

## IN THIS ISSUE

**Preventing Harm From Your Licensor's Bankruptcy: How To Protect The Intellectual Property Rights You May Not Even Know You Have**  
page 1

**Lessons From The Schiavo Case**  
page 2

**Protecting the Attorney-Client Privilege**  
page 2

On June 9, 2005, Mike Farnell traveled to Washington D.C. to participate in a hearing conducted by the Senate Committee on Health, Education, Labor, and Pensions concerning the Capital Consultants LLC disaster, the largest investment fraud case in United States history. Mike serves as special insurance coverage counsel to employee benefit plans that lost millions in the fraud, and he was asked to submit testimony regarding the pervasive regulatory shortcomings of insurance products marketed to ERISA plans.

The firm welcomes Candice Kim who joined our business/transactional team. Candice is a graduate of Boston University School of Law and, most recently, worked for the American Prosecutors Research Institute in Alexandria, Virginia as a staff attorney. A native of the Pacific Northwest, Candice's desire was to return to the area to be closer to family. Candice is currently licensed to practice law in New York and will be sitting for the July 2005 Oregon State Bar exam.

*Parsons Farnell & Grein, LLP* is a boutique firm specializing in helping Northwest businesses and their leaders. Our law practice concentrates on general business litigation, policyholder insurance disputes, construction litigation, business formation, business and real estate transactions, estate planning, probate, and tax planning/ litigation.

## PREVENTING HARM FROM YOUR LICENSOR'S BANKRUPTCY: How to protect the intellectual property rights you may not even know you have

*John Parsons & Justin Leonard*



Whether you know it or not, your business probably relies on one or more intellectual property licenses on a daily basis. Computer software is one example. Your business likely does not "own" the software programs upon which it relies each day. Rather, whether straight out of the box or specifically customized for the end-user, the software is subject to a license. The license may be embedded in the software itself, attached to the shrink-wrap, or documented in accordance with negotiated terms. Your license may provide technical support, regular updates, and quick fixes should bugs arise. The software author, however, holds the copyright and thus retains ultimate control over the software. Such control can wreak havoc when the software licensor – or the licensor of any copyrighted or patented property upon which your livelihood relies – files for bankruptcy.

To illustrate the point, consider the following example. A small to mid-sized mortgage broker purchases a software package including a one-year license with automatic renewal, coupled with 24-hour service and support, which includes periodic fixes and updates to the software required to meet constantly changing federal and state lending regulations. All of its 43 loan brokers and 50 additional staff personnel are dependent on the software, which allows the business to qualify and document \$10,000,000 in loans per month. On a random Tuesday the business receives notice that the licensor

has filed bankruptcy and the bankruptcy trustee is attempting to sell the rights to the software – irrespective of any rights the business may have to continue to use it. The mortgage brokerage invested hundreds of thousands of dollars in the license and countless additional funds on specialized training. Without the software, the business will be effectively shut down.

Congress established a special provision in the Bankruptcy Code that protects licensees of intellectual property in such situations. Typically licenses may be sold by the bankruptcy trustee in order to maximize the bankrupt’s assets; normally, a business licensing the intellectual property would have few remedies other than completing a claim for damages against the estate. Under a special provision for intellectual property licenses, the licensee is provided additional rights. The licensee can either make its claim for damages or may elect to retain its rights under the license as they existed pre-bankruptcy for the duration of the contract, plus any period for which the contract may be extended. