The College Bulletin

News for Members of the College of the State Bar of Texas *Spring 2011*

Our "TOP TEN" List

BECAUSE OF RECENT EVENTS, there has been a national dialogue calling for higher levels of understanding and less vitriol in our daily lives. The dialogue for us as attorneys should be "How do we tamp down the contentiousness in our daily practices?" Toward this end, I have taken an informal survey of attorneys that reflects the **Top 10 "Sins"** committed by lawyers in their practices. Here they are, and not necessarily in any order of importance (apologies to David Letterman):

1. Setting hearings or depositions without making a good faith effort to schedule them by agreement.
2. Setting multiple hearings on the same date.
3. Advising a client that you are simply "going through the motions" in an upcoming mediation because it is Court-ordered, and there is no chance that a mediated settlement can be reached.
4. Advising opposing counsel that requested discovery may be viewed in your office with proper notice when the requested documents are not voluminous (a clear violation of the Texas Rules of Civil Procedure).
5. Responding to a request for discovery by providing voluminous documents that have not been appropriately indexed and catalogued.
6. "Bad-mouthing" the judge and suggesting to your client that the reason a point was lost in a hearing was because the opposing attorney knew the judge or has significantly contributed to the judge's campaign chest.
7. Not returning phone calls or responding to opposing counsel's correspondence when a response was requested.
8. Not advising the client that you will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
9. Not paying attention to miscellaneous clauses in contracts, e.g., venue or arbitration clauses.
10. Making changes in legal documents and not advising opposing counsel that you have done so.

From the Chair

Herman Segovia

This list is by no means exhaustive. Certainly, many more "pet peeves" could be included, but space is limited. However, being mindful of these and avoiding their traps could make for smoother sailing for all of us.

LIFELONG EDUCATION

We at the College of the State Bar are dedicated to promoting professionalism through lifelong education. To that end, we provide two excellent CLE programs annually: **Spring Training**, focusing this time on **"Litigation Strategies"** in Houston on March 24, 2011, and the **Summer School** course which is geared toward the general practitioner, and will be conducted at the beautiful Moody Gardens complex in Galveston on July 21-July 23, 2011.

The dues to join The College are a mere $60 annually, and that includes **a free subscription to TexasBarCLE's Online Library**, which provides access to over 14,000 articles from the Bar's CLE courses (normal subscription fee is $295 annually). Apparently lawyers throughout the state are recognizing this value as we have had a tremendous increase in membership this year! Join us!! ■

Beneath the Surface:
The Continuing Fight Over Texas Groundwater

By Marvin W. Jones • Sprouse Shrader Smith, P.C., Amarillo

WHEN OIL MOGULS LIKE CLAYTON WILLIAMS and T. Boone Pickens get involved in a specific commodity, you can safely bet that money is to be made. Both are embroiled in disputes over the most basic of commodities—water. Why would water capture their fabled entrepreneurial attentions? And just what kind of fight is going on? The answer to the first question is easy: Texas faces a growing water crisis. While Governor Perry is welcoming refugees from sister states that have bad economies and high taxes, planners in cities like San Antonio, Austin and Dallas are scrambling to find and secure long term supplies of water. Without water, those cities cannot quench the thirst that will accompany their projected growth. Projections of double digit growth in these cities are grounded on the assumption that they will have the infrastructure, including water, to support growing populations. No surprise, then, that business-minded folks see economic opportunity in water. It is a surprise, however, that various factions in Texas are arguing over the fundamental question of who owns groundwater. Yet this key question may steer the results of water planning and procurement over the next century of Texas' development.

The ownership question is currently being fought on two fronts, the judiciary and the legislature. Judicially, the battle is joined in a case pending in the Texas Supreme Court styled *Day and McDaniel v. Edwards Aquifer Authority* (No. 08-0964). There, Day and McDaniel are challenging the regulatory scheme employed by EAA to parcel out groundwater from the Edwards Aquifer. According to that scheme, if a groundwater rights owner was producing water during a prescribed historical period, that use may continue; if not, the owner may get a permit to produce water only for domestic and livestock use. Day and McDaniel's application to produce water for irrigation was mostly denied, leading them to sue EAA to reverse the decision or to compensate them for a regulatory taking. EAA responded that because Day and McDaniel don't own the groundwater in place under their land, there could be no taking.

After winding its way through the trial court and the court of appeals, the case landed at the Supreme Court. Although several issues are briefed, the question of ownership of groundwater drew the most attention and the most amicus briefing. While the Court might dodge the ownership issue, the battle lines are clearly drawn and the issue seems ripe for decision. Day and McDaniel and their supporters take the position that the question of ownership of groundwater in Texas was determined long ago and needs no clarification and certainly no alteration. Their analysis begins with the adoption of English common law as part of the first Texas Constitution. Under English common law, groundwater belonged to the surface owner as did all materials from the surface to the center of the earth. This principle was implicitly adopted in Texas in 1840 when the Texas Legislature adopted the common law of England. *See* Laws of the Republic of Texas, Act of January 20, 1840, *reprinted in* 2 H.P.N. Gammel, The Laws of Texas 1922-1987, at 177-78 (Austin, Gammel Book Co. 1989 (recodified as amended at Tex. Civ. Prac. & Rem. Code Ann. § 5.001 (Vernon 2002)). In 1860, the Texas Supreme Court expressly adopted this ownership principle in *Williams v. Jenkins*, 25 Tex. 279, 1860 WL 5835, at *6 (1860) ("We may, with confidence, appeal to the time-honored legal maxim, *Cujus est solum,ejus est usque ad caelum*; which has given to the term *land* an extension bringing within its scope everything which exists naturally, or has been fixed artificially, between the center of the earth and the confines of the atmosphere.") (emphasis in original)

Later, the Texas Supreme Court specifically addressed groundwater ownership in *Houston & T.C. Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904), where Mr. East claimed that the railroad dried up his well by drilling and producing water from its own well. The railroad company did not deny the effect of its own well, but pointed to English common law to conclude that it could not be held liable for this inconvenience. Applying common law principles, the Court held that a landowner has absolute ownership of groundwater and adopted the corollary principle (later denominated as the rule of capture) that a landowner has no liability for draining his neighbor's water. Subsequent Texas cases have adhered to the *East* holding.

Siding with Day and McDaniel are a variety of interests, including the City of Amarillo and Canadian River Municipal Water Authority, who between them own more than a half million acres of groundwater rights—or at least believe they do. Others supporting Day and McDaniel include the cities of Lubbock, Victoria and El Paso, the Pacific Legal Foundation, owners like Picken's Mesa Water and the Four Sixes Ranch, private organizations like Texas Farm Bureau, Texas Cattle Feeders Association, Texas & Southwestern

Cattle Raisers Association, Texas Landowners Council and Texas Wildlife Association. Even the Texas Comptroller and the Texas Department of Agriculture weighed in on the side of ownership. Notably, the Department of Agriculture's letter brief includes a statement that the brief was filed with the permission of the Texas Attorney General's office, which has filed briefs on the other side as part of its representation of the State (made a party to the action by EAA)..

ON THE OTHER SIDE OF THE ISSUE, ADVOCATES of EAA's position say that there is a difference between actually owning water in place and having a right to produce water from the land. They point to the rule of capture and argue that this rule of non-liability means that a landowner cannot exclude neighbors from capturing water by pumping it out from under that land. This right to exclude others being a central part of ownership, the EAA proponents claim that ownership of groundwater in place is illusory at best. These interests note that the *East* case and its progeny have never specifically dealt with the question of whether the interest in groundwater is such as to give rise to a takings claim. Predicting dire consequences from such claims, they urge the Court to reject the Day and McDaniel position. A common theme on this side of the conflict is that the recognition of vested property rights in groundwater in place will impair or even destroy the ability of groundwater districts to effectively regulate this resource.

Advocates of the EAA position include the Harris-Galveston Subsidence District, the Texas Attorney General, the Environmental Defense Fund, the Medina County Irrigator's Association, the Texas Alliance of Groundwater Districts, Senator Robert Duncan, the Alliance of EAA Permit Holders and Texas Rio Grande Legal Aid.

The Court heard oral argument in the Day case on February 17, 2010, and the case is submitted and awaiting opinion. This widely watched case is sure to spark further controversy and, in all likelihood, more litigation.

In the meantime, the Texas Legislature is entering its biennial session for 2011. Perhaps growing impatient with the Supreme Court or perhaps just doubling down on their bets, those advocating ownership of groundwater have introduced legislation addressing the subject. Senator Fraser recently filed SB 332, proposing an amendment to Section 36.002 of the Water Code to specifically recognize that groundwater is a vested property right while beneath the surface. Given the concurrent judicial and legislative fronts, it will be interesting if the legislature passes Senator Fraser's bill and the Supreme Court decides that groundwater is not owned by the surface owner. The fight might not end.

The folks who are engaged in this fight are not, generally speaking, merely academically interested in the ownership battle. Both sides perceive consequences that are far-reaching. As noted above, many groundwater districts express concern that the recognition of a vested property right in groundwater will impede regulation of groundwater. Takings claims, they argue, will exhaust the public fisc. On the other side, ownership advocates note that ownership and regulation are not mutually exclusive. Regulation, they argue, has not proved to be impossible in other areas where property ownership is clearly recognized, nor have takings claims proved problematic. They point to the Railroad Commission's regulation of oil and gas as an example, noting that oil and gas are also fugacious substances owned in place by the surface owner.

A consequence not mentioned in the Supreme Court briefing bears examination. There are now 98 separate groundwater conservation districts in Texas, most of which are single county districts defined only by political boundaries. These 98 districts exist over 16 major aquifers. Inherently, many districts share the same aquifer. Notwithstanding legislation designed to encourage joint planning between such districts, many districts sharing an aquifer have separate and disparate rules and production limits. Accordingly, farmers on opposite sides of a county line may be subject to different production limits, which means that one of the farmers is effectively being drained.

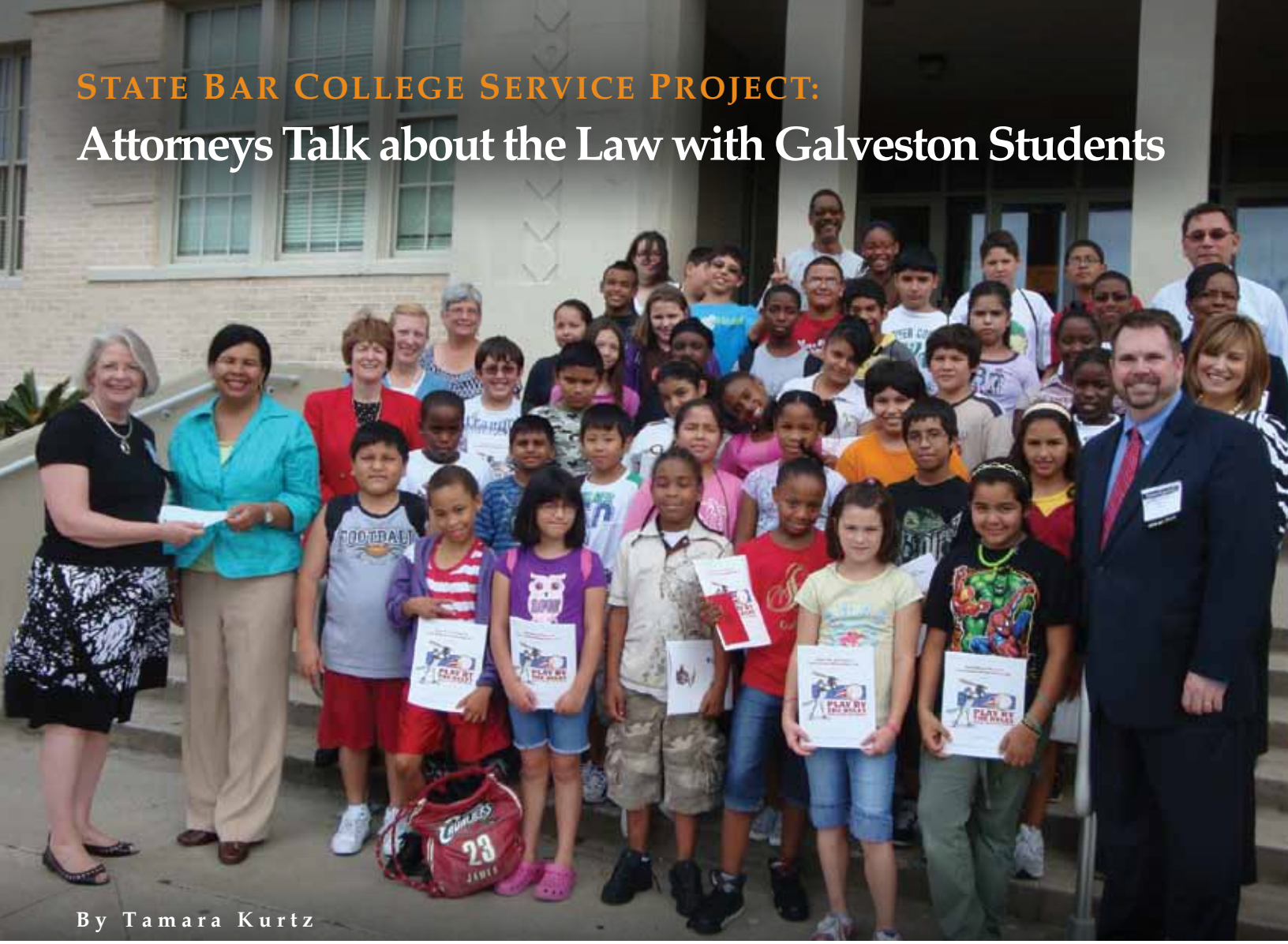
If groundwater is not owned in place by landowners, no issue arises as a result of this disparity, and the existence of different production limits over the same aquifer is of no consequence. On the other hand, if landowners have a vested and constitutionally protected interest in groundwater in place, unequal production rates may give rise to takings claims. Texas law regarding subterranean fugacious substances—oil and gas—is well settled. The Railroad Commission cannot establish different production rates for mineral interests in the same field or reservoir. If groundwater districts are subject to the same legal principles, the groundwater regulation system may radically change. Districts sharing an aquifer would be required to have production rates that do not result in drainage across district lines. Even rules affecting such things as permit applications might come under scrutiny if those rules affect substantive rights.

A second consequence arising from the ownership battle relates to the ability of groundwater districts to employ historic use production schemes. Under these schemes, those who have been producing get to continue producing, while those who have not may be denied a permit altogether. If groundwater is not owned in place, this regulatory plan poses no problems *per se*. On the other hand, if groundwater represents a vested property right, historic use schemes may come under takings scrutiny. This result springs from the fact that historic use regulation allows one farmer to produce more than his neighbor. The neighbor is getting drained as a result of governmental action, which is a taking under settled Texas law.

None of the many briefs filed in the *Day* case mention these potential consequences, but they must be apparent to those who study the issue. The real impetus for the ownership fight might, therefore, be literally and figuratively beneath the surface.

State Bar College Service Project:

Attorneys Talk about the Law with Galveston Students



By Tamara Kurtz

On July 22, 2010, members of the Board of the State Bar College spoke with students at the summer camp program at Austin Middle School in Galveston about law and legal careers. The attorneys presented information to the students about federal, state, and local law and provided each student with a copy of the U.S. Constitution. The students also received a booklet on Texas law, "Play by the Rules: Texas Laws for Youth." Later, fifty copies of this booklet were provided for the library of Jack Yates High School in Houston.

Following the presentations, Board members Sally Crawford, Herman Segovia, John Grace, Judge Rose G. Reyna, Veronica Jacobs, and Tamara Kurtz answered students' questions about the law, law school, and what is involved in the practice of law. The students demonstrated a refreshing and genuine interest in the laws, including the U.S. Constitution, that govern their everyday affairs. College Chair Herman Segovia commented, "The trip to Austin Middle School was well worth it!"

The students' questions and comments showed their understanding and interest in the laws that affect them on a daily basis. Judge Reyna described hypothetical situations to students and then she discussed how the rule of law and constitution applied. "We hope the kids enjoyed this experience as much as we did," said College Vice-Chair Tamara Kurtz.

The College also raised $1,541 in donations from law firms and the attorneys attending the State Bar College's Summer School seminar. This donation was made to the Galveston Independent School District for the purchase of school supplies for economically-disadvantaged kids. Sally Crawford, former Chair of the College Board, said that she hopes the College will make this service project or projects like it an annual event for the College.

In the future, perhaps some of these middle school students will become attorneys and members of the College.

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Thursday

6.75 hours, including 1.75 hours ethics

8:00 **Registration and Continental Breakfast**

8:45 **Welcoming Remarks**
Chair, State Bar College
Herman H. Segovia, *San Antonio*
Law Offices of Herman H. Segovia

8:55 **Announcements and Program Introductions**
Course Director
Hon. David Keltner, *Fort Worth*
Kelly Hart Hallman

9:00 **Pre-trial Strategies: Personal Injury** *1.5 hrs (.5 ethics)*
Moderator:
Hon. David Keltner, *Fort Worth*
Kelly Hart Hallman

Judge:
Hon. Alfred H. Bennett, *Houston*
Judge, 61st Civil District Court

Plaintiff:
Howard L. Nations, *Houston*
Law Office of Howard L. Nations

Frank Guerra, IV, *San Antonio*
Watts Guerra Craft

Defense:
Patricia O. Alvarez, *Laredo*
The Alvarez Law Firm

Thomas C. Riney, *Amarillo*
Riney & Mayfield

10:30 **Break**

10:45 **Pre-trial Strategies: Personal Injury, continued** *1.5 hrs*

12:15 **Break for Luncheon**

12:30 **Luncheon Presentation - Practicing Law and Wellness: Ten Mistakes and the Lessons I Learned From Them** *.75 hr ethics*
Scott Rothenberg, *Houston*
Law Offices of Scott Rothenberg

1:15 **Break**

1:30 **Pre-trial Strategies: Business** *1.5 hrs (.5 ethics)*
Moderator:
David A. Chaumette, *Houston*
De la Rosa and Chaumette

Judge:
Hon. Rose Guerra Reyna, *Edinburg*
Judge, 206th District Court

Plaintiff:
Robin C. Gibbs, *Houston*
Gibbs & Bruns

David T. Lopez, *Houston*
David T. Lopez & Associates

Defense:
David J. Beck, *Houston*
Beck Redden & Secrest

Victoria McGhee, *Houston*
Shell Global Solutions, Inc.

3:00 **Break**

3:15 **Pre-trial Strategies: Business, continued** *1.5 hrs*

4:45 **Adjourn**

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What Did I Forget?

By J. R. (Ronnie) Horsley

PRACTICING FOR A NUMBER of years and being older has its disadvantages: we tend to remember selectively, and often only pieces of law and procedure we once knew, but are no longer at the forefront of our practice. In dealing with decade-long events, it is especially troublesome.

A recent conversation with an attorney who practices real estate law, led me to draft this piece. My friend assured me that he had kept a seventeen-year-old judgment "lien" alive by filing a new abstract of judgment every ten years. "Did you ever issue execution?" I asked. "No, I wasn't sure of any property to levy on, but I kept the lien alive with the abstracts."

Abstract of Judgment

This invaluable tool is inexpensive and effective. How else could one better protect the interests of a client than by issuing and recording an instrument for less that $30? This provides the client with a lien on all non-exempt real estate owned by the debtor in the county of recording.

Texas Property Code 52.002

When can the abstract be issued or prepared? "When the judgment is rendered." While some courts and clerks still believe they must wait until the appeal time has run, (particularly in Justice Courts), this is simply a mistake. The practice in my office is to have an abstract prepared and recorded immediately upon securing the judgment—hopefully, the same day.

Who prepares the Abstract? The "judge or justice of the peace" or "clerk of the court" can prepare it, as can the attorney (authorized persons other than the court or clerk must verify the abstract). 52.002 TPC. The most effective method is to prepare the instrument in your own office, have the recorded instrument returned to you by placing your return address on the face of the abstract. The form can be found in the *Texas Collections Manual*, or any number of easily available sources.

Where is it recorded? The county of the defendant's known (or believed) residence; the county of the defendant's family (inherited property); and any other county where property may be owned or bought. I happened to be in line at a clerk's office, waiting for the attorney ahead of me to pick up 254 abstracts prepared by the clerk. He had a client which had obtained a large judgment against Billie Sol Estes, and intended to record an abstract in every county in Texas, since they weren't sure where properties might be located.

Since you are to be responsible for any errors in the instrument, you might as well be the one preparing it. Not only this, but once filed, you are responsible to see to it that the clerk has properly indexed and recorded the instrument. *Caruso v. Shropshire*, 954 S.W. 2d 115 (Tex. App.—San Antonio, 1997). Minor errors can be overlooked, but others can be fatal.

What must be in the abstract? 52.003 Texas Property Code:

1) the names of the plaintiff and defendant;
2) the birthdate of the defendant, if available;
3) the last three numbers of the driver's license of the defendant, if available;
4) the last three numbers of the social security number of the defendant, if available;
5) the number of the suit in which the judgment was rendered;
6) the defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation;
7) the date on which the judgment was rendered;
8) the amount for which the judgment was rendered and the balance due;
9) the amount of the balance due, if any for child support arrearage; and
10) the rate of interest specified in the judgment.

