dismissed the complaint for lack of personal jurisdiction over the Costa Rican distributor. The court found that Constenla was amenable to suit in Mississippi based on Mississippi's long-arm statute regarding contracts, but that despite the presence of minimum contacts, the exercising of personal jurisdiction would be unreasonable in this case.

The court supported its conclusion by noting that the corporations bringing suit were both based in Delaware with no offices located in Mississippi, Constenla (as well as the majority of the evidence and witnesses necessary in this case) were located in Costa Rica, and it was unlikely that the Costa Rican courts would enforce a U.S. court's judgment that applied the governing Costa Rican law.

3. Issues

- (a) Whether Constenla is amenable to suit under the Mississippi long-arm statute. (b) Even if Constenla is amenable to suit based on the Mississippi long-arm statute, does personal jurisdiction over this dispute comport with due process?

4. Holding

- (a) Yes. By using Mississippi's ports to take possession and title of goods, Constenla performed some character of work within Mississippi, which is all the long-arm statute requires to exercise jurisdiction according to its doing-business prong.
- (b) No. While the 55 shipments that Constenla took possession of in Mississippi do constitute purposeful contacts with Mississippi such that Constenla can be fairly said to have partially performed its contract in Mississippi, and therefore availed itself of the laws of that state. But the dispute in this case did not sufficiently arise from the contacts that Constenla had with Mississippi.

While Constenla did partially perform the contract in Mississippi, but the dispute did not arise out of that partial performance, and instead arose out of trademark claims and general contract issues. Even though

Constenla could have anticipated being haled into Mississippi courts to answer for any claims arising out of the activity conducted there, it could not have foreseen being haled into a Mississippi court for the claims raised by Plaintiffs in this case.

IV. PLEADING STANDARDS (*Twombly/Iqbal*)

In the aftermath of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) clarifying the pleading standards for complaints, district courts have been struggling to deal with the related issue of whether this standard also applies to the pleadings of affirmative defenses. No circuit court has addressed this issue arising from *Twombly* and *Iqbal*, and there are splits within circuits on how the issue should be resolved. There are even splits within the districts themselves, showing the state of confusion surrounding this issue.

Within the Fifth Circuit, the question district courts have struggled with is whether the pre-*Twombly* and *Iqbal* pleading standard set forth in *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999), applies to affirmative defenses.

Until the Fifth Circuit (or any other circuit court of appeals) or the Supreme Court directly speaks to this issue, the district courts across the country will act as the only guides available to one another.

A. Cases Applying Standard to Affirmative Defenses

Willins v. Credit Solutions of Am., Inc., No. 3:09-cv-1025-M, 2010, WL 624899 (N.D. Tex. Feb. 23, 2010). The Northern District of Texas was in the first wave of district courts across the country that dealt with the impact of *Twombly* and *Iqbal* on the pleading standard for affirmative defenses.

The plaintiffs in this case moved to strike the affirmative defenses of the defendants for failure to meet the pleading standard of FRCP 8(c). In a short analysis of the issue, Judge Barbara M. G. Lynn noted that affirmative defenses are subject to the same pleading requirements that apply to complaints, as noted by the Fifth Circuit in *Woodfield*.

Without discussing whether it made a difference that *Woodfield* was decided before *Twombly* and *Iqbal*, Judge Lynn noted the pleading requirements for a complaint as laid out by the Supreme Court in *Twombly* and *Iqbal*. Applying that standard to the affirmative defenses before it and noting the *Afair notice* standard used in *Woodfield*, the court held that most of the defendants' affirmative defenses met this requirement, but that some of the affirmative defenses did not because they did not state any factual allegations and it was impossible to determine the basis of those defenses by the pleadings.

B. Not Applying *Iqbal* to Affirmative Defenses.

1. *EEOC v. Courtesy Bldg. Servs. Inc.*, No. 10-1911, 2011 U.S. Dist. LEXIS 5938 (N.D. Tex. Jan. 21, 2011). In this opinion, Judge Sidney A. Fitzwater, from the Northern District of Texas declined to address the question of whether the *Twombly/Iqbal* standard applied to affirmative defenses.

The court declined to answer this question because the defendants did not respond to the plaintiff's motion to strike the affirmative defenses, and therefore the court lacked sufficient briefing on the issue.

