

CHAMBERS

Volume 37, Number 1

Winter, 2010

The ESI's of Texas



**PLUS:
Executive Director
Announces
Retirement**



**Annual
Conference
Wrap Up**

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Readers are encouraged to write letters to the editor and submit questions, comments, or story ideas for *In Chambers*. To do so, please contact Kimber Cockrill, Publications Coordinator, at 512.482.8986 or toll free at 800.252.9232, or via email at kimberc@yourhonor.com.

The Texas Center for the Judiciary is located at 1210 San Antonio Street, Suite 800, Austin, TX 78701.

New Administrators of Justice

As of December 31, 2009

Caroline Baker

Judge, 295th District Court
Houston

Jennifer Balido

Judge, 203rd District Court
Dallas

Alfonso Charles

Judge, 124th District Court
Longview

Tracy Christopher

Justice, 14th Court of Appeals
Houston

Melvin “Rex” Emerson

Judge, 198th District Court
Kerrville

Eva Guzman

Justice, Supreme Court
Austin

Leslie “Les” Hatch

Judge, 237th District Court
Lubbock

Renee McElhaney

Judge, 73rd District Court
San Antonio

Lana Rolf Myers

Justice 5th Court of Appeals
Dallas

Jeff Rose

Judge, 353rd District Court
Austin

Raymond G. Wheless

Judge, 366th Judicial District
McKinney



ANNUAL JUDICIAL EDUCATION CONFERENCE Wrap Up



The 2009 Annual Judicial Education Conference, held this year at the Gaylord Texan in Grapevine, was an overwhelming success. Over 550 judges attended the conference that covered such diverse topics as: Immigration, Updates, Domestic Violence, Ethics and more.



Retired Chief Justice John Hill and Justice James Campbell



Judge Lora Livingston was honored for her services on the TCJ Board of Directors.



Judge Steve Smith, 2009-10 Judicial Section Chair-Elect, and Judge David Garcia, 2009-10 TCJ and Judicial Section Chair.



Judge Craig Estlinbaum, Judge P.K. Rider, Judge Marc Holder

Thanks to Texas Court Reporters!



Justice Jim Worthen, Justice Dori Garza



We would be incredibly remiss if we didn't mention the outstanding volunteers from TCRA! These ladies took on the big task of putting together and staffing the Silent Auction this year at the Annual Conference. Because of their efficiency and enthusiasm, the Silent Auction was packed with great goodies to bid on, and TCJ raised more than \$10,000, one of the most successful auctions ever. Thank you to the following fantastic volunteers:

2009 Silent Auction Volunteers

Pam Esquivel, TCRA President – 107th District Court
Jo Anne Leger, VP of Finance – 253rd District Court
Karen Freeman, Co-Chair – County Court At Law No. 1
Marigay Black – County Court At Law No. 2
Holly Gilbert – 221st District Court
Lisa Morton – 396th District Court
Melanie Oldham – 392nd District Court
Lisa Williams – 367th District Court
Robin Cooksey – 410th District Court
Melinda Garriga – County Court at Law No. 2



Judge Carter Schildknecht and Justice Mackey Hancock



Presiding Judge B.B. Schraub, Associate Director Tana Petrich, Presiding Judge Dean Rucker, Presiding Judge Kelly G. Moore.

And the winner is....

Judge Mike Herrera was the lucky winner of the 2009 Annual Judicial Education Conference raffle that raised over \$10,000 for TCJ. Ruffled off this year was a pair of his and hers Rolex watches. Congratulations, Judge Herrera!

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Executive Director Mari Kay Bickett and Judge Ralph Strother



Justice Carolyn Wright, Judge Erleigh Wiley, Judge Louis Sturns, Justice Mary Murphy



Judge Jeffrey Walker, Judge Steve Smith, Judge Olen Underwood

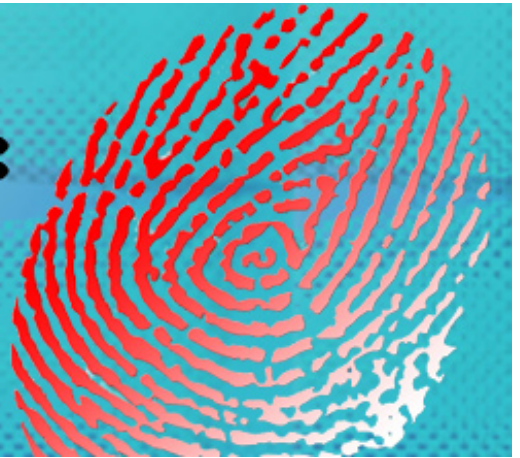


Judge David Evans, and Smart Start vendor Debra Coffey.