The section continues that it "<u>may</u> show the mailing address for each plaintiff or judgment creditor," but don't be fooled; this is just a tease. 52.0041 TPC imposes a "fine" for failure to include the information (double the recording fee or $25, whichever is greater).

The clerk is statutorily obliged to record the date and hour of receipt of the abstract, and enter the abstract on the alphabetical index to the real property records, showing:

(1) the name of <u>each</u> plaintiff in the judgment;
(2) the name of <u>each</u> defendant in the judgment; and
(3) the volume and page or instrument number in the records in which the abstract is recorded.

The statutory "check list" seems easy enough to follow, and it is, but only up to a point. If one is allowing the clerk's office to prepare the abstract, be cautious of misspellings and of a tendency in some offices to consider the <u>style</u> of the case as being the final word on the parties' identity. No one (except you) wants to read the <u>actual</u> judgment: parties may have been added, or dropped, cross-claims asserted with new capacities, interveners, third parties, different amounts and interest rates for different parties, and any number of other variations can confuse even the most experienced clerk.

Now that the instrument is recorded in every county in which you know of property (or suspect it), create a calendar entry to re-

issue in 9 years and 6 months, and check the calendar for the last execution on the judgment. The abstract lien has a life of 10 years from the "recording and indexing"—not from the date of issue. Separate calendar entries are necessary for each recording in each county, as there may be months, or years between the respective recording events. Recording the new abstract should overlap the life of the predecessor instrument to avoid a gap in the lien.

Regardless of the person preparing the Abstract, the attorney is ultimately responsible for the content and proper recording of the instrument to establish the lien. Reference materials are filled with examples of failed liens resulting from such "confusion." Failure in the content of the instrument as well as failure in the recording and indexing, can be disastrous, and certainly have an impact on client relations—especially when the only property available to satisfy the judgment has been sold and the lien of your client's abstract is held invalid.

The two important principles reiterated in *Caruso v. Shropshire*, 954 S.W. 2d 115 (Tex. App.—San Antonio, 1997): 1) it is the judgment creditor's responsibility to insure that the clerk abstracts the judgment properly and, 2) that substantial compliance with the statutory requirements is necessary for a lien to exist. Essentially, again "content" and "recording." In *Shropshire*, there were 54 plaintiffs who recovered, but listing all of them was tedious, so only one of the plaintiffs was named in the abstract, and indexing took place only in the name of one of the plaintiffs (Joe Shropshire who it was asserted was acting as attorney-in-fact for the other 53 plaintiffs). Omission of the name of a party to the judgment, whether plaintiff or defendant, in the body of the abstract (content), or the omission in the clerk's indexing (recording) can be fatal to the lien.

What else could they forget? The "who," "what," "where," and "when"; the correct spelling of the name of the defendant; the date of the judgment; the amount of the judgment; the incorrect designation of the plaintiff or its name. Indexing under the wrong letter of the alphabet; omitting the name of one or more party—much of which can take place in the clerk's office, and is only in your control if you check the record.

Foreign Judgment

Chapter 35, Texas Civil Practice and Remedies Code

Abstracting a foreign judgment in Texas same requires a little additional consideration. Being a "belt and suspenders" person, I tend to believe more is better. The date of rendition, court, and number of the suit in the foreign jurisdiction are included, along with the same information as to when same became a Texas judgment.

Now, we've taken care of the paperwork, and all we have to do is wait for the title company to call and cut a check…well, not exactly.

Death of the Abstract Lien

As previously discussed, the lien of the abstract has a 10 year life from "recording and indexing."(52.006 TCPRC) All of which assumes correct content and indexing. Its life is also tied as an umbilical to the life of the judgment. If the judgment is allowed to become dormant, the lien of the abstract dies. Judgments have their own 10 year lifespan (34.001 TCPRC), but unlike the abstract, the judgment lives for 10 years from the date of rendition, and is kept alive by issuing a writ of execution. If 10 years pass and no writ is issued and sent to the sheriff or constable, the judgment becomes dormant. Issuing successive writs of execution over a period of years can keep the judgment alive indefinitely, but the abstract lien lives on its own calendar, and is not renewed or extended by the issuance of execution.

It should be noted that the statute does not require a new abstract to be prepared. If the "old" instrument otherwise meets the statutory requirements and is accurate in all respects, there is no reason why it can't simply be re-indexed and re-recorded in the counties where previously filed. The abstract itself, then, as long as the judgment is alive or capable of being revived, cannot die, only the lien of the abstract.

Life After Death

For the abstract of judgment lien, there is no life after death (dormancy) of the judgment. Regardless of the age of the abstract, the lien dies with dormancy. The judgment itself, in addition to its 10 year life, has an additional 2 years within which it can be "revived"(31.006 TCPRC), but the abstract must be re-recorded after the revival of the judgment. The new, or re-recorded abstract of the judgment fixes a lien from the date of its recording and indexing, and a gap in the lien status will exist from the date of dormancy of the judgment to the new recording date.

Keeping two calendars is prudent—one for abstracts and one for executions—keeping in mind the fact that the execution you issued five years after the rendition of your judgment adds 10 years to your judgment from that date, but adds nothing to the life of the lien created by the abstract recorded on the date of the judgment. Scheduling the monitoring of properties of the debtor on which the lien attaches would also be advisable in light of the possible application of various statutes of limitation in the event of a conveyance to or occupation by a third party .

What did I forget? Many things, I'm sure, but the important ones can be handled with proof-reading, a good calendar and file management—especially for those who have practiced for decades, and those who hope to.