In its analysis, the court applied the pre-*Twombly/Iqbal* fair notice standard because of the distinction between FRCP 8(a), which the *Twombly/Iqbal* pleading standard is based upon, and 8(b) and (c), which govern defenses and affirmative defenses, respectively. Specifically, FRCP 8(a) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief.² This is the language that stemmed the plausibility standard of *Twombly* and *Iqbal*. This language, however, is not present in either FRCP 8(b) or (c).

The court concluded that because the requirements of each provision are different, the *Twombly/Iqbal* pleading standard for complaints should not be applied to affirmative defenses. In the absence of complete briefing and guidance from the Fifth Circuit and the Supreme Court³ to do so.

2. *U.S. v. Brink*, No. C-10-243, 2011 WL 835828 (S.D. Tex. March 4, 2011). Judge Janis Graham Jack from the Southern District of Texas in Corpus Christi also discussed the conflict between the pleading standard for affirmative defenses as governed by *Woodfield*, and the plausibility standard outlined in *Twombly* and *Iqbal* for complaints.

Judge Jack concluded that because the Fifth Circuit had not clarified the issue, and the majority of district courts across the country had applied the *Twombly/Iqbal* plausibility standard to affirmative defense pleadings, it would follow suit and apply the same standard.

3. *Vargas v. HWC Gen. Maint., LLC*, No. H-11-875, 2012 U.S. Dist. LEXIS 37352 (S.D. Tex. March 20, 2012). Judge Melinda Harmon from the Southern District of Texas in Houston had an opportunity earlier this year to offer an opinion on the issue. The court cited the *Brink* opinion, and concluded that it would also apply the *Twombly/Iqbal* standard to affirmative defense pleading because that is what the majority of district courts has done. The court noted that it agreed with the conclusion that the plausibility standard applied to affirmative defenses and analyzed the affirmative defenses in this case according to that standard.

V. CLASS CERTIFICATION

Wal-Mart Stores v. Dukes, ___ U.S. ___, 131 S.Ct. 2541 (2011). The Supreme Court decided a case this past summer that will have lasting effects on class certification in class action suits. The Court was faced with a possible class of almost 1.5 million plaintiffs, all claiming to be victims of sexual discrimination.

1. Facts

Three named plaintiffs, Betty Dukes, Christine Kwapnoski, and Edith Arana, claimed that discrimination

they had been subjected to was common to all Wal-Mart current and former female employees, and that a strong and uniform "corporate culture" permits bias against women. This bias affects the discretionary decisions of store managers who decide issues such as promotions and raises, and therefore makes every woman who has worked or is working at a Wal-Mart store the victim of a common discriminatory practice.

Dukes started working at Wal-Mart as a cashier in California in 1994. Dukes sought and received a promotion to customer service manager, but was later demoted back to cashier and then to greeter after a series of disciplinary violations. Dukes claimed that the disciplinary actions were retaliation for earlier internal complaints she had made. Additionally, she claimed that male employees did not receive the same disciplinary actions that she did for the same conduct, and that two male greeters in her store were paid more than her for doing the same job.

Kwapnoski worked at Sam's Club stores in Missouri and California for an extended period, and held various positions during her years with the company, including a supervisory position. Kwapnoski claimed that one male manager that she worked with yelled at her and other female employees, but did not yell at male employees. She also claimed that he made certain remarks such as suggestions that she get "dolled up," wear make up, or dress better.

Arana worked at a Wal-Mart store in California from 1995 to 2001 when she was fired for failing to comply with the timekeeping policy. A year before she was fired, Arana approached her store manager on multiple occasions to receive management training, but claimed she was brushed off. Arana initiated internal complaint procedures, but was told to apply directly to the district manager. Arana did not do this, and did not ask about management training again.

2. Procedural History

The California District Court and Court of Appeals for the Ninth Circuit approved the certification of the class of almost 1.5 million current and former female employees of Wal-Mart who alleged that the discretion exercised by their local supervisors regarding pay and promotion matters violated Title VII by discriminating against women.

3. Issue

Whether the certification of the plaintiff class was consistent with Federal Rule of Civil Procedure (FRCP) 23(a) and (b)(2), specifically with regard to the commonality requirement that "there are questions of law or fact common to the class" included in FRCP 23(a)(2).

