San Antonio Lawyer

The Honorable Robert Lee Pitman

July-August 2017

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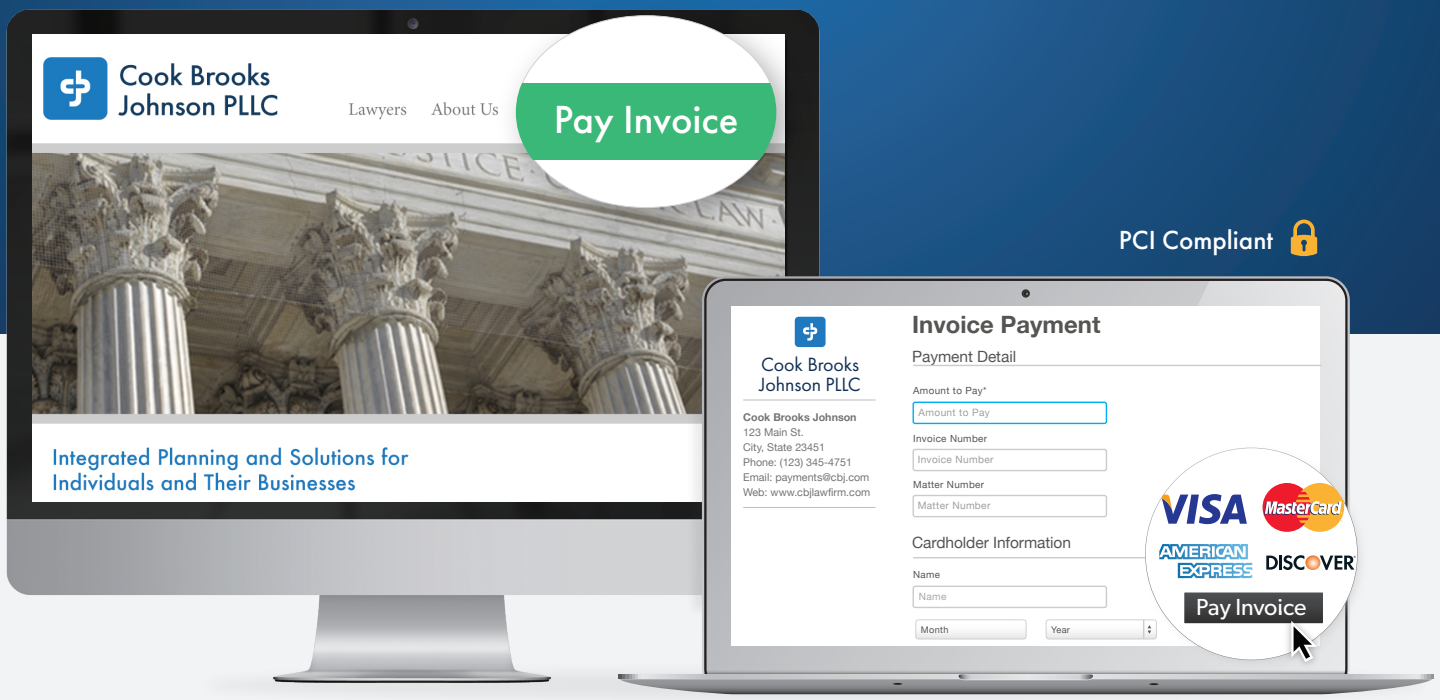

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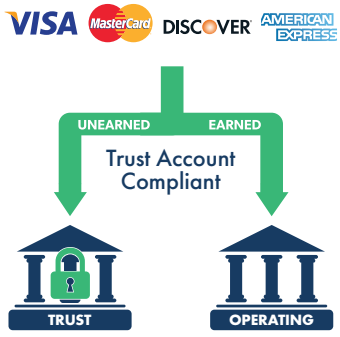

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The Honorable Robert Lee Pitman
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By Magdalena DeSalme

I first met Judge Robert Pitman in December of 2014, in an elevator at the John Wood Federal Courthouse shortly after his confirmation as the 39th United States District Judge for the Western District of Texas. He was casually dressed and carrying on his shoulder a large rug that he joked contained more dog hair than anything else—a reference I soon learned was to his dog Jack, who typically accompanies Judge Pitman to work. I congratulated him on his appointment and after thanking me, he humbly replied that it was the best Christmas gift he could have ever received. At the time, I knew Judge Pitman had served as United States Attorney for the Western District of Texas and, before that, as a Magistrate Judge for the Austin Division of the Western District of Texas. During our brief elevator ride and in interviewing Judge Pitman for this article, it became readily apparent that, in addition to being eminently qualified, Judge Pitman is also humble, kind-hearted, and sincere.

Robert Lee Pitman was born in Fort Worth, Texas, in 1962 and is the youngest of five children. He attended Trinity Valley High School in Fort Worth, Texas, where he received an award for best prosecutor as part of a statewide program, an achievement that foreshadowed an illustrious legal career. After high school, Pitman attended Abilene Christian University, where he served as a Class Senator and Student Body President before he graduated in 1985 with a degree in psychology and history. In 1988, Pitman obtained his Juris Doctorate from the University of Texas School of Law, and in 2011, he received a Master's Degree in International Human Rights from the University of Oxford.

Pitman began his legal career in 1989 as a law clerk for the Honorable David O. Belew, Jr. of the United States District Court for the Northern District of Texas in Fort Worth. Following his clerkship, Pitman returned to Austin where he briefly practiced international law at Fulbright & Jaworski. During this time, though primarily engaged in the practice of civil law, he successfully represented a criminal defendant *pro bono*. In 1990, Pitman became an Assistant United States Attorney for the Western District of Texas, a position he held, for the most part, until 2003. In 2001, Pitman briefly served as interim United States Attorney for the Western District of Texas and was acting United States Attorney for the district following the September 11, 2001 terrorist attacks.

In late 2001, Pitman was asked by Johnny Sutton, President George W. Bush's nominee for United States Attorney, to continue serving as Deputy United States Attorney. Two years later, Pitman was appointed to serve as United States Magistrate Judge for the Austin Division of the Western District of Texas, a position he held until 2011. Meanwhile, in 2009, Pitman was one of two candidates recommended for United States Attorney for the Western District of Texas. He was nominated for the position by President Barack Obama in June of 2011, and confirmed on September 26, 2011. Judge Pitman then resigned as United States Magistrate Judge and served as United States Attorney until 2014.

In June of 2014, President Obama nominated Pitman for a lifetime appointment as a United States District Judge for the Western District of Texas. Given his impressive background, it was no surprise that Pitman was confirmed on December 19, 2014, thereby filling a six-year vacancy left after Judge William Royal Furgeson, Jr. took senior status on November 30, 2008. Pitman was formally invested on April 16, 2015, as the 39th United States District Judge for the Western District of Texas, an area covering approximately 93,000 square miles from Austin to El Paso and encompassing sixty-eight counties.

Upon his appointment, Judge

- Continued on page 16 -

MENTAL HEALTH ISSUES, MENTAL INCAPACITY, AND THE BEXAR COUNTY COURT SYSTEM

Part II: The Civil Commitment Process

This article is Part II of a four-part series entitled "Mental Health Issues, Mental Incapacity, and the Bexar County Court System." Part I, published in the May-June 2017 issue of San Antonio Lawyer, *provided an introduction to the mental health systems that affect Bexar County residents. This Part II focuses on the civil commitment process. Part III will focus on the criminal justice process, and Part IV will focus on the guardianship process.* Eds.

By Stephen H. Gordon

Beginning the Commitment Process

Generally, there are two ways to begin the civil commitment process. The first is simply to call 911 and explain that you need help with someone going through a mental health emergency. The second is to go to the courthouse and fill out an affidavit that can be used to issue a warrant for the person's apprehension and transfer to a mental health facility.

A parent or legal guardian of the person in need of help has the legal right to transport the person directly to a mental health facility for an evaluation.[1] However, if the ill person is not willing to go voluntarily, the person seeking to effectuate such transfer may still need the help of law enforcement officials and, if so, will need to follow one of the procedures listed below. Both options have pros and cons.

Calling 911

Calling 911 is the way to get immediate help. However, it is important to explain to the 911 operator that the emergency involves someone going through a mental health crisis, and not someone acting with any criminal intent. The caller should specifically request that the law enforcement agency send out a "Crisis Intervention Team" (CIT Unit). Once this information is clearly conveyed, the law enforcement agency is supposed to send out officers who specialize in dealing with mental health cases.[2] Making sure that the officers who show up have this specialized training is critically important to ensuring that the officers do not misinterpret the ill person's behavior and respond with more force than necessary. Recent news reports have included several unfortunate cases in which using more force than necessary has led to deadly consequences for the person in need of help.[3]

One way to help get this critical message through loudly and clearly is to call the Mental Health Crisis Hotline first (210-223-7233). The Hotline is staffed by members of the Center for Health Care Services (CHCS), who are trained to walk people through the process, and who can help connect the caller to the 911 dispatch office and explain that this case involves a specialized request for help. They can also be helpful in non-emergency situations by sending out a member of their "Mobile Crisis Outreach Team" to evaluate and advise the person facing a mental health crisis episode.

