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February Luncheon Meeting

Wednesday, February 14th, 12:00 p.m.
Congressman Solomon Ortiz International Center
402 Harbor Drive

Speaker: Alice Oliver-Parrott, President, Texas Chapters of the American Board of Trial Advocates

Topic: "The Disappearing Jury Trial — Changes in Jury Trials"

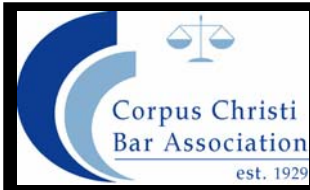
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Cost: \$18.00 per person for members, \$23.00 per person for non-members if reserved by noon, Tuesday, February 13, 2007. Call the Bar Office at 883-4022 to RSVP or e-mail us at sgonzales@corpusbar.com. All reservations must be paid for. The cost at the door will be \$20.00 for members, \$25.00 for non-members. **PLEASE NOTE THAT THIS IS A \$2.00 PRICE INCREASE DUE TO INCREASED COSTS AT THE ORTIZ CENTER.**

L NOTE 7

ADDED ADVANTAGE OF ADVANCE RESERVATIONS — THOSE WHO RSVP IN ADVANCE WILL HAVE THEIR CLE ATTENDANCE CARDS PRE-POPULATED SO ALL THEY HAVE TO DO IS TO SIGN THE CARD (AND, OF COURSE, STAY FOR THE PRESENTATION) IN ORDER TO OBTAIN THEIR CLE CREDIT — Just another service of your Corpus Christi Bar Association



Newsletter

February 2007

ABA Issues Formal Opinion Approving the Review and Use of Opposing Counsel's or an Adverse Party's Metadata

The American Bar Association has issued a formal opinion (Formal Opinion 06-442) on the review and use of metadata. E-mail and other electronic documents frequently contain "embedded" information. Such embedded information is commonly referred to as "metadata." (See CCBA Newsletter, September 2006 for a more in depth explanation of "metadata")

"[The] opinion addresses whether [the receiving] lawyer [can] review and use embedded information contained in e-mail or other electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party," when the "the receiving lawyer did not obtain the electronic documents in a manner that was criminal, fraudulent, deceitful, or otherwise improper." **The conclusion reached by the Standing Committee on Ethics and Professional Responsibility (the Committee) is that "the [ABA Model Rules of Professional Conduct (Rules)] [generally] permit a lawyer to [review and use embedded information contained in e-mail and other electronic documents whether received from opposing counsel, an adverse party, or an agent of an adverse party.]"**

The Committee notes that "[c]omment [16] to Model Rule 1.6 states that '[a] lawyer must act competently to safe-

guard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." (Citations omitted)

It also notes that "[n]ot all metadata . . . is of any consequence." Nevertheless, the Committee continues that "[i]n some instances . . . such as when a party to a lawsuit is attempting to establish 'who knew what when,' the date and time that a critical document was created or who drafted it may be a critical piece of information." Other examples given by the Committee of when metadata can be of high import are when "a payment amount is being negotiated and a . . . change or comment in a draft agreement . . . suggests how much more the opposing party is willing to pay or how much less they might take."

In explaining its position, "[t]he Committee . . . notes that the Rules do not contain any specific prohibition against a lawyer's reviewing and using embedded information." The Committee observes that "[t]he most closely applicable rule, Rule 4.4(b) relates to a lawyer's receipt of inadvertently sent information . . . [and notes that it] is silent as to the ethical propriety of a lawyer's review or use of such information." The Committee continues its explanation with the following:

The Rule provides only that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment [3] to Model Rule 4.4

indicates that, unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.

In addressing Rule 4.4, the Committee also noted that

Comment [2] to Rule 4.4 confirms that the word "document" includes e-mail and other electronic documents. The Comment also indicates that the notification requirement exists "in order to permit the [sender] to take protective measures" and includes a recognition that applicable other law (outside the applicable rules of professional conduct) may require the lawyer to take additional steps beyond notification.

The Committee further observed that after Rule 4.4(b) was adopted in 2002, Formal Opinion 05-437 withdrew Formal Opinion 92-368, which

opined that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential under Model Rule 1.6, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the sending lawyer.

As a caveat, the Committee acknowledges that other authorities (New York and Florida) have examined the issue in light of lawyers' duty to be honest and "have found [reviewing and using metadata] ethically impermissible." Those opinions are based "in part on language contained in present Rule 8.4(c) and (d) that prohibits engaging in conduct 'involving dishonesty, fraud, deceit, or misrepresentation' or 'that is prejudicial to the administration of justice.'"