4. Holding

No. Class members must have suffered the same kind of injury, not just a violation of the same law. The Court, in applying its precedent, noted that the plaintiffs here failed to provide sufficient evidence to support a companywide

discriminatory pay and promotion policy as was required to show commonality since there was not a biased testing procedure used on all of the plaintiffs to determine promotions and pay. See *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982).

The Court also held that class certification under FRCP 23(b)(2) is appropriate only if a single injunction or declaratory judgment would provide relief to each class member. Here, the plaintiffs asked for back pay, meaning each class member, if plaintiffs were successful, would receive a different amount depending on the individual facts of the member's alleged injury.

Concurrence and Dissent: Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, wrote a separate opinion concurring in part and dissenting in part. Justice Ginsburg, while agreeing with the majority that the class should not be certified under FRCP 23(b)(2) based on the type of relief asked for, did not believe that question was before the Court, and therefore the Court should not have addressed that issue.

Justice Ginsburg also disagreed with the majority's analysis of the commonality question, and in fact believed that the Court analyzed the FRCP 23(a)(2) question by looking at concerns better addressed during the FRCP 23(b)(3) assessment. The plaintiffs presented a common question that would require a common examination of Wal-Mart's policies – FRCP 23(a)(2) demands nothing more than that.

VI. EVIDENCE

The Federal Rules of Evidence were restyled and made effective December 1, 2011. The intent was to make the rules easier to apply and understand. This restyling was not intended to have any substantive effect, only stylistic.

VII. ATTORNEY-CLIENT PRIVILEGE

U.S. v. Jicarilla Apache Nation, __ U.S. __, 131 S.Ct. 2313 (2011). The Supreme Court declined to extend the common law trustee exception to the attorney-client privilege to relationships where the United States serves as a trustee in its sovereign capacity.

1. Facts

The Jicarilla Apache Nation occupies a reservation in New Mexico that was established by Executive Order in 1887. Pursuant to the American Indian Trust Fund Management Reform Act of 1994, proceeds derived from the natural resources on the land are held by the United States in trust for the tribe.

2. Procedural History

The tribe brought suit in 2002 against the United States in the Court of Federal Claims for breach of trust. The parties attempted to resolve the claims by participating in alternative dispute resolution for several years. Throughout this process, the United States turned over thousands of documents, but withheld 226 documents, as protected by

certain privileges.

In 2008, after the parties were unsuccessful in resolving the claims through alternative dispute resolution, the tribe requested that the case be restored to the active litigation docket. The Court of Federal Claims separated the case into two phases—the first (and only one at issue) dealt with the United States' management of the tribe's trust accounts from 1972 to 1992.

During discovery, the tribe moved the court to compel the United States to produce the 226 previously withheld documents. In response, the United States produced some of the documents, but reasserted the attorney-client privilege and attorney work-product doctrine with respect to 155 documents.

The Court of Federal Claims granted the tribe's motion compelling the United States to produce the remaining documents, holding that communications relating to the management of trust funds fell within a fiduciary exception to the attorney-client privilege.

The court further noted that this exception applies to legal advice relating to the execution of fiduciary obligations that a common law trustee receives. Because it found that the trust relationship between the tribe and the United States was sufficiently analogous to a common law trust relationship, it applied the same exception.

The United States petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus. The Court of Appeals denied the petition because neither the United States, nor its attorneys claimed that there were competing interests at play in those documents. Therefore, there was no reason to withhold the documents. The Supreme Court granted certiorari.

3. Issue

Whether the fiduciary exception to the attorney-client privilege used in cases involving a common law trust relationship applies to the general trust relationship between the United States and the tribe.

4. Holding

No. The Supreme Court reaffirmed that the attorney-client privilege does not extend to communications regarding the execution of fiduciary duties provided to certain fiduciaries when the communications are sought by the beneficiaries. This is because the real client in those cases is the beneficiary, not the fiduciary.

In this case, however, the fiduciary exception did not apply because the trust relationship between the tribe and the United States was not similar enough to a common law trust relationship. The main difference was that the United States served as fiduciary in its sovereign capacity, whereas in a common law trust relationship, the trustee serves in a private capacity.