Filing an Application for a Mental Health Warrant

The second option is to complete an affidavit in support of an "Application for Emergency Detention," commonly referred to as a Mental Health Warrant.[4] This process takes a little more time, but it can usually be completed the same day, or sometimes the next day, and it can also help ensure that specially trained officers arrive to handle the situation.

A person can fill out the affidavit at the Bexar County Clerk Mental Health Office, located in the basement of the Bexar County Courthouse across from the Central Jury Room or at the Center for Health Care Services at 601 North Frio, San Antonio, TX 78207. Once the application is submitted, one of the Bexar County probate judges will review it to decide if there is enough evidence that the proposed patient is a danger to him or herself or to others. If the patient meets one of these criteria, the judge will sign an Order on Mental Health Warrant.[5]

Once the Order on Mental Health Warrant is signed, it will then be served on the person by the Bexar County Sheriff's Office by a pair of special Mental Health Deputies. The deputies will then transport the person to a mental health facility for an initial evaluation. The default location for such evaluation is University Hospital or the San Antonio State Hospital, unless the person requests treatment at another facility. At least seven local hospitals offer in-patient psychiatric care: (1) San Antonio Behavioral Health Clinic; (2) Laurel Ridge Treatment Center; (3) Methodist Specialty Transplant; (4) Southwest General Hospital; (5) the Nix Hospital; (6) Baptist Medical Center Hospital; and (7) University Hospital. A current or former military member can also be taken to the Veterans Administration Hospital. Making sure the person is taken to the right facility can be crucial to ensuring that the treatment is covered by the patient's health insurance provider.

Initial Period of Hospitalization (48-72 Hours)

Initial Evaluation

After a person is taken into the proper facility, he or she is evaluated by a mental health professional. Before someone can be admitted to a mental health facility, he or she must be examined by a licensed psychiatrist.[6] This examination is usually done in person, but in some cases, it can actually be done by remote access over the Internet, through a program such as Skype. Part of the reason the system allows this type of flexibility is because there is a serious shortage of psychiatrists in particular areas of the country, including Bexar County.

The standard for admission is based on whether the person has a mental illness and poses an imminent danger to him or herself or others.[7] If the patient meets these criteria, then he or she is to be admitted. If not, then he or she is to be released.[8] Like many other types of medical procedures, this process can take several hours. By law, the evaluation is supposed to take place "as soon as possible," and no later than twelve hours after the person is brought into the facility.[9]

The legal definition of "mental illness" is "an illness, disease, or condition (other than epilepsy, dementia, substance abuse, or intellectual disability), that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior."[10]

Admission

If the doctor determines that the patient meets the criteria for admission, then the facility can hold the patient for up to forty-eight hours.[11] This period can be extended if the day that follows at the end of the forty-eight-hour period is a weekend or holiday.[12] It can also be extended for additional twenty-four-hour periods during extreme weather emergencies or the occurrence of a natural disaster.[13] This emergency extension requires a written order from a judge or magistrate.[14] Upon expiration of the period during which the patient can be held, the patient must be released unless the facility obtains a written Order for Protective Custody.[15]

San Antonio State Hospital

The default public facility to which many mentally ill patients are taken is the San Antonio State Hospital (SASH), established in 1894. SASH is designed to serve 54 separate counties in Texas, but it currently only has a 302-bed inpatient capacity. Bed space availability is divided among acute patients, patients with pending criminal charges, adolescent patients, and geriatric patients. Like many public facilities in Texas, SASH is underfunded and understaffed. The average annual cost of housing a patient is $100,000.

SASH's procedures tend to be different from those of private, for-profit facilities. Two main differences are that: (1) SASH accepts all patients, regardless of their ability to pay; and (2) patients admitted to SASH receive assistance for a variety of medical issues that go beyond mental health treatment. For some patients, the treatment they receive at SASH is the only medical treatment they have received in several years. In addition, SASH patients are generally released with a one-week supply of their necessary medications, and before the patient is released, hospital discharge personnel make sure the patient has appropriate living arrangements. Also, in terms of release of information, SASH does not use the "access code" procedure described in Part I of this series. Instead, SASH sets up a pre-approved communication list with the patient and family or friends when the patient is first admitted.

Post-Admission Legal Process

Application for Temporary Mental Health Services

Once the patient is admitted under the initial forty-eight to seventy-two-hour detention period, the psychiatrist must decide whether it is necessary to keep the patient hospitalized for a longer period. If the answer is "yes," then the doctor files an Application for Temporary Mental Health Services. The court must then appoint an attorney for the patient within twenty-four hours.[16] The patient's attorney shall be furnished with all records and papers in the case and is entitled to have access to all hospital and physicians' records.

A hearing on the application must be held within fourteen days of its being filed,[17] but an extension may be granted for "good cause" or by agreement of the parties.[18] As with the initial rules for detention, there can also be twenty-four-hour extensions granted for weather emergency or disaster.[19] The hearing cannot be held any sooner than three days after filing of the application, unless the parties agree otherwise.[20]

Order for Protective Custody

Applications for Temporary Mental Health Services usually contain a request that the targeted person be taken into protective custody.[21] In many cases, the person is already in custody and the applicant wants the person to remain that way until the hearing. Such requests are granted in the vast majority of the cases.

If the Order for Protective Custody is signed, the patient will be housed in the nearest private mental hospital facility.

Mental Health Cases in County-level Courts from Jan. 1, 2015 - Dec. 31, 2015

Bexar County - 100% Reporting Rate (12/12 Reports Recieved) | Shown in red
Texas Counties - 99.9% Reporting Rate (3,045/3,048 Reports Recieved) | Shown in black

		Temporary Mental Health Services	Extended Mental Health Services	Modification: Inpatient to Outpatient	Modification: Outpatient to Inpatient
Intake	New Applications Filed	**3,555** | 45,231	**51** | 725	**0** | 84	**10** | 100
	Orders for Protective Custody Signed	**4,237** | 42,564	**--** | --	**--** | --	**--** | --
Hearings	Probable Cause Hearings Held	**4,234** | 30,452	**--** | --	**--** | --	**--** | --
	Release/Dismissal Prior to Final Hearing	**347** | 28,365	**0** | 24	**0** | 4	**0** | 2
	Final Commitment Hearings Held	**5,056** | 11,566	**7** | 299	**0** | 6	**0** | 5
Other Information: Disposition at Final Hearing	Denied (Release)	**2,599** | 4,434	**9** | 15	**0** | 2	**0** | 0
	Granted (Commit) - Inpatient	**361** | 7,843	**7** | 253	**0** | 4	**--** | --
	Granted (Commit) - Outpatient	**93** | 289	**31** | 38	**--** | --	**6** | 8

Order to Authorize Psychoactive Medications	
New Applications Filed	**420** | 4,992
Dismissal Prior to Hearing	**1** | 634
Hearings Held	**223** | 3,417
Disposition at Hearing — Denied	**26** | 140
Disposition at Hearing — Granted	**197** | 3,610

If the patient cannot afford a private facility, then he or she will be transported to SASH, assuming that there is an open bed available. The patient will remain there until the next stage in the process—the probable cause hearing.

Probable Cause Hearing

If a person is taken into protective custody, then a hearing must generally be held within seventy-two hours to determine if the person should be kept in custody (or taken into custody, if necessary).[22] This hearing is known as a probable cause hearing.

Probable cause hearings are held at SASH on Mondays and Thursdays, starting at 9:30 a.m. They are generally open to the public,[23] although court records regarding mental health cases are all sealed.[24] Family members who want to have input about what happens to the patient are strongly encouraged to attend. They may also be called to testify at the hearing.

The hearings are presided over by Probate Court #1 Judge Kelly Cross. The State of Texas is represented by a prosecutor from the Bexar County District Attorney's Office, currently Assistant District Attorney Kelvin Tatum. An attorney *ad litem* from the Civil Mental Health Public Defender's Office will be appointed to represent the proposed patient. This position is currently held by Kevin McManus and Sandra Casias. The patient also has the right to hire private counsel of his or her choice.