J. R. (RONNIE) HORSLEY *is a solo practitioner with RONNIE HORSLEY, P.C., in Tyler. Since 1975, he has presented numerous CLE topics related to civil writs and process, debt collection and enforcement of judgments for the Houston Bar, State Bar of Texas, Texas Justice Court Judges Assn., District and County Clerks, and sheriffs and constables. He is a member of the State Bar College and the Commercial Law League of America.*

Recognizing Mental Health Issues

By Jim Huggler

EVERYONE INVOLVED IN THE CRIMINAL JUSTICE SYSTEM realizes that there is a problem in how the system handles people who are mentally ill. Estimates range from 16% to 35% or more of the prisoners in the Texas Department of Criminal Justice need mental health care. There are more people in custody receiving mental health care than the state's psychiatric hospitals. Harris County operates the largest mental health unit in the state through the county jail. Travis County was the first county to establish a specific public defender's office for mentally ill. Several other counties have specific components in place to assist and properly represent the mentally ill.

As attorneys, we frequently deal with adult and juvenile clients suffering from bipolar disorder, schizophrenia, major depression, often compounded by alcohol or drug abuse. There are numerous resources available which provide assistance in this area. Frequently symptoms overlap between illnesses, some are readily apparent, others are more subtle. If in your notes, you use the term(s): delusional, hallucinations, nonsense, psychotic, paranoid, compulsive, grandiose, manic, hyper, obsessed take the time to determine whether you need assistance.

Orientation

Does the person know where they currently are, why you are meeting with them, what the consequences are for their situation? It is most obvious, but if the client does not realize they are in custody, or the county, there are probably issues. Ask some simple questions regarding address, the identity of the President and Governor, family members or current events. You can frequently receive a wealth of information, and you may receive information pertaining to other areas as well.

Medical History

Inquire as to any medical treatment. Frequently, clients will not tell you that they have been committed, but they may use phrases like treated or mis-diagnosed. Learn what medications they have taken in the past. Often you will hear drugs mentioned that should provide insight. If your client has seen multiple medical professionals not related to routine medical care or an acute incident, it may be an indicator that they or their family are seeking assistance for an undiagnosed mental health illness.

Behavior/Mood

How is your client acting? Does he behave appropriately for the setting? Does he interact appropriately with the people around him? Very few people are happy to be in custody, but if your client is exhibiting behavior out of the ordinary, take more time with the interview. Facilities regularly screen at intake for some basic mental health issues, among them depression and possible suicide risks. If he is sleeping all day, or not sleeping at all, inquire further. Is he speaking rapidly or so fast that he is difficult to understand? Does he appear to be extremely energetic or lethargic? Your client may tell you that he is contemplating suicide or wants to die. Take this seriously, inquire further, and if necessary alert the facility staff. Is your client excessively happy or excited? Is his mood fairly stable or does it vary from anger to hopeful or optimistic and back again or from happy to hopeless? Look for any repetitive movements or gestures. Sometimes these can indicate either a mental disorder or side effects from some of the early treatment regimens. If they act in a manner indicating intoxication, but there is no apparent source of intoxication, inquire further. Ask about what is important to them, everyone has family and interests, take the time to speak with them about their interests, family, work, projects or hobbies.

Basic Abilities

Can your client drive? This involves motor skills and mental skills. If they are the appropriate age to drive, and do not or cannot, follow up to determine why they are not driving. You may learn that their family does not trust them driving, or they have a history of blackouts or other issues. Can they obtain or maintain employment? Frequently our clients are not the best employees, but if they quit employment or school suddenly, look for other indicators of bi-polar or manic behavior. Inquire as to their military service. Our military and courts have recognized that there are issues regarding post-traumatic stress disorder and how veterans are adapting to life following military service.

JIM HUGGLER *is a Member of the College of The State Bar and is Board Certified in Criminal Law by the Texas Board of Legal Specialization. He practices in Tyler and East Texas and represents juvenile and adults in state and federal court as well as post-conviction matters.*

Affect
Is your client emotionally appropriate? Do they show emotion or vary their tone during conversation? If you client laughs at inappropriate times it could indicate several different mental issues. They may experiencing auditory or visual hallucinations. Similarly, if the client does not respond at all or is flat, it could be an area of concern.

Thought Processes
Listen to your client. Is he able to understand the information you are conveying and convey it back to you in his own words? Does he appear to be processing information in a rational logical fashion? Are they exhibiting bizarre or paranoid thought processes or an extreme lack of trust? If you client is convinced that they are the subject of a conspiracy or government plot, you may need the assistance of a mental health professional. If he provides insight in the form of "bizarre" thoughts, inquire further as to the source of these ideas. It is also very interesting to look at his letters to you. You may see a lack of logical thinking in his writings, or diagrams added which indicate issues.

Facility concerns
Every facility has medical treatment areas and confinement cells called different names in each facility. If your client is in a solitary cell and it is located on the same floor as the clinic, inquire of the jail staff. In the larger counties, there are even mental health wings, and you should know if your client is located there. The deputies are a tremendous source of information about your clients, watch them for signs when they bring your client to meet with you. In East Texas, frequently a deputy or bailiff will comment that a person is "10-99."