VIII. ATTORNEYS' FEES

Fox v. Vice, __ U.S. __, 131 S.Ct. 2205 (2011). The Supreme Court resolved a circuit split on the issue of whether attorneys'

fees may be recovered on the grounds that the plaintiff raised a frivolous claim where the plaintiff also raised meritorious claims.

1. Facts

During an election for the Chief of Police in Vinton, Louisiana, one candidate (Billy Ray Vice) engaged in malicious conduct in an attempt to force the other candidate (Ricky Fox) out of the race. Vice's plan did not work, and Fox ultimately won the election.

2. Procedural History

After winning the election, Fox filed suit in state court against Vice and the town of Vinton, alleging state law claims as well as 28 U.S.C. 6 1983 violations based on the defendants' interference with Fox's right to seek public office. The defendants removed the case to federal court based on the 6 1983 claims.

Vice moved for summary judgment on Fox's federal claims. The District Court dismissed those claims with prejudice, and even Fox conceded that they were not valid. The District Court remanded the case to state court.

Vice filed a motion with the federal court seeking an award of attorneys' fees under 6 1988 based on Fox's frivolous claims. In support of the motion, Vice submitted his billing records, but did not differentiate between the charges associated with the federal and state law claims.

The District Court granted the motion, did not ask Vice to separate his billing records, and awarded him the entire amount that he asked for. The Court of Appeals affirmed, holding that it is not a requirement for every claim in

the case to be frivolous in order to award attorneys' fees. Additionally, in this case the focus of the litigation up to the point when Vice submitted his billing records had been Fox's frivolous federal claims, so any separation of records was unnecessary as the majority (if not all) of the costs were properly attributed to defending against the frivolous claims.

3. Issue

- (a) Whether a court may award fees to a defendant when a plaintiff asserts both frivolous and non-frivolous claims.
- (b) If so, to what extent may a court award fees?

4. Holding

- (a) Yes. A prevailing defendant in a 6 1983 civil rights case can recover attorneys' fees even if some of the plaintiff's claims are non-frivolous.
- (b) The fees awarded must be limited to the amount of fees that the defendant would not have incurred but for the frivolous claims.

IX. CONCLUSION

Attorneys practicing in the federal courts should be cognizant of the state of the law in these areas as it develops, particularly in how their local district courts, or any other court they plan to appear before, are deciding the issues.

Fernando M. Bustos is with the Law Offices of Fernando M. Bustos, P.C. in Lubbock.

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The Ethics of Email Signatures in Mobile Devices

Ellen Lockwood, ACP, RP

It seems almost everyone has a smartphone these days and many also have tablet computers. With so many ways to stay connected when you aren't in the office, it is even easier to answer emails while away from your desk. While you likely have a specific email signature for emails sent from your desk computer, there are different considerations for email signatures for your mobile devices.

The most important part of your email signature, other than your name, is your title. Non-attorneys must include their titles on all correspondence, regardless of the correspondence method.

In addition to your title, many law firms have specific information that must be included in all signatures such as the IRS compliance disclosure, or statements regarding confidentiality and privilege. It can be a challenge to comply with these requirements on mobile devices, especially considering emails are often read on small mobile devices with limited screen space. There are several ways to handle this issue. One method is to include the relevant information in the initial agreements with clients so it isn't necessary to reiterate the information in email signatures. Alternatively, the information could be sent to all clients via email or hard copy, perhaps requiring client confirmation of receipt. Clients would then be on notice of not only the disclaimers and other information, but that the information applies to all communications, regardless of method. Another option is to post disclaimer and other information on the firm website and include a link to that information in sig-



natures from mobile devices. Most devices support creation of signatures including website links. There are also third party applications for producing such signatures.

When mobile devices were new, many people included humorous statements in their signature lines such as "typed using tiny keys so please excuse any typos." Now, mobile devices include spell check for emails so continuing to include a justification for misspelled words may be perceived as unprofessional and give the impression the sender is too lazy to spell check emails.

Most mobile devices include a default signature that says something similar to "sent from my [mobile device]." Of course, these statements are a form of advertising for the mobile device manufacturers. However, there are a couple of issues to consider before leaving that default statement as part of your signature. First, it is not relevant to your signature or the content of your mobile device messages and is taking up valuable space you could use for more relevant portions of your signa-

ture. Second, some clients may consider it off-putting or even arrogant, as if you are boasting about your mobile device. You may not want to run the risk of alienating or offending others with a manufacturer's default signature.