The standard of proof used to determine if a person should be detained is whether there is a "substantial risk" that the patient is likely to cause serious harm to him- or herself or to others.[25] The prosecutor must produce: (1) the Application for Order of Detention (with the supporting affidavit of the applicant); and (2) a Certificate of Medical Examination,[26] which must be filled out by the examining physician.[27]

The prosecutor can rely strictly on the Certificate of Medical Examination if it contains sufficient evidence to meet the burden of proof.[28] However, the prosecutor can introduce additional evidence in the form of affidavits, letters, or live testimony.[29] Because the normal rules of evidence are not strictly adhered to in a probable cause hearing, the parties can introduce this type of evidence, even though it would normally be excluded as hearsay.[30]

Hearing on Application for Temporary Mental Health Services

The hearing on the Application for Temporary Mental Health Services can be held at the same time as the probable cause hearing if all parties agree. Otherwise, the hearing must be held within fourteen days of the date the original application was filed.[31] For this hearing, there must be on file with the court two Certificates of Medical Examination from at least two different physicians.[32] At least one of those certificates must be filled out by a psychiatrist, unless no psychiatrist is located in the county.[33]

Depending on the severity of the patient's condition, the court can order inpatient commitment or outpatient treatment. If the judge issues an Order for Mental Health Services, such services are automatically authorized for ninety days.[34]

Application for Authorizations to Administer Psychoactive Medication

Once a person is taken into custody, the mental health professionals do their best to help them become stable, and in some cases regain their sanity. This often requires the administration of very powerful psychoactive drugs. Unfortunately, some patients refuse to take the necessary medication to help them get well. Patients with symptoms like paranoia may think that the doctors are trying to poison them instead of help them.

Although taking medication may be in the patient's best interest, the general rule is that a doctor cannot force a patient to take medication against his or her will.[35] One exception to the general rule is when the patient is "having a medication-related emergency."[36] Another exception is for cases involving a guardian or ward, and the guardian has given the physician permission to administer such medication.[37] The fact that a patient has already been committed against his or her

will does not create a blanket exception to the general rule prohibiting forced medication.

In cases where the patient resists taking prescribed medicine, the doctor must file an Application for Order to Authorize Psychoactive Medication.[38] If such application is granted, the medical staff then has the legal right to forcibly administer medication to a patient. This should be done in the least restrictive manner possible, but can include the use of physical restraints if necessary.

Application for Extended Mental Health Services

In most cases, a person who completes the initial term of treatment will be released from court-ordered treatment after the initial ninety days have expired. However, in some cases, it may be necessary for the person to undergo continued supervision by the court system. In those cases, the State can file an Application for Extended Mental Health Services.[39] If the application is granted, the court can order that the patient continue to receive court-ordered treatment for up to one year, instead of another ninety days.[40] If necessary, at the end of the one-year period, the court may then grant an Order for Renewal of Extended Mental Health Care Services.[41]

Modification from Inpatient to Outpatient Treatment

At some point, a patient who was initially ordered to undergo inpatient treatment may be transferred to an outpatient program, provided the physician in charge of the patient's treatment recommends such a transfer. The actual transfer request has to be submitted to the court by the administrator of the facility where the patient is housed.[42]

The patient is entitled to notice of the request for transfer[43] and to a hearing on the matter if the patient requests such a hearing.[44] The patient is not entitled to a jury trial on this issue.[45] Instead, the judge will decide. If the patient does not request such a hearing, the court may make its decision based only upon the paperwork presented to it.[46]

Modification from Outpatient to Inpatient Treatment

The court can also transfer a patient from outpatient to inpatient care upon request.[47] The court can set a hearing on its own motion, or upon the request of the patient or "any other interested person."[48] If warranted, the judge can also issue an Order for Temporary Detention of the patient, pending the hearing date.[49] The patient is entitled to notice of the hearing date, and a court-appointed attorney to represent him or her at the hearing.[50]

Outpatient Treatment Program

Patients whose condition is not as severe as others may be allowed to attend an outpatient treatment program instead of being committed. The outpatient program lasts for ninety days initially.[51] However, the time can be extended for an additional ninety days, or even up to a year if necessary.[52] In the Bexar County area, there are numerous outpatient programs run by private health care facilities. All facilities that have inpatient treatment programs offer outpatient programs, as well.

Until recently, Bexar County also had a publicly run program known as the Involuntary Outpatient Commitment Clinic (IOPC). This program was initially implemented and supervised by Judge Oscar Kazen. The clinic was located at the Center for Health Care Services. Judge Kazen presided over the clinic program for over ten years, with the assistance of the staff at CFCS.

Views from the Bench

Judge Kelly Cross presides over the mental health docket. During her time on the bench, she has seen that there is a severe shortage of housing for mentally ill patients. Although there are a number of local facilities able to provide short-term housing for a week or two, there are only a few facilities designated for long-term housing, which can be up to ninety days. Further, Bexar County patients only have only one public long-term facility—SASH—available for those who are uninsured and cannot afford housing in a private facility.

Unfortunately, SASH has only eighty long-term beds available, and those beds must serve not only Bexar County patients, but also patients from as many as fifty-five of the surrounding counties. The State of Texas reserves many of those beds for people who are being committed under the criminal court commitment system. For the remainder of those who need long-term housing, the State provides money to Bexar County to contract with local hospitals and behavioral health facilities to house those involved in the civil commitment process.

As noted above, however, many of these facilities are only designed for short-term care, *not* long-term care. The short-term-care facilities often consist of nothing more than a small secure wing in the hospital, with a few dozen beds and a small common area with a TV and vending machines. Patients have no access to the outdoors or to basic exercise facilities. Because of the perpetual overcrowding problem at these facilities, many hospitals are pushing for the release of those committed when they become mentally "calm" instead of "stable."

According to Judge Cross, one potential solution to this problem is to build a county hospital instead of relying on the state hospital for help. That way, there could be more beds dedicated to our local population, instead of the small number of beds allotted to Bexar County by the State. Of course, this solution would require a huge financial commitment from Bexar County. As with many public policy issues, the officials in charge of the County's budget have to prioritize among many competing interests.

Regarding the current state of our mental health system, Judge Tom Rickhoff argues that more attention needs to be paid to those who are "manifestly dangerous." In fact, he wrote an article on this topic.[53] Recently, he has witnessed a number of local cases in which there was clear evidence of a person's making specific, but unheeded, threats to hurt another. While he notes that the overwhelming majority of those suffering from mental illness never pose any danger to the public, a very small percentage do, and the system needs to do a better job of detecting them.

Former Judge Oscar Kazen believes it is important to emphasize that people from all walks of life came through his outpatient treatment program, and that mental illness can strike anyone at any time. Judge Kazen went to great lengths to ensure that every patient was reminded that mental

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E-Discovery from the Technical Perspective

Part I: Planning

By David T. Gallant

This article is Part I of a three-part series focusing on e-discovery from a technical perspective, leaving the legal aspects of e-discovery to the legal professionals. Each article in the series will address one or more of the five distinct phases of an e-discovery engagement: (1) planning; (2) preservation and collection; (3) processing; (4) analysis; and (5) production. Eds.

E-discovery has become mainstream. Gone are the days of a truck pulling up to your office with boxes filled with papers that require hours, days, or weeks to review. While we were in the process of transitioning from paper to electronic file-keeping, many attorneys avoided the topic of e-discovery altogether and tried to wish it away. By now, though, you likely have had litigation that involved some aspect of e-discovery, and learning more about the technical aspects of e-discovery may help you better use and manage e-discovery in your practice. From a technical perspective, I break e-discovery engagements into five distinct phases: (1) planning; (2) preservation and collection; (3) processing; (4) analysis; and (5) production. This article addresses the first of those phases: planning.

E-Discovery Is Not Digital Forensics

At the outset, I would like to point out a technical and legal distinction between e-discovery and digital forensics. Although the two have certain commonalities, they also have stark differences. From the technical perspective, e-discovery is the preservation, searching, and production of files (emails, other communications, and documents primarily) as part of litigation. Digital forensics includes all the above, but with an investigative slant to the analysis. For instance, if you are concerned that someone used software in an attempt to completely delete files (known as wiping), that would fall under the digital forensics umbrella. Or, if you want free space searched (more on that later), digital forensics would be the best option. If you only want the "active files" processed for *your* review, not the review of a third-party provider, e-discovery is the way to go.

If you need digital forensics services, the State of Texas requires the service provider to be licensed as a Private Investigations Company. *See* Tex. Occ. Code § 1702.104(b). Both the unlicensed person who performs the service *and* the person who knowingly hires an unlicensed person to perform the service can face civil penalties of up to $10,000 per violation. *Id.* § 1702.381.

To clarify the differences between e-discovery and digital forensics, the Texas Private Security Board offered an opinion on their website, in which they stated that a private investigations company license is *not* required to process electronic data so long as the service provider meets the following:

1. The company does not obtain or secure data by way of an investigative analysis;
2. Does not analyze or review the content of the data;
3. Processes the data (provided by others) in order to create a database that can be searched by the lawyer/clients; and/or
4. Reproduce or retrieve the documents or images upon request of the clients.

See **https://www.dps.texas.gov/rsd/psb/Laws/psb_opin_sum.htm**. When in doubt, it is best to seek guidance from the Texas Private Security Board's legal staff.

Phase 1 of an E-Discovery Engagement: Planning

Consider Retaining an E-Discovery Expert Early

You should consider retaining an expert early in the litigation, to assist you in all phases of the e-discovery process. The expert can guide the legal team in tailoring the litigation hold letter, and help formulate the scope of the analysis to achieve the desired results. While the legal team will eventually need to obtain a court order or formal agreement by both parties to provide the expert with access to the data, too often I am retained *after* such agreements are in place, when it is too late for me to have much input about ways to increase the chance of success and reduce costs.