Retired Chief Justice John Boyd, Retired Justice Don Reavis, Justice Terrie Livingston, Justice Sue Walker, Retired Chief Justice Marilyn Aboussie

BALL IN YOUR COURT: *The ESIs of Texas*



By Craig Ball

Editor's Note: The following article originally appeared in Law Technology News and reprinted here with the author's permission.

My home state of Texas was the first to enact a discovery rule dealing with electronically stored information. Years before the federal rules amendments, and in four simple sentences, Rule 196.4 addressed a litigant's right to discover ESI, the scope of e-discovery, forms of production and cost shifting. The rule was either so completely successful or so utterly ignored that it wasn't cited in a published decision for nearly a decade. So, when the Texas Supreme Court — the state's highest tribunal — issued its first e-discovery opinion, I listened to oral arguments. In re: Weekley Homes, 52 Tex. Sup. Ct. J. 1231 (2009), concerned a litigant's right to directly access an opponent's storage media. The plaintiff wanted to run 21 search terms against the hard drives of four of defendant's employees in an effort to find deleted e-mails from 2004. I eagerly anticipated insightful arguments by advocates who grasped the important technical and legal issues afoot, but what I heard would make a hearse horse snicker. Judge for yourself by listening to the arguments at <http://tinyurl.com/weekleyhomes>.

Fortunately for Texans and all e-discovery practitioners inspired by well-reasoned opinions, the lawyers' confusion didn't infect the Court's decision. The Weekley Homes standards that emerged from the Court's remand serve as a sensible guide to those seeking to compel an opponent to recover and produce deleted e-mail, to wit:

1. Parties seeking production of deleted e-mails should specifically request them and specify a form of production.
2. Responding parties must produce reasonably available information in the format sought. They must object if the information is not reasonably available or if they oppose the requested format.
3. Parties should try to resolve disputes without court intervention; but if they can't work it out, either side may seek a hearing at which the responding party bears the burden to prove that the information sought is not reasonably available because of undue burden or cost.

4. If the trial court determines the requested information is not reasonably available, the court may still order production if the requesting party demonstrates that it's feasible to recover deleted, relevant materials and the benefits of production outweigh the burden, i.e., the responding party's production is inadequate absent recovery.
5. Direct access to another party's storage devices is discouraged; but if ordered, only a qualified expert should be afforded such access, subject to a reasonable search and production protocol protecting sensitive information and minimizing undue intrusion.
6. The requesting party pays the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

The Texas Supreme Court further articulated a new duty: Early in the litigation, parties must share relevant information concerning electronic systems and storage methodologies to foster agreements regarding protocols, and equip courts with the information needed to craft suitable discovery orders. That's a familiar — though poorly realized — obligation in federal practice, but one largely absent from state court practice nationwide. Weekley Homes brings much-needed discipline to the process of getting to the other side's drives, but scant guidance about what's required to demonstrate feasible recovery of deleted e-mail or what constitutes a proper protocol to protect privilege and privacy. Something that sounds simple to counsel can enormously complicate forensic examination and recovery, at great cost. A sound protocol balances what lawyers want against what forensic experts can deliver.

Because everyone uses e-mail, everyone has a little knowledge about e-mail. A little knowledge is a dangerous thing. Most assume their e-mail experience is universal, transferable and relevant. "When I delete a message," an opponent may say, "it goes into that trash bin, and I just look in there to find it." Much of what even tech-savvy lawyers and judges understand about deletion of data doesn't apply to e-mail.

(Continued next page)

ESIs

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For example, one of the lawyers arguing the In re Weekley Homes case claimed his client wasn't seeking electronic data such as databases and spreadsheets. They were just seeking documents, i.e., deleted e-mail.

The problem with that distinction is that most e-mail systems are databases. And not simple sorts either, but poorly-documented, proprietary, compressed, encrypted, pull-your-hair-out-complicated databases.