The Committee explains that its contrary position is based on two aspects of the Rules. First, the Committee notes that it

"does not believe that a lawyer, by acting within the circumstances assumed by the instant opinion, would violate either of those paragraphs of Rule 8.4." Second, the Committee notes that it "reads the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct found in other Rules."

In closing, the Committee makes a couple of observations that could be significant. First, after noting that counsel can take action to prevent the transmission of metadata with their electronic communications and documents, the Committee states that

[o]f course, when responding to discovery, a lawyer must not alter a document when it would be unlawful or unethical to do so, e.g., Rule 3.4(a) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to any such act[.]")

Second, the Committee notes that

On April 12, 2006, the Supreme Court of the United States approved extensive amendments to the Federal Rules of Civil Procedure relating to discovery of electronic documents. . . . Among other provisions, certain of the amendments allow a producing party to pull back privileged information and work product under certain circumstances. The amendments [were] effective December 1, 2006.

To date, the State Bar of Texas has not issued an opinion or a rule with regard to metadata. A copy of ABA Opinion 06-442 can be obtained from your CCBA Office at dking@corpusbar.com, sgonzales@corpusbar.com, voice 883-4022, or fax 883-0353.

Board Actions

The CCBA Board met January 23rd and took the following actions:

Agreed to provide free advertising space to CASA and allow them to participate in the Family Law Seminar in October

Agreed to hold a 3 hour Ethics Seminar on March 30th

Agreed to approach Judiciary to request that schedule court sessions so members can attend the Criminal Law seminar and the monthly Luncheons

Agreed to offer a \$100.00 reward for return of the Master Copy of the 2007 pictorial Directory, no questions asked

Decided to exclude Municipal Judges from the Judicial Evaluation and to include Federal Judges

Agreed to set March 22 as the date for the March Docket Call

Agreed to offer the Aransas Bar the opportunity to participate in the Judicial evaluation

Mark Your Calendars

(Changes and seminars noted in **Bold**)

February 2007

- 3** — **Mock Trial Competition**
- 14 — Joint Luncheon with CPA's, 12:00 p.m., Ortiz Center
- 21 — Criminal Defense Section Luncheon, 12:00 p.m., Katz
- 27 — Board of Directors Meeting

March 2007

- Nominating Committee, Docket Call,
- 12 — 16 CCISD Spring Break
- 7** — **Coastal Bend Women Lawyers Association Luncheon**
Speaker: Mavis Leno
- 22** — **Docket Call**
- 27 — Board of Directors Meeting
- 30** — **Ethics Seminar**

April 2007

Election of New Board

- 2 — Passover Begins
- 6 — Good Friday
- 8 — Easter
- 11 — Annual Meeting Luncheon, 12:00 p.m., Ortiz Center
- 20** — **Advanced Civil Trial Seminar**
- 24 — Board of Directors Meeting

May 2007

- 3 — Law Day Reception, 5:30 p.m. To 7:30 p.m., Ortiz Center
- 4 — Law Day Luncheon, 11:30 a.m. Ortiz Center, Judge Carl E. Stewart, 5th Circuit Court of Appeals
- 18** — **Criminal Law Seminar**
- 22 — Board of Directors Meeting
- 28 — Holiday, Office Closed

June 2007

- Docket Call, Baseball with the Bench, State Bar Annual Meeting
- 21 — 22 State Bar Annual Meeting
- 26 — Board of Directors Joint Meeting with new Board

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Fish Fry "Thank You" Omitted

In last month's "Thank You's" for contributors to the Fish Fry, we failed to include **Wood, Boykin & Wolter, P.C.**, among those who contributed cash to help finance the Fish Fry. We apologize for our omission.

YOUR HELP DESPARATELY NEEDED!!

We need your help. Our master copy of the new 2007 Pictorial Directory with changes in it has disappeared from the CCBA Office. It contained **deletions of entries requested by members, such as home addresses and or phone numbers, spouses' names, e-mail addresses, etc.**, as well as updates provided since December 27, 2006, that had not been recorded elsewhere.

If you contacted our office since **September 2006** requesting that information included in the 2006 Pictorial Directory be **deleted** in the 2007 issue, please re-contact us so we can delete the information as you have requested. You can do so via e-mail at dking@corpusbar.com, sgonzales@corpusbar.com, voice 883-4022, or fax at 883-0353.