Keep Expectations Realistic

If you ever watch television shows about the legal profession, you realize their portrayal of lawyers is often unrealistic. Many of your clients may rely on these depictions as their initial basis for judging your capabilities and potential actions. I, too, see laughable representations of the digital forensics industry on TV, which often sets an unrealistic bar for me to hurdle. On TV, forensic cases are solved in an hour, but in reality, what they accomplish in minutes would take hours or even days in the real world. You and your client

should consider this as you venture into the technical world of e-discovery.

Determine the Necessity and Scope of E-Discovery

From the earliest onset of litigation, the legal team needs to determine the necessity and scope of e-discovery. If there is even the slightest chance you will need it, send a litigation hold letter to the other party as soon as possible. Boilerplate litigation hold letters are available, but I find these to be overly broad and onerous on the receiving party. Your litigation hold letter should be reasonable, but cover all the possible data locations. If you are not sure how to make it more streamlined, go ahead and send the expansive one and be prepared to discuss ways to tailor it with opposing counsel. Put yourself in their shoes. Would you want an unreasonable (and costly) litigation hold letter served on your client? That could happen when opposing counsel uses the same template and sends it back to you!

If opposing counsel balks at your request stating that personal, privileged, and non-relevant files will be included in the collection, reassure them that even though *all* data will be preserved, only relevant data, based on search terms and date ranges, will actually be sought in production. Typically, opposing counsel will have an opportunity to review and redact any personal, privileged, or non-relevant data. I will discuss that later in this three-part series.

Cover All Possible Data Locations in Your Litigation Hold Letter

I believe the litigation hold letter must do all of the following:

1. Request that *all automatic deletions be immediately stopped*—including backup copies of potentially relevant data.

2. Request that *all email for all custodians relevant to your litigation be preserved*. Make sure to include email stored on any servers, online archives, and workstations. The email stored on email servers likely will be less than on workstations in a typical networking environment. The numbers of companies having an email server in their facilities are dwindling. Microsoft Exchange, the predominant email server program, can now be hosted online using the Office 365 service. In that case, whoever manages the Office 365 account (typically third party IT support companies) will create individual email files (known as PST files) for each custodian, so you still need the email from the workstations.

3. Request that *all data backups be preserved*. Backups can be in the form of an online repository, stored in-house on external hard drives, stored on backup tapes (not commonly used any more), or some combination of these methods. In your litigation hold letter, be sure to include terms to the effect of "any backup files secured off-site" to compel the preservation of "safety copies" of backups. IT personnel worth their salt will always have a copy of backups stored offsite, in the event of a catastrophic event within the primary facility. The bottom line is to have them preserve *all* backups that were created during the time period relevant to your litigation. Backups are routinely overwritten, so ordering the suspension of any automated destruction of *any* files is vital.

4. Request that *all data on mobile devices be preserved*. As I discussed in a previous article, we all carry a cell phone or tablet and routinely use them to communicate with clients, coworkers, family, and friends. Any communications between the relevant custodians may be discoverable, so ordering the preservation of mobile devices is vital. Often, text messages, Facebook messenger chats, and the like can *only* be produced from mobile devices, or from backups on the computer the users sync to their mobile device(s), but such data are especially volatile since the storage space on mobile devices is smaller than on computers and the data can be quickly overwritten or easily discarded.

5. Request that *all computers used for telecommuting be preserved*. Many companies allow employees to work from home. Some provide them with a company laptop, while others permit the use of a personal computer for company work. These computers should also be ordered preserved.

6. Request that *no data from social networking sites involved in the litigation be deleted*. For instance, if someone disparages another on-line, the content of that site may be vital to the litigation. This information is *very* volatile and can be deleted with ease. Make sure your litigation hold letter requires that the parties *not* delete any content from any of their social networking sites.

Conclusion

Planning your e-discovery engagement should be thorough and include the expertise of someone well versed in this special area of litigation support. By properly planning your e-discovery engagement, you will hopefully avoid some of the pitfalls I have witnessed over the years and will be able to keep costs to your client to a minimum. As the saying goes, "Failure to plan is a plan to fail."

David Gallant is a licensed Private Investigator and former Federal Computer Crime Investigator. He has almost thirty years' investigative experience and over twenty-two years focusing on computer-related investigations. He has provided digital forensic and e-discovery services in Texas and nationwide for sixteen years, and has been certified as an expert witness in federal, state, and military courts. David can be reached at (210) 271-2999 or on his website ***www.WhatsOnTheComputer.com****.*

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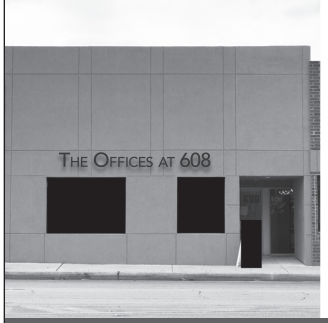

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LEAD Academy: The Bexar County Women's Bar Continues to Change the Landscape for Lady Lawyers

By Lauren Horne

In 2014, the Bexar County Women's Bar (BCWB) Officers and Board of Directors, led by then-President Tiffanie Clausewitz, got together on a cold winter weekend to discuss how they could best use their resources to really make a difference in the community. This was not something new to the BCWB, but with so many needs in both the legal profession and the community at large, what exactly was the next big thing?

BCWB's History of Impactful Programming

The BCWB has a rich history of implementing projects that have grown their own legs and continue today. In 1984, a BCWB committee designed a child-support formula that was accepted by the Bexar County District Judges. It became the model for the child-support formula eventually set by the Texas Supreme Court for the entire state of Texas.

That same year, the BCWB began hosting its annual Bench Brunch, which was founded in an effort to keep the Women's Law Center from closing. That first Bench Brunch raised $5,000 and met its goal. The event evolved into one promoting women in the judicial and legal fields and raising money for those most in need in our community. At the time of the first Bench Brunch, there were only thirty-two women judges in the entire state. By 2000, there were approximately 335 women judges in Texas. That number is now over 1,000.

In 1985, the BCWB began honoring local women attorneys at Bench Brunch with the annual Belva Lockwood Award, named after the first woman allowed to practice before the United States Supreme Court. In 1988, the Bexar County Women's Bar Foundation was formed and began overseeing Bench Brunch. The successor to Bench Bunch—Autumn Affair—continues to raise funds for programs benefitting women and children and recognizing local women attorneys.

In 1990, the BCWB welcomed the opening of the Teddy Bear Room in the Bexar County Justice Center, a special waiting room for children (trial witnesses and others) in the District Attorney's Office. The BCWB sponsored the project after then-Judge Susan Reed and then-State Senator Cyndi Taylor Krier told the membership about a similar project in California. The BCWB also successfully lobbied in 1990 for amendments to the San Antonio Bar Association (SABA) bylaws, allowing presidents of all the local minority bar associations to serve as non-voting members of the SABA board. Similar success was achieved in obtaining minority representation on the Texas Young Lawyers Association board.

Starting in 1993, the BCWB hosted an annual Judicial Recognition Reception to honor student mentees and the BCWB's judicial advisory committee. One of the BCWB's original goals was achieved in 1994, when five women were nominated for four SABA director positions.

In the years that followed, the BCWB continued its contributions to the community through such projects as the Elder Law Handbook, a day-long training program on representing battered immigrant women, a regular Wills Clinic, and the Working Parents' Summer Guide.

Identifying the Current Needs of Women in the Legal Profession

Given the success seen by BCWB programs over the past thirty years, there was no longer a strong need to assist female attorneys, right? Wrong. During the hours-long discussion in January of 2014, one recurring theme became quite clear—talented women attorneys were leaving the profession at alarming rates and those who stayed were not on the same playing field as their male counterparts. This issue was not only something observed by the BCWB Board, but was also recognized by national statistics.

In 2006, the First Annual National Association of Women Lawyers (NAWL) Survey reported that for more than fifteen years, half of law school graduates had been women. Yet for a number of years, only about 15% of law firm equity partners and chief legal officers had been women. Almost ten years later, data taken from the Ninth Annual NAWL Survey reveals not much has changed.[1]

★**Firms have made no appreciable progress in the rate at which they are promoting women into the role of equity partner**. The data demonstrate that women still comprise only approximately 18% of equity partnership.

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★**Not only do the responses to the questions about equity partner elevation demonstrate the lack of progress for women, but the data also suggest that the opportunities for equity partnership in general are diminishing for both male and female associates.** For those who began their careers at their law firm, the overall elevation rates are lower than for lateral attorneys. Of new equity partners promoted in the year prior to the survey, the typical firm had one female equity partner who started with the firm and one who was a lateral. For men, the typical firm promoted one lawyer into the equity partnership who started with the firm and five who were laterals.

★**Men continue to be promoted to non-equity partner status in significantly higher numbers than women**. Among the non-equity partners who graduated from law school in 2004 and later, 38% were women and 62% were men. These data remain vexing in light of the longstanding pipeline of women, as women and men have been graduating from law school in nearly equal numbers for decades.