To illustrate, when you delete messages from the Deleted Items folder in a Microsoft Exchange mail server or Microsoft Outlook mail client ("double deletion"), they don't go to the Recycle Bin. They don't even go to the same place documents go when you empty the Recycle Bin. They don't just slink off to the unallocated clusters, and they don't simply "lose their address in the file directory" as counsel claimed in the Weekley Homes arguments. Because individual messages aren't tracked by a computer's file system before deletion, they never had an address in the file directory!

Double-deleted Outlook messages lurk locally inside the mail container file, invisible to the user, until the container file is compacted. Maybe in a day. Maybe two weeks. Maybe never.

If deleted messages were stored on an Exchange server or backup media, everything changes — the potential for recovery, the places

an examiner looks, the encoding of the messages and even the tools and techniques employed are different. For example, Microsoft's Exchange Server includes a deleted item recovery feature inelegantly named "the dumpster." Messages purged from a user's Deleted Items folder are gone insofar as the user is concerned; however, those double-deleted messages remain in the Exchange dumpster for a period of (typically) 14 to 30 days after deletion or for any interval set by the server administrator.

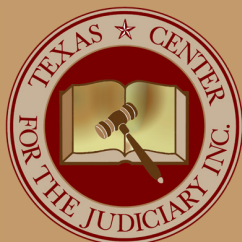
If the deleted messages were webmail, the leftovers lodge in entirely different forms and venues!

Again, e-mail are entries in a database; and thus, they reside within a world all their own. They are like the bottled city of Kandor in the Superman comics or domed Springfield in The Simpsons Movie — encapsulated and isolated from the outside world of the computer's operating system.

Deleted messages may serve as linchpins of liability and be well worth the cost and effort of recovery; but recovery methods and expectations must be calibrated to particular systems and applications, as well as to the needs and the budget of the case.

Recovering deleted e-mail is one of the most challenging tasks in computer forensics. If someone assures you it's easy or cheap, they've either never done it, or they're not doing it very well.

*Austin's Craig Ball is a trial lawyer and computer forensics/EDD special master.
E-mail: craig@ball.net.*



DOES THE TEXAS CENTER FOR THE JUDICIARY HAVE YOUR CURRENT EMAIL ADDRESS?

The Texas Center frequently sends out important information via email. To ensure you receive this information in a timely manner, please keep your email address current with us. To submit or update your email information, please contact Michele Mund, Registrar, at (512) 482-8986, or michelem@yourhonor.com.



by **Christie L. Smith**

Just prior to this year's annual conference, Executive Director Mari Kay Bickett announced her pending retirement effective Fall, 2010. In preparing to step down from the Executive Director position, Bickett said, "So much has happened in my life this past year which, in turn, has made me realize there remains so much I have yet to experience."

During Bickett's tenure, the Texas Center has grown, both in staff size and in budget. "When I came here the budget was around \$850,000 annually, and there were five staff members. Now, we have 15 full and contract staff, and the budget has grown to \$5-1/2 million in grants and contributions. With the growth in staff and budget, has also come a greater responsibility in managing the affairs of the organization."

Bickett says she feels fortunate that she has been able to serve the excellent judiciary in her native state of Texas in a career in judicial education that has spanned 22 years. She has been the Executive Director of the Texas Center for 16 years. "I'm proud to say that I'm the longest-serving Executive Director of the Center," she said. But she's most proud of how the education offerings have continued to improve over time. "Now it's rare to see a judge out of class once the bell rings. I believe TCJ's programs are meeting the needs of our judges and that they are relevant and timely."

Recognition for the excellence of the programs offered by the Texas Center has spread, both nationally and statewide. In 2006, Bickett traveled with then-chair Hon. Laura A. Weiser to Hawaii to accept an award from the American Bar Association for Judicial Excellence in Education. In addition, the Texas Center has been recognized by the State Bar of Texas and the Offices of the Governor and Lieutenant Governor for delivering quality education to the judges of Texas.

Bickett says accepting that award was one of her most memorable moments – but she has others. "Moving into our new offices in 2003 was a highlight. We went from a 2,000 square foot office at the State Bar, to a state-of-the-art 9,000 square foot facility. We occupy the entire floor and have room for small trainings now."