What do you do next? There are clients who are mentally ill and who are still competent, and there are clients who are either not competent or insane. If you have concerns regarding competence or sanity, file the appropriate motions with the court for evaluations. Develop contacts with the local mental health treatment providers so that you are able to provide contacts at a minimum. Obviously, most of us are not trained mental health professionals; and any of us can miss more subtle signs of mental illness, but hopefully, we can improve our own practices and function better as advocates for our clients. ■

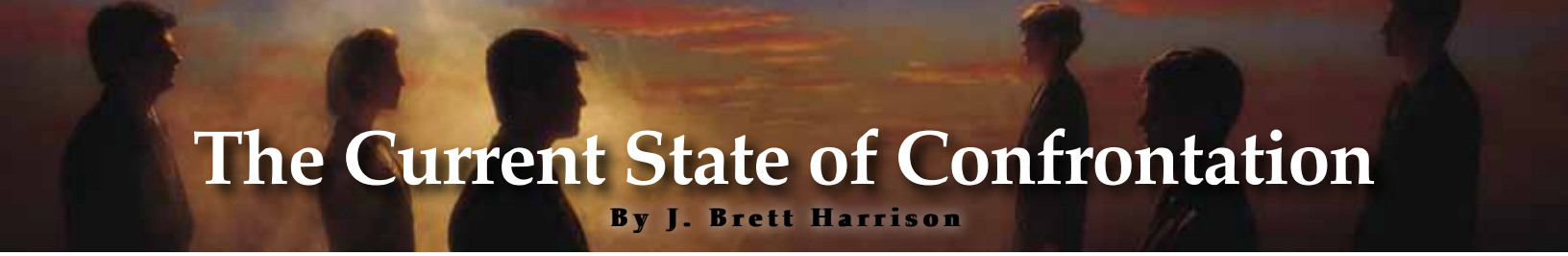
Meet the New College Board Members

A past President of the Mexican-American Bar Association of Texas, **Patricia O'Connell Alvrarez**, with the Alvarez Law Firm, P.C. in Laredo, is a trial attorney specializing in transportation, commercial, insurance, and products liability cases. Board certified in personal injury law, Ms. Alvarez has been named a "Super Lawyer" by *Texas Monthly* seven years in a row. An author of numerous articles dealing with procedure, pre-trial and trial practices, trucking law, and insurance coverage, she assisted with the development of the State Bar's Pattern Jury Charges series (vols. 1 and 2). She has served on planning committees for several TexasBarCLE Advanced Courses, as well as on the State Bar's CLE Committee and on the State Bar Board of Directors.

Susanne Bonilla practices in Corpus Christi with the Law Offices of William D. Bonilla, P.C. (The firm's founder, her father, is a 25-year-member of the College.) The firm handles cases in the areas of worker's compensation, personal injury, Social Security, family law, criminal law, products liability, premises liability, and admiralty. A graduate of Texas A&M University and the University of Texas School of Law, Ms. Bonilla is a member of the Texas Bar Foundation and Texas Family Law Foundation, as well as local bar associations and the ABA. A mother of three sons, she has served as President of both the Cullen Middle School PTA and of the Texas PTA, Area 9.

Assistant Lubbock City Attorney **John Charles Grace** is also a Qualified Mediator. Prior to his present position, he was a solo practitioner in San Antonio, then served as Assistant Criminal District Attorney for Lubbock County. A passionate advocate for the legal profession and education, Mr. Grace has taught for the Texas District and County Attorneys Association, the Lubbock Police Academy, the Lubbock County Sheriff's Academy, the West Texas Legal Professionals Association, the Texas Judicial Academy, and the Lubbock Leadership Forum, among others.

Board certified in criminal law by both the Texas Board of Legal Specialization and the National Board of Trial Advocacy, **Russell D. Hunt, Sr.**, of Waco has over 30 years' experience defending clients facing charges in state and federal courts — everything from DWI to capital murder. Prior to opening his own firm, he focused on prosecution as an Assistant District Attorney for McLennan County. He has lectured on topics for both the Federal Bar Association and Baylor Law School. ■



The Current State of Confrontation

By J. Brett Harrison

"**THERE ARE FEW SUBJECTS, PERHAPS,** upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed2d 923 (1965).

With the advent of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), and its progeny, the Confrontation Clause has enjoyed a resurgence of litigation affirming its vital importance to criminal defendants. This area of constitutional law promises continued changes and new challenges for all who defend and protect the rights of citizens accused.

In *Crawford*, the Supreme Court reversed more than two decades of Confrontation Clause jurisprudence and laid the groundwork that practitioners have been navigating ever since. With the decision in *Crawford*, the landscape changed dramatically regarding the admissibility of out-of-court statements. Under *Crawford*, the admission of an out-of-court testimonial statement made by a non-testifying witness to law enforcement officials is barred by the Confrontation Clause – regardless of its inherent reliability – unless the defendant had a prior opportunity to cross-examine the witness and that witness is unavailable to testify at trial.

The intent of the Court's opinion is summarized in a single sentence: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374.

Unfortunately, the Supreme Court in *Crawford* left unanswered the precise question of what constitutes a testimonial statement. The Supreme Court and other state and federal courts responded with clarifications, tests and formulas in an attempt to help define the term. The first attempt at clarification occurred in *Davis v. Washington*, 126 S.Ct. 2266 (2006), and both State and federal courts continue to grapple with this thorny issue today. In *Davis*, the Supreme Court considered the issue of what constituted testimonial evidence in two cases consolidated into one opinion. *Davis v. Washington*, 126 S.Ct. 2266; *Hammon v. Indiana*, 829 N.E.2d 444, 446 (Ind.2005).