★**The data continue to be challenging for other diverse groups.** Lawyers of color represent 8% of the law firm equity partners. LGBT lawyers comprise 2% of equity partners.

★**The compensation gender gap remains wide.** Not one of the responding law firms reported having a woman as its highest earner. Moreover, the gap between what women equity partners earn compared to men is striking: the typical female equity partner earns 80% of what a typical male equity partner earns.

★**Women continue to be under-represented on law firm compensation committees, yet law firms that report more women on their compensation committee have narrower gender pay gaps**. In the twelve firms that reported having two or fewer female members on the compensation committee, the typical female equity partner earns 77% of that earned by a typical male equity partner. In the eighteen firms that reported three or more women on the compensation committee, the typical female equity partner earns 87% of what is earned by a typical male equity partner.

★**Men continue to outpace women in obtaining rainmaking credit**. **Moreover, client relationships are frequently passed down to the fortunate beneficiaries who inherit the internal credit, often with little client input on the decision**. This year's survey shows a wider gender gap in client origination credit than last year. Among the firms that provided data regarding the gender of the ten lawyers who generated the highest amount of revenue, 88% percent of the top producers were men and 12% were women. Similar to last year, approximately a quarter of the firms report that the current relationship partner selects his or her successor, meaning that valuable client credit is, in essence, an inheritance that can be passed from one individual to another.

★**There is a gender gap in revenues generated from client billings, even as women report overall higher working hours**. The typical female equity partner bills only 78% of what a typical male equity partner bills. When asked to report total client billable and non-billable hours, however, the total hours for women equity partners exceeded the total hours for men equity partners. The median hours reported for the women were 2,224 and, for the men, were 2,198. The data raises questions about whether committee assignments, hourly billing rates, and the distribution of pro bono hours contribute to disparities in client billings.

★**Women continue to be under-represented on the highest governance committees**. The typical firm has two women and eight men on their highest U.S.-based governance committee. Women do slightly better in achieving these key leadership roles at AmLaw 100 firms, compared to the Second Hundred, but both groups report numbers that demonstrate limited progress when compared to the decades-long pipeline of women in the profession.

★**Every respondent reported having a Women's Initiative, but the budgets allocated to these efforts reinforce that women's affinity groups lack sufficient resources to accomplish strategic goals**. 75% of the responding law firms reported having a formal budget for their Women's Initiative, which is lower than the 80% reported in the NAWL Foundation's 2012 survey of Women's Initiatives. Even as the responses indicate the limited overall financial resources available for Women's Initiatives, there is a significant variance between the average budgets in AmLaw 100 firms and the lower budgets reported in the Second Hundred. The median annual budget for the AmLaw 100 is $112,500; for the Second Hundred, the median annual budget is $82,000. Half of the reporting AmLaw 100 firms report that their Women's Initiative annual budget is $100,000 or less; only 25% report that the budget exceeds $200,000. None of the Second Hundred firms reports an annual budget of $200,000; 73% report being in the $100,000 or less category.

★**Training programs vary significantly**. Of note, 20% of the respondents reported that they do not provide training on diversity and inclusion, 26% reported that they do not provide training on unconscious bias, and 57% do not train on the topic of micro-inequities.

★**There are more male associates than female associates in the U.S. offices of the respondents, including at the more junior and senior levels, suggesting that women may be turning elsewhere for greater professional fulfillment**. Women comprise 44% of associates. Even as the AmLaw 100 firms have more female associates than the Second Hundred, the AmLaw 100 firms also employ more females designated as staff attorneys.

Why LEAD?

Fortunately, progress is being made by national associations, state bars, and organizations in closing the gap between female and male lawyers. The BCWB hopes to do its own part for the Bexar County legal community and, eventually, the Texas Bar. Since that weekend in January 2014, Tiffanie Clausewitz, and the BCWB's LEAD Academy Steering Committee spent three years developing the program, which aims to assist women attorneys in attaining the highest level of success in their firms and organizations, their communities, and the legal profession by teaching class members to lead in a way that is authentic and effective; empower themselves with self-awareness and self-confidence; advance in their firms or organizations; and develop robust professional networks. LEAD will accomplish this through its annual year-long program consisting of a two-day symposium, quarterly seminars, and a graduation celebration. Faculty for the symposium and seminars include local and national experts on wide-ranging topics detailed on the LEAD website's program page (**https://bexarcountywomensbar.**

org/LEAD/Program). In addition to instructional time, each session includes interactive workshops to allow participants to apply what they are learning to their specific practices.

The 2017 LEAD Academy is already off to a great start. The Steering Committee welcomed the 2017 Inaugural Class at a Winter Symposium on February 2-3, 2017, in Fredericksburg, Texas. The Symposium was an intense two-day program led by some of the nation's leading women: Patricia K. Gillette, J.D., Courtney R. Chavez, J.D., Cynthia Pladziewicz, J.D., Ph.D., Jennifer Ostrich, PCC, Gindi Eckel Vincent, J.D., and Gwen Brehm, M.Ed., LPC, LMFT. To learn more about the 2017 faculty, please visit: **https://bexarcountywomensbar.org/LEAD/Faculty**. Overall, the class members, steering committee, and speakers loved the event. The class members reported that the sessions were practical, helpful, challenging, and productive.

The panel members also praised the LEAD program. Speaker Patricia Gillette, J.D., a partner in Orrick's San Francisco office, wrote: "You all put together a fabulous program that I believe will directly and substantially impact these women's personal and professional lives. I was so happy to be part of the inaugural event, and I am certain this will be a model for other bar associations to follow. Congrats on a great job!"

On May 11, 2017, the LEAD class attended the Spring Seminar. The featured speaker, Victoria Pynchon, presented and led a workshop entitled "Strategic Conversations." Ms. Pynchon, a mediator, attorney, and author, is the co-founder of She Negotiates, a Los Angeles-based company which provides consulting services and executive coaching for professional women, including attorneys. Ms. Pynchon provided class members with strategies, tactics, and skills necessary for negotiating on behalf of both themselves and their clients. Following the presentation, Ms. Pynchon praised the LEAD Academy program, stating, "It was a privilege to present to so many successful, optimistic, hard-working women."

The Winter Symposium and Spring Seminar are just two events in a series of year-long programming. On behalf of the LEAD Steering Committee, we are incredibly thankful for the support of our Advisory Board and for a generous grant from the Texas Bar Foundation. This support allows LEAD to give women attorneys a unique opportunity to grow professionally and personally, while benefitting our San Antonio community by enhancing the ethical and professional practice of law, and by developing strong community leaders. LEAD looks forward to continuing its success throughout the year and seeing how its program ultimately impacts the gender gap and greater community for years to come.

Women attorneys selected for participation in the LEAD Academy must be members of the State Bar of Texas with approximately three to eight years of experience (variations in length of experience will be considered); aspire to lead and have the demonstrated potential to become leaders; and want to serve their communities and the profession and be committed to the promotion of women in the legal profession.

*If you fit this description or know someone else who does, visit our website (**www.bexarcountywomensbar.org/LEAD**) for more information. 2018 application packets are coming soon. Please contact LEAD Director Tiffanie S. Clausewitz (tiffanie@rosenblattlawfirm.com) with any questions.*

Lauren M. Horne is an associate with Hoblit, Darling, Ralls, Hernandez & Hudlow, LLP's medical malpractice defense group. She currently serves on the Bexar County Women's Bar Association Board of Directors and the Bexar County Women's Bar Foundation LEAD Academy Steering Committee. Leslie Hyman and Tiffanie Clausewitz, who are members of the LEAD Academy Steering Committee, also contributed to this article.

ENDNOTES

[1]Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, National Association of Women Lawyers (2015) available at **http://www.nawl.org/p/cm/ld/fid=506** (last visited May 22, 2017).

- Continued from page 5 -

Pitman immediately began traveling between San Antonio and Austin, handling not only part of the San Antonio docket, but also one-third of civil filings in the Austin Division. In December of 2015, following Judge Walter S. Smith, Jr.'s retirement, Judge Pitman also began traveling to Waco where he assumed responsibility for part of the Waco Division's docket, in addition to his other duties. He currently oversees a docket of approximately 60-70 cases in San Antonio, 150-200 cases in Austin, and 150-200 cases in Waco—causing Chief Judge Orlando L. Garcia to remark at a Federal Bar Association luncheon that while he, Judge Fred Biery, and Judge Xavier Rodriguez were residents of San Antonio, Judge Robert Pitman was a resident of IH-35.

As a result of his constant traveling, Judge Pitman is perhaps better known in the Austin legal community where, as a Magistrate Judge, he was consistently ranked highest among local, state, and federal judges by the Austin Bar Association. Pitman is also highly ranked by college students at the University of Texas in Austin, where he has lectured in the Plan II Honors Program and taught trial advocacy. Although a prosecutor for almost thirteen years, Judge Pitman has always believed that his duty was that of gatekeeper for the court to ensure that justice was served, a perspective that has enabled him to transition fluidly from advocate to jurist.