Another high point happened at the Annual Conference in 2005. Staff members entertained the judges with a rousing rendition of the Gloria Gaynor classic, "I Will Survive." "It was a great fundraiser, and also one of the best team-building exercises we've ever had," she said.

Leaving the Texas Center is not without some sadness for Bickett. "I'll miss all of the judges that are part of TCJ. So many of them I call close friends." She also says it will be tough to leave the position she's been so passionate about for so long. "I believe quality judicial education makes a real difference in giving Texas judges the tools to administer justice with fairness, efficiency and integrity. In my heart, I am a judicial educator...If I did not really believe in TCJ's mission, then this would just be a job."



As of January 1, 2010, new mileage reimbursement rates have been adopted. Automobile mileage will now be reimbursed at the rate of 50 cents per mile.

In Memoriam

Our hearts go out to the families of those honorable souls who have passed before us and served the bench so well.

Please join us in remembering:

Hon. William Jennings

124th District Court
Longview, TX

Hon. Andy Mireles

73rd District Court
San Antonio

Hon. Mace Baxter Thurman, Jr.

Senior District Judge
Austin, TX

Contributions

The Texas Center for the Judiciary thanks you for your generosity.

Lists include contributions made through December 31, 2009.

In Honor of . . .

Ms. Mari Kay Bickett

Hon. Don Burgess
Hon. Camile G. DuBose
Hon. Neel Richardson

Hon. Georgia Dempster

Hon. Don Ritter

Hon. Annette Kurtz

Hon. Don Ritter

Hon. B.B. Schraub

Hon. Derwood Johnson

Hon. Linda Thomas

Hon. Carolyn Wright

In Memory of . . .

Hon. O'Neal Bacon

Hon. David Walker

Hon. Andrew Z. Baker

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Hon. David Walker

Ms. Sarah Elizabeth Worley

Hon. Carmen Rivera-Worley

The Texas Center thanks the following donors for their generous contributions from September 1, 2009 to December 31, 2009



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Hon. Lamar McCorkle
Hon. Pat McDowell
Hon. Roland Dale Saul
Hon. David Walker

UPCOMING CONFERENCES

2010

CIVIL LAW CONFERENCE (A)

JANUARY 22

LOST PINES

APPELLATE CONFERENCE

FEBRUARY 12

LOST PINES

FAMILY LAW CONFERENCE (B)

FEBRUARY 26

SOUTH PADRE

FAMILY VIOLENCE CONFERENCE

MARCH 22-24

GALVESTON

EVIDENCE SUMMIT

APRIL 7-9

AUSTIN

TEXAS COLLEGE FOR JUDICIAL STUDIES

APRIL 28-30

AUSTIN

TxDOT TEAM TRAINING

MAY 16-20

AUSTIN

CRIMINAL LAW CONFERENCE (B)

JUNE 4

RICHARDSON

PDP CONFERENCE

JUNE 13-18

AUSTIN

CIVIL LAW CONFERENCE (B)

JUNE 25

FORT WORTH/DALLAS

ASSOCIATE JUDGES CONFERENCE

JULY 5-7

AUSTIN

DWI COLLEGE

JULY 19-23

AUSTIN

CPS JUDGES CONFERENCE

AUGUST 4-6

SAN ANTONIO

ANNUAL JUDICIAL EDUCATION CONFERENCE

SEPTEMBER 21-24

CORPUS CHRISTI

COLLEGE FOR NEW JUDGES

DECEMBER 5-10

AUSTIN

2011

REGIONAL CONFERENCE 2,3,4 & 5

JANUARY 23-25, 2011

BASTROP

REGIONAL CONFERENCE, 1,6,7,8 & 9

FEBRUARY 9-11

DALLAS

TEXAS COLLEGE FOR JUDICIAL STUDIES

APRIL 10-15

AUSTIN

CRIMINAL JUSTICE CONFERENCE

MAY 16-18

DALLAS

ANNUAL JUDICIAL EDUCATION CONFERENCE

SEPTEMBER 18-21

DALLAS

COLLEGE FOR NEW JUDGES

DECEMBER 4-7

AUSTIN

More conferences await confirmation.

Look for announcements on

www.yourhonor.com

and in future editions of *In Chambers*.