There may be circumstances when you want the recipients of your mobile messages to be aware that you are communicating while you are out of the office. In that case you may either add that information to your email as needed or as part of your regular signature for your mobile device. You may also include your cell phone number with your signature as an indicator of the best way to reach you at that time.

Paralegals should discuss with their attorneys exactly what to include in their mobile device signatures. Communicating from mobile devices does not relieve us of the responsibility to maintain professional and ethical signatures.



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

PARALEGAL DIVISION 2013-2014 EXECUTIVE COMMITTEE



Front Row left to right: Mariela Cawthon, Deirdre Trotter, Clara Buckland, Misti Janes, Erica Anderson, and Linda Gonzales. Second Row left to right: Kristina Kennedy, Pamela Snaveley, Lydia McBrayer, Martha Ramirez, Christine Cook, Sharon Wornick, Mona Tucker, Megan Goor, and Allison Seifert

President

Misti Janes, TBLS-BCP



Misti is a graduate from the paralegal studies program at Amarillo College. Beginning August 2012, she has taught the

family law class at Amarillo College. Misti is board certified in family law by the Texas Board of Legal Specialization.

Misti is a member of the Texas Panhandle Paralegal Association, Panhandle Family Law Association, Family Law Section of the State Bar Texas, and the Paralegal Division of the State Bar of Texas.

Misti was the District 7 director of the Paralegal Division from 2007 to 2011. She has been on the Paralegal Committee for the Family Law Section of the State Bar of

Texas since 2009.

Misti Janes has worked at Underwood, Wilson, Berry, Stein & Johnson, P.C since May 2000. Misti works for Sally Holt Emerson and Christopher K. Wrampelmeier as a paralegal in the practice area of family law.

Misti is married to Lex Janes with 3 children; Mariah 19, Jakob 13, and Samuel 9.

President-Elect

Clara Buckland, C.P.



beginning June 2005, and District Director for two terms from June 2006 to June

2010. While on the Board of Directors, Clara served as liaison for the National Association of Legal Assistants and the Association of Legal Administrators. She further served on the Division's Executive Committee as Secretary from June 2007 to June 2009, and Parliamentarian from June 2009 to June 2010. Clara has also served as Chair of the Membership Committee.

Clara received her A.A.S. in Paralegal Studies from the El Paso Community College and has served on the college's Advisory Committee for the Paralegal Program. At this time, she is in the process of going back to school to complete her studies in Business Administration. Clara is a member of the El Paso Paralegal Association and has served on that organization's board in various capacities, including President in 2003, the same year she received the Paralegal of the Year Award.

Clara is a Certified Paralegal and Investigator in the office of the General Counsel of the El Paso Electric Company, where she works on employment, civil and commercial litigation matters. Clara worked in the area of Labor and Employment Law for 17 years and in

Family Law for five years.

Clara enjoys many interests, including reading and research on the Tudor court of England, creating jewelry and mosaic. Clara has an identical twin, Claudia. She is married to Bucky (Mark) and they have two wonderful daughters, Jazmine and Olivia. In addition, they have been blessed with six beautiful grandchildren: Jason, Raymond, Jordan, Jayden, Gabriel and Trynity.

Treasurer

Erica Anderson, ACP



Erica Anderson currently serves the Paralegal Division of the State Bar of Texas as District 7. Erica began her career as a

file clerk and worked diligently to become the lead paralegal on several matters. In January 2006, she earned her Certified Paralegal status from NALA, and in 2009, received notice that she had achieved the designation of Advanced Certified Paralegal in Trial Practice. In 2010, Erica was invited to be a CLE speaker at TAPS and continues to speak to other audiences.

A member of the Paralegal Division since 2004, she served as Membership Chair for three terms prior to being elected as District 7 Director (2008-2011). She has served in several different positions to the Texas Panhandle Paralegal Association, including Public Relations Chair, Professional Development Chair, TAPA Chair and President. With her member-

ships in these associations and in NALA, Erica is able to participate in a variety of ways to help develop the paralegal profession. Most recently, Erica was invited to join the Advisory Committee to Amarillo College's Paralegal Studies program.