Though Pitman does not adhere to overly formal courtroom decorum, he does insist that attorneys be courteous of witnesses and each other. He enjoys teaching and would be open to teaching at St. Mary's University School of Law. His background in both civil and criminal law—along with his experiences as a prosecutor, defense attorney, trial attorney, Magistrate Judge and District Court Judge—would most certainly provide students with a unique opportunity to obtain an in-depth and comprehensive understanding of, and appreciation for, the art of trial advocacy. However, local law students will likely have to wait until Judge Pitman's docket eases up—or at least until he can finally call some place other than IH-35 his residence. Hopefully, that day will come soon.

Magdalena DeSalme is a Judicial Law Clerk for United States Magistrate Judge John W. Primomo.

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Business and Commercial Litigation in Federal Courts

4th Edition

Reviewed by Paula Boston

Haig, Robert L., editor in chief, *Business and Commercial Litigation in Federal Courts,* Fourth Edition (Thomson Reuters, 2016), 17,142 pages, plus CD-ROM, $1,811.

The Fourth Edition of the *Business and Commercial Litigation in Federal Courts* treatise aims to provide a step-by-step practice guide that covers all aspects of a commercial case "from the investigation and assessment that take place at the inception, through pleadings, discovery, motions, trial, appeal, and enforcement of judgment." Foreword, viii. Since the *San Antonio Lawyer* reviewed the eleven-volume Third Edition in 2013, the series has been substantially expanded, to include twenty-five new chapters, for a total of fourteen volumes with a separate appendix. Adding approximately 4,400 pages, the new chapter subjects are: Civil Justice Reform, Cross-Border Litigation, Declaratory Judgments, Effective Trial Performance, Negotiations, Mediation, Arbitration, Social Media, Marketing to Potential Business Clients, Teaching Litigation Skills, Securitization and Structured Finance, Regulatory Litigation, Health Care Institutions, Telephone Consumer Protection Act, Mass Torts, Aviation, Joint Ventures, Fiduciary Duty Litigation, Advertising, Media and Publishing, Fraud, International Trade, Civil Rights, Public Utility, and last but not least, Fashion and Retail. There are hundreds of pages of litigation forms and jury charges included in print and on a CD-ROM that comes with the set.

To compile such a detailed publication, Editor-in-Chief Robert L. Haig worked with 296 primary authors, including 28 judges. They conservatively estimate that their combined investment of time spent on editions one through four and the accompanying pocket parts—if it had been billable—now stands at more than 80 million dollars. All royalties from the sales of these books and their annual pocket parts benefit the ABA Section of Litigation.

A summary of each new chapter is outside the scope of this review, but I would like to point out a few chapters that struck me as either useful to most federal practitioners or helpful in highlighting the substance and breadth of this treatise.

In particular, the chapter on Declaratory Judgments is a welcome addition, focusing upfront on the importance of local court rules, discussing jurisdiction, providing insight into the effect of the pendency of another action, and wrapping up with a tidy form for a complaint and counter-claim. Equally helpful is the chapter on Arbitration, which covers the scope and application of the Federal Arbitration Act; procedures and defenses for enforcing arbitration agreements; domestic commercial arbitration proceeding specifics; procedures for the confirmation, vacatur, and modification (or correction) of an arbitration award; and practice aid checklists.

The chapter on Social Media is timely. It covers specific discovery and evidentiary issues that have arisen under the Federal Rules of Civil Procedure and Federal Rules of Evidence, and addresses emerging issues in this growing area. From the basic principles of social media discovery to a section concerning jury exposure to social media and a discussion about employees and social media, this chapter provides a thoughtful overview of topics that could impact litigation. This chapter also provides an immediate benefit to any litigator dealing with social media in a federal context by providing practice aid models for interrogatories, requests for admission, requests for production of documents, and deposition questions.

If you encounter questions concerning the Telephone Consumer Protection Act (TCPA), Chapter 96 is a standout, detailed chapter. Along with information on facsimile prohibitions and private actions under the TCPA, you will also find mention of the Public Utility Commission of Texas' two statewide DNC (Do Not Call) Lists within the section discussing whether federal preemption applies.

Unfortunately, one of the difficulties in presenting such a vast amount of information is that specific examples and topic choices cannot be applicable to everyone. For instance, some Texas practitioners may be disappointed that the chapter on Cross-Border Litigation focuses heavily on Second Circuit caselaw and litigation in Europe and Asia. Strategic advantages and disadvantages of particular international business venues are discussed in detail for London, Paris, Hong Kong, Singapore, and Switzerland . . . but not Mexico.

The chapter on Health Care Institutions is more straightforward when it comes to its limitations, explaining "the authors wrote this chapter to give the practitioner an introduction to this area and to highlight salient issues and developments . . . the chapter should be a starting point for guidance in this area, but should not be the only place one looks." §87:1 Scope Note. Fair enough, and even then, Chapter 87 provides a surprisingly detailed overview, discussing health care institutions in the context of federal administrative litigation, federal business litigation, and government enforcement litigation.

When I was told our firm could keep the set of books that I had been asked to review, my first thought was "Do I want fourteen volumes of *anything* in my office?" After reviewing this treatise, I can tell you that I agree with Mr. Haig; this is a very thorough federal practice publication that covers nearly every conceivable aspect of a commercial case. I'll happily move a potted plant or two aside for these books. And if I'm away from the office, or just don't feel like lugging a volume around, this treatise is also conveniently available on Westlaw.com as a secondary source, if you've got a professional (or higher) plan. If it's in your plan, you can simply start typing "Business & Commercial Litigation in Federal Courts" into the search bar and a "Looking for this" option should pop-up to link you to the table of contents. If it's not in your plan, it can be used on a pay-as-you-go basis. For further plan and subscription information, you can contact the San Antonio Westlaw Sales Representative, Steve Harris, at Steven.Harris@TR.com. To order the hardbound treatise, you can visit **legalsolutions.com** or call the Thomson Reuters sales team at 1-800-328-9352 (7am-6pm CT).

Paula Boston is a civil litigation associate at Langley & Banack, Inc.

Fourth Court Update:
Post-Judgment Options to Enforce a Judgment

By Justice Patricia O'Connell Alvarez and Matthew S. Compton

You won at trial. You have a final judgment, and the defendant has not superseded the judgment. To enforce the judgment, what are some of your options?[1]

Establish a Lien

Your client is now a judgment creditor; you may record an abstract of judgment to secure a lien on the judgment debtor's real property. *See* Tex. Prop. Code Ann. §§ 52.001, 52.002 (West 2014). The abstract must strictly comply with the statutory requirements. *E.g.*, *id.* §§ 52.002(b) (attorney prepares abstract), 52.003 (contents of abstract), 52.0041 (address requirement). The trial court signs the abstract, *id.* § 52.002(a), and the judgment creditor files it with the county clerk in each county where the judgment debtor has real property, *id.* § 52.004. Because the abstract of judgment may not create an enforceable lien if the abstract is not properly indexed, *Reynolds v. Kessler*, 669 S.W.2d 801, 806 (Tex. App.—El Paso 1984, no writ), be sure to confirm the abstract is properly filed and indexed, *see* Tex. Prop. Code Ann. § 52.001. When properly recorded, the lien attaches to all of the judgment debtor's non-exempt real property in that county. *Id.* The lien will also attach to exempt property (e.g., homestead) that becomes nonexempt, *Drake Interiors, L.L.C. v. Thomas*, 433 S.W.3d 841, 847 (Tex. App.—Houston [14th Dist.] 2014, pet. denied), or to property later acquired in each county where the abstract had been properly recorded and indexed, *see Diversified Mortg. Inv'rs v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 806 (Tex. 1978); Tex. Prop. Code Ann. § 52.001. The lien continues in effect for ten years. *See* Tex. Prop. Code Ann. § 52.006; Tex. Civ. Prac. & Rem. Code Ann. § 34.001 (West 2014).

Writ of Execution and Levy

Another option to enforce a judgment that has not been superseded is a writ of execution. *See* Tex. R. Civ. P. 313, 621–56. A writ may issue 30 days after (1) the final judgment is signed or (2) any motion for new trial has been denied or overruled by operation of law. Tex. R. Civ. P. 627. A writ of execution may issue before 30 days if the judgment creditor files an affidavit that the judgment debtor is about to remove nonexempt personal property from the county or about to transfer or secrete that property to defraud creditors. Tex. R. Civ. P. 628. Under the writ, a sheriff or constable may levy on the judgment debtor's nonexempt property, sell it, and deliver the proceeds to the judgment creditor in satisfaction of the judgment. Tex. R. Civ. P. 637.