While the Court continued to caution against any strict classification of certain types of statements, it is now clear that fact situations are to be reviewed objectively. *See Davis, supra* at 126 S.Ct. at 2273. The Court placed emphasis on the "primary purpose" of any form of interrogation by any member of law enforcement. *Id.*

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.*

The hottest issue regarding whether a statement is considered testimonial is the post-*Crawford* treatment of business records. Although true business records are generally considered non-testimonial, courts are looking closely at the reason behind their creation.

"Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2539-40, 74 L.Ed.2d 314 (2009).

In *Melendez-Diaz*, the prosecution, pursuant to state law, submitted "certificates of analysis" in a possession of cocaine case as part of the proof that the accused illegally possessed cocaine. Over a confrontation objection, the trial court admitted the certificates as "prima facie evidence of the composition, quality, and the net weight of the narcotic." The Court held that the certificates (affidavits) were "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*[*omitting internal quotation marks*].

The certificates did not qualify as a business record admissible without confrontation because the information contained therein was "calculated for use essentially in the court, not in the business" of the lab. *Id.* at 2538 *quoting Palmer v. Hoffman*, 318 U.S. 109 (1943).

J. BRETT HARRISON *is a partner in the Tyler law firm of Bain, Files, Jarrett, Bain and Harrison, P.C. A former Assistant Criminal District Attorney for Smith County, he is board certified in Criminal Law by the Texas Board of Legal Specialization and in Criminal Trial Advocacy by the National Board of Trial Advocacy. For 2007 through 2010 he has been selected each year by* Texas Lawyer *as a Rising Star.*

Another evolving issue post-*Crawford* deals with the concept of forfeiture (of one's right of confrontation) by wrongdoing. Although courts have widely accepted this doctrine, the test to determine whether forfeiture has occurred differs from jurisdiction to jurisdiction. Recently, the Supreme Court addressed this issue.

In *Giles*, the Supreme Court indicated that prior to a finding of forfeiture, there must be evidence that the accused, directly or indirectly, employed an intent or design to prevent a witness from testifying. *Giles v. California*, 128 S.Ct. 2678, 2684-86, 2691, 171 L.Ed.2d 488 (2008). See also *Gonzalez v. State*, 195 S.W.3d 114, 125 n. 47 (Tex.Crim.App.), *cert. denied*, 549 U.S. 1024, 127 S.Ct. 564, 166 L.Ed.2d 418 (2006).

So what happens when the Texas courts get it wrong? When constitutional error occurs at the trial court level, a harm analysis under Tex.R.App.P.44.2(a) is conducted. Under this analysis, the Court must reverse the conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the jury's verdict.

In *Clay v. State*, 240 S.W.3d 895 (Tex.Crim.App. 2007), the Court set out the factors to consider in a harmless error analysis: "(1) the importance of the hearsay evidence to the State's case; (2) whether the hearsay evidence was cumulative of other evidence; (3) the presence or absence of other evidence corroborating or contradicting the hearsay evidence on material points; and (4) the overall strength of the State's case. *Davis v. State*, 203 S.W.3d 845, 852 (Tex.Crim.App.2006). We must also consider any other factor, as revealed by the record, that may shed light on the probable impact of the trial court's error on the minds of average jurors." *Id.*

Wading through the multitude of cases spawned by *Crawford* is no easy task. The cases are at times ambiguous and are often contradictory. When looking at the body of cases, however, certain trends have emerged.

1. Courts appear more inclined to find error but to deem it harmless beyond a reasonable doubt.
2. There seems to be an increase in the number of cases where courts of appeal have held that trial counsel failed to preserve error and have thus forfeited their right to appellate review.
3. We are beginning to see Appellants arguing ineffective assistance of counsel claims for failure to object on confrontation grounds. Although Appellate courts have consistently rejected these claims, it is just one more issue the criminal practitioner has to worry about.

If *Crawford* has taught us anything, it is to continue to challenge what we have come to believe is settled law. Clearly, as the courts attempt to refine and define issues surrounding the Confrontation Clause, new law is ready to be made. The only way to continue this forward momentum is with aggressive and creative litigation. ■

Charter Member Ed Lindsay Remembered

College Charter Member and former Board Member **Edward E. Lindsay,** 91, passed away peacefully at home on January 17. He practiced law in Houston for 58 years. After earning his B.S. in Mechanical Engineering from Texas A&M, in 1942 he reported for duty as a 2nd Lieutenant in the U S Army Corps of Engineers. On D-Day, he landed with the first wave on Utah Beach and was awarded a Bronze Arrowhead. He also was awarded two Bronze Stars for heroism in ground combat and five Bronze Battle Stars for his five campaigns in Europe.

After the War Ed became an Asst. Professor of Military Tactics at Texas Tech University, where he met his future wife Laneta. He resigned from the service and returned to Houston to attend South Texas School of Law and Commerce (now South Texas College of Law). Two years later he was called back to duty for the Korean War.

Board Certified in Family Law and Appellate Law, he was a Charter Member of the State Bar College and the Pro Bono College, a Distinguished Mediator, a former State Bar Director, and the current president of the North Harris County Bar Association. A champion for solo practitioners, he fought for recognition for attorneys who served in World War II. Ed was also proud of being a charter member of the Texas Association for Investigative Hypnosis and was a certified hypnotist for 25 years. ■

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Under MCLE rules adopted in 2010, **you may now claim 6 hours of self-study each year** (up from 5). Self-study is allowed for reading substantive legal articles such as ones found in the *Texas Bar Journal* or other legal publications. ■

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