If you contacted our office between December 27, 2006, and January 23, 2007, to provide updates, etc., please re-contact us to provide us with that information again.

Thank you for your help in this matter.

CCBA New Members

We welcome the following new members:

Baker F. Newman, III, who is with Davis, Hutchison & Wilkerson, phone 882-2272

Justice Gina Benavides, Justice on the 13th Court of Appeals, phone (956)318-2405

Gabriel "Marc" Cervantes, who is with the Rodriguez Law Firm, phone 883-8900

Deeanne Svoboda Galvan, phone 442-9330

D.R. "Doug" Gwyther, Jr., who is with CGT Law Group International, phone 884-6201

Alissa Adkins Jackson, who is with the Nueces County Attorney's Office, phone 888-0391

Juan P. Reyna, phone 993-8100

Charles C. Smith, phone 883-1055

Monica Vaughn, phone 882-4120

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Technical background

- B.S. Chemical Eng., B.A. Economics, Rice Univ., magna cum laude, 1994.
- Research intern at Texaco, Polaroid, and Brandeis University.

Legal background

- J.D., Univ. of Tex., with honors, 1997.
- Author/co-author of appellate briefs and articles on a wide variety of topics.
- Former associate of international intellectual property litigation firm.
- Co-chair, TYLA Consumer Information Committee.

Brian Miller

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bmiller@bmillerlaw.com

THE LAW OFFICE OF
BRIAN MILLER

Court of Criminal Appeals Judge January Speaker

Following on the heels of the Coastal Bend Criminal Defense Lawyers becoming a section of CCBA, Judge Paul Womack of the Texas Court of Criminal Appeals was the guest speaker at the CCBA January Luncheon. He provided



Judge Paul Womack Speaks at January Luncheon

an update on the Court of Criminal Appeals and its workload. 66 attended.

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Corpus Christi, TX 78412

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Mavis Leno to Speak at CBWLA's Spring Luncheon

The Coastal Bend Women Lawyers Association's annual Spring Luncheon honoring "Women of Distinction" will be **Wednesday March 7th**. CBWLA's Spring Luncheon is held annually during Women's History Month.

This year's speaker will be Mavis Leon. Her presentation is entitled "Making a Difference: A Voice for Afghan Women and Girls." The luncheon will commence at **12:00 noon** at the **Omni Bayfront Hotel**. The cost will be **\$40 for CBWLA members**, and **\$45 for non-CBWLA members if purchased on or before February 28th**. After that it will be \$45 for members and \$50 for non-members. CBWLA is seeking sponsors to help defray the costs of the luncheon and increase the amount donated to charity.

If you have questions or wish to purchase a sponsorship, please contact Kathleen Day at 888-4342 or Sandy Sterba-Boatright at 866-8136.

Ethics Seminar to Be Held March 30th

CCBA will present 3.0 hours of ETHICS CLE on Friday afternoon, March 30th. It will be at the Ortiz International Convention Center commencing at 1:00 p.m. Stay tuned for more information.

"Rookie Judges" Speak at Young Lawyers' Luncheon

Newly elected Judges, the Honorable Bobby Galvan of the 94th District Court and the Honorable John Martinez of County Court of Law Number 3, were the guest speakers at the Corpus Christi Young Lawyers Association's January Luncheon. They provided the "Perspective from the Bench." Each explained in general terms how he would run his court and answered specific questions from those in attendance. The attendance demonstrated the popularity of the judges. It was literally standing room



Judge Bobby Galvan explains the procedures he will follow in the 94th District Court.

only as there were 38 in attendance. In addition to the presentations by the Judges, Sandra Garza of the Texas Rio



Judge John Martinez fields a question.

Grande Legal Aid made a pitch for additional lawyer participants in the Legal Aid pro bono program.

Cassidy's Irish Pub Hosts CCYLA January Happy Hour

It was fun-filled Thursday evening as the



Ira Miller and Anita Shahani at CCYLA Happy Hour

Corpus Christi Young Lawyers Association invaded Cassidy's Irish Pub for their



Jerry Goetz and Tim McCoy were among those attending the CCYLA January Happy Hour.

January Happy Hour. The Happy Hours have been such a success that the Young Lawyers will be holding a "Fat Tuesday" Happy Hour at Cassidy's. Stay tuned for the details.

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CCBA Directory Errata Sheet

February 2007

Additions:

Pg. 17 – **Newman, Baker F. III**
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