Garnishment Action

A writ of garnishment may be available if (1) the judgment creditor has a final, valid, and subsisting judgment against the judgment debtor, Tex. Civ. Prac. & Rem. Code Ann. § 63.001(3); (2) no supersedeas bond has been filed, Tex. R. Civ. P. 657; and (3) the judgment creditor swears that, to his knowledge, the judgment debtor does not have in his possession in Texas sufficient property subject to execution to satisfy the judgment, Tex. Civ. Prac. & Rem. Code Ann. § 63.001(2)(B). The garnishment action—a separate suit—is filed against a third party garnishee as the defendant. Tex. R. Civ. P. 659. The suit is ancillary to the original action and should be filed in the same court where the original judgment was obtained. *Baca v. Hoover, Bax & Shearer*, 823 S.W.2d 734, 738 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

Turnover Proceeding

Through a turnover proceeding, a judgment creditor seeks the trial court's help to reach the judgment debtor's non-exempt property that "cannot readily be attached or levied on by ordinary legal process." Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a). If the judgment creditor proves each of the statutory elements, *see id.*, the "trial court has discretion to issue a range of remedies." *Moyer v. Moyer*, 183 S.W.3d 48, 52 (Tex. App.—Austin 2005, no pet.) (listing some remedies). Although the turnover statute does not require notice to the judgment debtor, it is a better practice to give notice, and some trial courts may require it.

Summary

To enforce a final judgment that has not been superseded, the judgment creditor may establish a lien, levy and execute, apply for a garnishment order, or seek a turnover order. The available enforcement options vary depending on the property, so be sure to select the appropriate option. ✤

Justice Patricia O'Connell Alvarez is Board Certified in Personal Injury Trial Law and a member of the Oil & Gas PJC Committee.

Matthew S. Compton is a staff attorney for the Fourth Court of Appeals and is Board Certified in Civil Appellate Law.

ENDNOTES

[1]TexasBarCLE includes some comprehensive discussions on the options available to a judgment creditor and a judgment debtor. *E.g.*, Elaine A. Carlson, *Practical Perspective on Supersedeas*, State Bar of Texas, 30th Annual Advanced Civil Appellate Practice, ch. 23 (2016); Donna Brown, *Post Judgment Remedies, Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships under the DTPA, and "Other Stuff,"* State Bar of Texas, 9th Annual Damages in Civil Litigation, ch. 22 (2017).

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Federal Court Update

By Soledad Valenciano and Melanie Fry

Summaries of significant decisions rendered by San Antonio federal judges from 1998 to the present are available for keyword searching at Court Web found at http://courtweb.pamd.uscourts.gov/courtweb. Full text images of most of these orders can also be accessed through Court Web.

If you are aware of a Western District of Texas order that you believe would be of interest to the local bar and should be summarized in this column, please contact Soledad Valenciano (svalenciano@svtxlaw.com, 210-787-4654) or Melanie Fry (mfry@dykema.com, 210-554-5500) with the style and cause number of the case, and the entry date and docket number of the order.

Removal and Remand; Improper Joinder

WMS, LLC v. Allied Prop. & Cas. Ins. Co., No. 5:17-CV-78-DAE (Ezra, D., Mar. 23, 2017).

Shopping center owner sued insurance company and procuring agent following April 12, 2016, hail storm, and insurance company removed. Insurer contended that its agent was improperly joined because plaintiff's claim for negligent procurement was barred by limitations. Court denied plaintiff's motion to remand. Insurer's removal was not untimely when filed within thirty days after agent's answer asserting affirmative defense of limitations. Although Eleventh Circuit has implied that an "other paper" triggering removal must be received from a plaintiff, statute does not so require. And, since plaintiff's claim against agent was barred by limitations, agent was improperly joined. Policy was first issued in 2008, and agent allegedly negligently misrepresented the policy provisions in April 2014. Plaintiff's suit in November 2016 was beyond the two year statute of limitations.

Chapter 13; Dismissal

Viegelahn v. Lopez, No. 5:15-cv-379-RCL (Lamberth, R., Mar. 7, 2017).

Court affirmed bankruptcy court's order granting debtors' motion to voluntarily dismiss Chapter 13 case. Courts are split regarding whether the right to voluntarily dismiss a Chapter 13 case is absolute, or is subject to exceptions such as bad faith. Fifth Circuit has denied an absolute right to dismiss a Chapter 13 case when the debtor acted in bad faith, and the motion was brought in response to a trustee's motion to convert. Court held that debtors had an absolute right to voluntarily dismiss their case regardless of any alleged bad faith because there was no pending motion to convert or threat of conversion, and therefore Fifth Circuit exception did not apply. Trustee's motion to modify the plan could not be construed as a motion to convert. Court reversed bankruptcy court's order returning funds held by trustee to the debtors. Proceeds from post-petition sale of debtors' homestead which were not reinvested within six months changed in character from the homestead and did not exist before commencement of the case, and therefore were not vested in the debtors. In addition, cause existed to order that the proceeds not be given to the debtors, since debtors neither sought approval for, nor gave notice of, the sale of their home.

Bankruptcy Appeal; Standing

Palmaz Sci., Inc. v. Vactronix Sci. Inc., No. SA-16-CV-1021-XR (Rodriguez, X., Apr. 18, 2017).

Court held that appellant lacked standing to appeal to the district court from a bankruptcy court order because she failed to file a proof of claim or otherwise appear or object before the bankruptcy court. The Fifth Circuit applies the "person aggrieved" test for standing in bankruptcy appeals, which asks whether an appellant was directly and adversely affected pecuniarily by the order of the bankruptcy court. Numerous circuits, including the Seventh, Ninth, and Tenth, additionally require that an appellant timely file an objection to the plan in bankruptcy. The Fourth and Second Circuits do not have this extra requirement. The Fifth Circuit has not decided the issue, but has indicated acceptance of the appearance and objection requirement in dicta. The Bankruptcy Court for the Western District of Texas also has this requirement. Court opined that the Fifth Circuit would likely hold that appearance and objection are requirements for standing in a bankruptcy appeal. Appellant admitted that she failed to file a proof of claim or lodge objections, but court held this was not dispositive; court evaluated whether the appearance and objection requirement was excused by a lack of notice. However, appellant knew of the bankruptcy proceedings and the original claims deadline, and her lack of notice that the bankruptcy court had shortened the claims deadline did not excuse her failure to appear and object.

Expert Disclosures; *Daubert*

Villegas v. Cequent Performance Prods., SA-15-CV-473-XR (Rodriguez, X., Mar. 1, 2017).

Court struck two sections of expert's declaration, filed in response to a *Daubert* motion, which contained new information such as a list of academic citations that the expert could not recall at his deposition. Continuance of the trial setting did not excuse expert's failure to comply with original scheduling order deadlines. Despite these strikes, court denied *Daubert* motion. Expert's reports stated that the scientific underpinnings of his theory were common knowledge, and cited Galileo and Sir Isaac

Newton, but were nevertheless based on more than just his assurances that he had utilized generally accepted scientific methodology. Expert's ignorance of certain facts and his failure to test his theories were matters of probative weight rather than admissibility. In addition, failure to test alternative designs, without more, did not render testimony unreliable.

Class Decertification; Reasonable Attorney's Fees

Espinosa v. Stevens Tanker Div., LLC, SA-15-CV-879-XR (Rodriguez, X., Apr. 27, 2017).

Court denied plaintiff's motion to decertify conditional class. Court assumed plaintiffs are able to request decertification of their own class, although case law unambiguously speaks in terms of defendants. Court also assumed the legal standard governing a defendant's motion to decertify applies to a plaintiff. Court rejected plaintiff's argument that opt-ins were not the same or similar. No evidence showed meaningful differences in job duties among opt-ins, who all worked as dispatchers in a fundamentally similar capacity. And defendant's main defense was equally applicable to all opt-ins. Court also questioned plaintiff's counsel's motives; court previously sanctioned plaintiffs' counsel for violating court's order regarding notice to opt-ins, which deprived plaintiff's counsel of their attorneys' fees for opt-ins, and ordered them to pay defendant's fees incurred in preparing the sanctions motion. Court granted defendant's motion for attorneys' fees in part. Counsel was not entitled to expenses incurred for Westlaw research, since billing statements did not link research expenses to motion at issue. Court also denied all travel and meal expenses to attend the hearing, since other matters were discussed besides the motion. Court held that an 18 page motion, with a lengthy timeline and block quotes, citing only 10 cases, and which was redundant, could not have reasonably taken three attorneys 130 hours to complete at a cost of nearly $40,000. Court held that in-house counsel's review of the motion drafted by outside counsel was not compensable. Court awarded fees only for the attorney who actually performed the majority of the work, at $300 an hour.

Edge Act; Subject Matter Jurisdiction

iHeart Communs., Inc. v. Benefit St. Partners LLC, SA-17-CV-00009-XR (Rodriguez, X., Mar. 16, 2017).