Erica is a senior litigation paralegal with the law firm of Mullin Hoard & Brown, LLP in Amarillo, Texas, and primarily works on high-volume litigation matters involving director and officer fraud and liability, accounting, appraisal and attorney malpractice, and banking matters.

Erica and her husband, Rich, are raising two children, Rich and Libby.

Secretary

Linda Gonzales, CP



Linda serves as District 16 Director for the Paralegal Division of the State Bar of Texas. This is her second term as District 16 Director and Secretary.

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

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 is also a part-time instructor in the paralegal program at El Paso Community College since 2006, and is also on the Advisory Board.

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

Parliamentarian

Deirdre Trotter, ACP



Deirdre Trotter, ACP, has been a certified paralegal since 1992, and obtained advanced certification in civil litigation in 2002. Deirdre has worked as a

paralegal since 1990.

She graduated from the University of North Texas with a Master of Science degree in Information Science. Deirdre is a member of Alpha Chi National College Honor Society and Phi Kappa Phi Honor Society.

Deirdre was first elected to the Board of Directors in 2006 and served two terms. Deirdre currently also serves as Liaison to the National Association of Legal Assistants/Paralegals, Inc., and the International Paralegal Management Association. She is the past President of the West Texas Paralegal Association.

Deirdre currently works at the Bustos Law Firm, P.C.

Deirdre has two daughters, a son-in-law, and two grandsons. Her major interests are research, genealogy, and artistic/creative expression.

ANNUAL MEETING LUNCHEON

FRIDAY, JUNE 21, 2013, DALLAS, TEXAS

The Paralegal Division held its 2013 Annual Meeting in Dallas, TX on June 21, 2013 at The Belo Mansion. Joncilee Davis, 2012–2013 President of the Paralegal Division, presided over the meeting. President Davis introduced the 2013 Annual Meeting Committee, the 2012–2013 Board of Directors, and special guests as well as local paralegal association leaders.

Keynote speaker Justice Mary Murphy was introduced by Jay Williams, Annual Meeting Co-Chair. Justice Murphy is a judge on the Texas Fifth District Court of Appeals. She has worked in private practice and law firms, and has worked in several areas of civil litigation with a primary focus on intellectual property litigation. Prior to joining the Court of Appeals, she was a judge for the 14th District Court, where she presided over cases involving intellectual property law. She gave a presentation on “*Paralegals Evolve into Success*.”

The 2012–2013 President’s Report was presented by President Joncilee Davis, ACP. President Davis stated that the Division is strong. She further stated that CLE, Pro Bono work, charity events, and knowledge of the field are all important parts of the Division and to its members; the theme for the 2012–2013 Board of Directors was TEAM, Teaching, Educating, Advancing, and Mentoring.



Keynote speaker
Justice Mary Murphy

Since June 2012, the Division offered approximately 42 hours of CLE, with an additional 14 hours at the 2012 Texas Advanced Paralegal Seminar (TAPS). The Paralegal Division hosted 22 social or charity-related events across the State and ten (10) Paralegal Day celebrations. The Board of Directors distributed over 152 e-mails to members in their Districts; 28 persons traveled to Scotland (2013 hosted trip); and the Division conducted a survey of the *Texas Paralegal Journal* on whether members would like to receive the publication electronically (the survey results indicated that 90 percent of the members read the *TPJ*, and 64.3 percent prefer to receive the *TPJ* in print format). President

Davis stated that the Paralegal Division Mentoring program has grown over the past year and the Leadership program is in progress. President Davis announced 2014 will be the 20th anniversary of voluntary paralegal certification by the Texas Board of Legal Specialization, and the Division is creating a “TBLS Helpful Hints” Study Guide.

President Davis presented the 2012–2013 Exceptional Pro Bono Service Award to Julie Sherman of Fort Worth. Julie has devoted many hours to pro bono service in the Fort Worth area and surrounding counties.

During the Annual Meeting, the Paralegal Division Outstanding Committee Chair Award was presented to Clara Buckland, CP, Chair of the Membership Committee. Lisa Sprinkle will be presented the Outstanding Ad Hoc Committee Chair Award (Paralegal Education Programs) at the upcoming TAPS 2013 event in the Fall.