Court granted motion to remand, finding no jurisdiction under the Edge Act. Suit was a civil suit "at common law or in equity," and certain trustee defendants were "corporation[s] organized under the laws of the United States," but declaratory judgment claims did not arise out of an offshore financial transaction of the trustee defendants. Edge Act jurisdiction would only exist to the extent the trustee defendants engaged in offshore financial transactions, and their role in the dispute was limited to domestic contracts. Case law is scattered regarding how direct of a nexus the Edge Act requires between the Act entity and the offshore financial transaction, and court noted the lack of "a clear statement of law" on this issue. Court held that the nexus did not exist here, where the Act entity was accused of no wrongdoing and where its conduct had little to do with the offshore financial transaction that gave rise to the claim.

Soledad Valenciano practices commercial and real estate litigation with Spivey Valenciano, PLLC. Melanie Fry practices commercial litigation and appellate law with Dykema Cox Smith.

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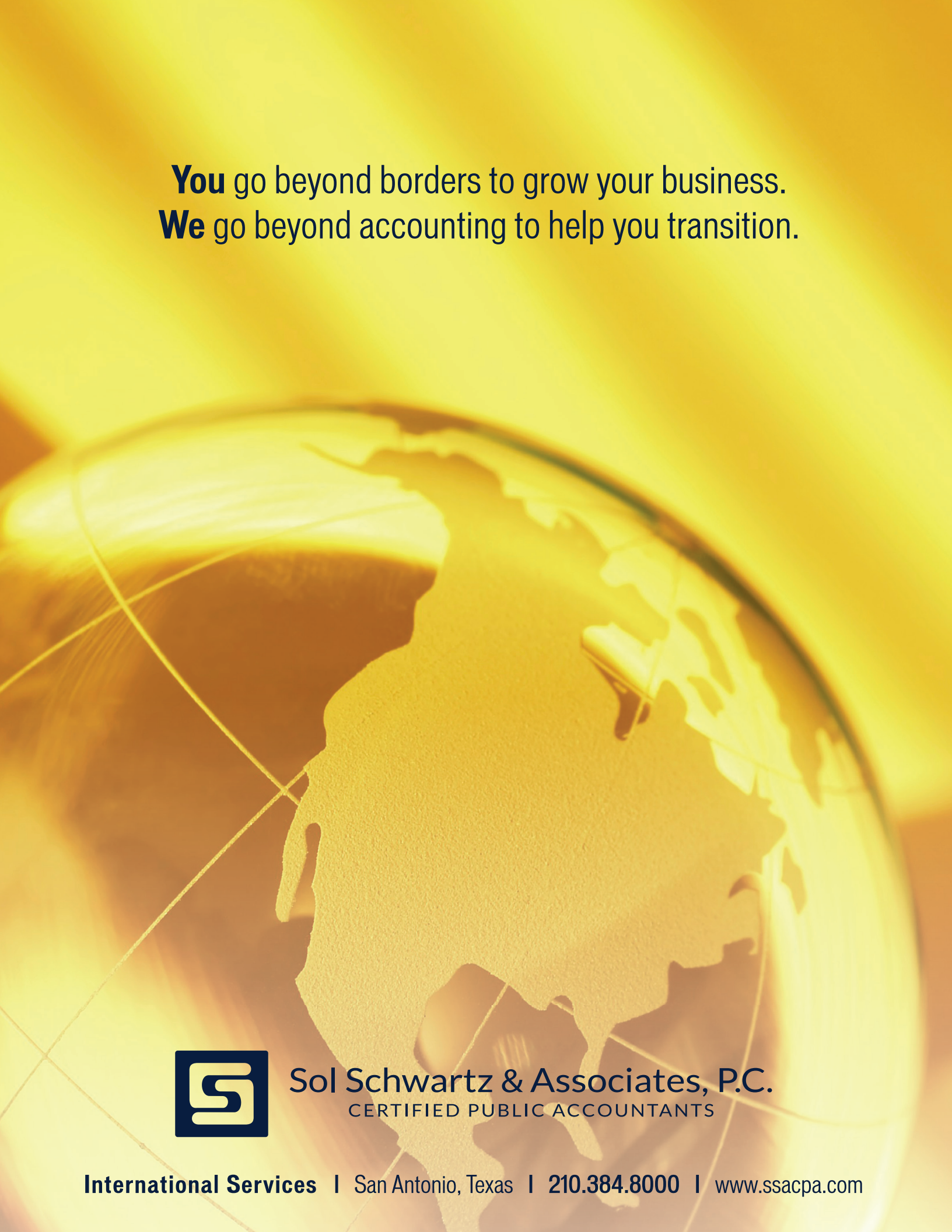
illness is just a biological and chemical imbalance like any other disease. The main difference is that patients suffering from mental illness often lack the insight needed to know that they are ill, and that they need to take immediate steps to treat their illness. This lack of insight is what makes certain forms of mental illness so difficult to treat.

Judge Kazen took a very hands-on approach to the program. He believed it was important to conduct progress meetings with the patient on a regular basis at the Center for Health Care Services. Most of the patients were able to successfully complete this program during the initial ninety days. Judge Kazen feels that running this clinic was one of the most rewarding parts of his judicial career, and that we could all benefit from knowing more about the problem of mental illness in our society.

Stephen H. Gordon is a general practitioner and owner of The Gordon Law Firm, P.C. His practice consists of Family Law, Criminal Law, Bankruptcy, Personal Injury, and Wills and Estate Planning.

ENDNOTES

[1]Tex. Health & Safety Code § 573.003 (2016).
[2]San Antonio Police Dept. Gen. Manual, Procedure 611—Mentally Ill Persons (2009), available at **https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/611%20Mentally%20Ill%20Persons.pdf** (last visited May 21, 2017).
[3]See Aamer Madhani, *Police Departments Struggle to Get Cops Mental Health Training*, USA Today, October 2, 2016, available at **http://www.usatoday.com/story/news/nation/2016/10/02/police-departments-struggle-cops-mental-health-training/91297538/** (last visited May 21, 2017); Associated Press, *Dallas Officer Who Shot Mentally Ill Man Is Fired*, San Antonio Express-News, October 23, 2013, available at **http://www.expressnews.com/news/local/article/Dallas-officer-who-shot-mentally-ill-man-is-fired-4924861.php** (last visited May 21, 2017); Peter J. Holley, *Safety Net Failed to Halt Fatal Slide to Mental Illness*, San Antonio Express-News, December 9, 2010, available at **http://www.mysanantonio.com/news/local_news/article/Family-of-man-killed-by-police-says-authorities-869339.php** (last visited May 21, 2017).
[4]Tex. Health & Safety Code § 573.011 (2016).
[5]*Id.* § 573.012 (2016).
[6]*Id.* § 573.021 (2016).
[7]*Id.* § 573.022 (2016).
[8]*Id.* § 573.023 (2016).
[9]*Id.* § 573.021(c) (2016).
[10]*Id.* § 571.003(14) (2016). Dementia is not technically classified as a mental "illness" because it is now considered by medical experts to be a mental "disorder." *See* Hunter Mental Health Services, *Is Dementia a Mental Illness?* 35 Australian J. of Psychiatry at 716-23 (2001).
[11]Tex. Health & Safety Code § 573.021(b) (2016).
[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]*Id.*
[16]*Id.* § 574.003(a) (2016).
[17]*Id.* § 574.005(a) (2016).
[18]*Id.* § 574.005(c) (2016).
[19]*Id.*
[20]*Id.* § 574.005(b) (2016).
[21]*Id.* § 574.021 (2016).
[22]*Id.* § 574.025(b) (2016).
[23]*Id.* § 574.031 (2016).
[24]*Id.* § 571.015 (2016).
[25]*Id.* § 574.025(a)(1) (2016).
[26]*Id.* § 574.025(f) (2016).
[27]*Id.* § 574.011 (2016).
[28]*Id.* § 574.025(f) (2016).
[29]*Id.* § 574.025(e) (2016).
[30]*Id.*
[31]*Id.* § 574.005(a) (2016)
[32]*Id.* § 574.009(a) (2016).
[33]*Id.*
[34]*Id.* § 574.034(g) (2016).
[35]*Id.* § 574.103(b) (2016).
[36]*Id.* § 574.103(b)(1) (2016).
[37]*Id.* § 574.103(b)(2) (2016).
[38]*Id.* § 574.104 (2016).
[39]*Id.* § 574.035 (2016).
[40]*Id.* § 574.035(h) (2016).
[41]*Id.* § 574.066 (2016).
[42]*Id.* § 574.061 (2016).
[43]*Id.* § 574.061(c) (2016).
[44]*Id.* § 574.061(d) (2016).
[45]*Id.*
[46]*Id.* § 574.061(e) (2016).
[47]*Id.* § 574.062 (2016).
[48]*Id.*
[49]*Id.* § 574.063 (2016).
[50]*Id.* § 574.062(b) (2016).
[51]*Id.* § 574.034(g) (2016).
[52]*Id.* § 574.035(h) (2016).
[5]See Judge Tom Rickhoff & Ellen Patterson, *Dangerous Minds: Addressing Violence and Serious Mental Illness from One Judge's Perspective*, 76 Tex. B.J. 745 (2013).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