Special President’s Award was presented to Gloria Porter for her “above and beyond volunteer duties as Elections Chair.” Other special awards will be presented to Ellen Lockwood for her service as Chair of the Professional Ethics Committee and the Paralegal Ethics Handbook Ad Hoc Committee and to Debra Crosby for her service to the



Committee Chair of the Year Award
Clara Buckland, CP, Membership Chair
Joncilee Davis, 2012–2013 President



Misti Janes, 2013–2014 President
Joncilee Davis, 2012–2013 President



Annual Meeting Co-Chairs and Board Advisor
Mariela Cawthon, Jay Williams, Kelli Smith

Ambassadors Program Ad Hoc Committee at the upcoming TAPS 2013 event.

The outgoing 2012-2013 Directors were presented with plaques for their service as a District Director. These directors are Cynthia Powell, District 1 (Houston), Kristy Ritchie, District 5 (San Antonio), and Cindy Curry, ACP, TBLS-BCP, District 15 (McAllen)

At the end of the Annual Meeting, the new incoming 2013-2014 Paralegal Division officers and directors were installed. It was announced that the 2014 Annual Meeting will be held in Fort Worth on Friday, June 27, 2014.

Denise Schumann of the Texas Board

of Legal Specialization (TBLS) made an announcement that TBLS is in the process of designing a new paralegal website. Ms. Schumann also discussed the board certification exams that are available to paralegals.

The Paralegal Division would like to express its sincere thanks to the sponsors of the 2013 Annual Meeting as listed below:

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JULIE SHERMAN

Paralegal Division 2012–2013 Exceptional Pro Bono Service Award Recipient

By Lyla Elk

In today's world, many of us get so caught up in the conundrum of our hectic work schedules and our personal lives, that we forget that there are countless individuals that are in desperate need of legal services that cannot afford such services. Involving paralegals in assisting with helping these individuals plays a very important role within the *pro bono* world.

The State Bar of Texas Paralegal Division's Exceptional Pro Bono Service Award ("Award") is awarded to a paralegal that has shown extreme dedication when it comes to ensuring that a fair and accessible justice system is provided to those who cannot afford it.

This year's recipient of the Award is Julie Sherman. Julie has been a paralegal for 28 years. She has worked in the litigation section of Cantey Hanger, L.L.P. in Fort Worth for 17 years. She is a Board Certified Paralegal by the Texas Board of Legal Specialization in Personal Injury Trial Law and has attended the paralegal studies program at Tarrant County College, as well as served on several board and chair positions with the Paralegal Division, including the Advanced Paralegal Seminar Planning Committee. She has been a member of the Fort Worth Paralegal Association since 1989, the Paralegal Division since 1986, and the State



Julie Sherman and Joncilee Miller Davis

Bar College since 2007. She was selected the 2006 Fort Worth Paralegal Association (FWPA) Paralegal of the Year, and has held several board and chair positions with the FWPA, including being its President in 2010.

Julie's volunteer efforts are established in several organizations. Julie is the paralegal member of the Tarrant Volunteer Attorney Services (TVAS) committee, who helps plan and organize all of the TVAS clinics, as well as recruiting and working with paralegal volunteers to contact potential TVAS clients, gathering information for preparation of the necessary documents for events, preparing documents, notarizing documents and working the events. TVAS was created by the Tarrant County Bar Foundation to provide assis-

tance to the indigent community who could not otherwise afford representation.

In addition, Cantey Hanger LLP has a pro bono program in which Julie works with the attorneys and assists them with the *pro bono* cases they undertake. Further, she volunteers with Legal Aid of NorthWest Texas. She is also involved in several community service projects including the Susan G. Komen Race for the Cure, Main Street Arts Festival, and Tarrant Area Food Bank.

She also is a Paralegal Program Instructor at the University of Texas-Arlington.

Julie has a daughter, who is married, and a four-year-old grandson, both of whom are the light of her life.

Julie feels that her participation in *pro bono* work is very important. In truth, it's not merely important, but vital. Her countless hours and volunteer efforts are the reason why she was this year's recipient.

Congratulations to Julie Sherman, this year's Exceptional Pro Bono Service Award Recipient, for all of her hard work and dedication to providing assistance to those who could otherwise not afford it.

Lyla Elk is paralegal to Reginald B. Smith Jr., Executive Coordinator, Grayson County Bar Association, in Sherman.



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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.

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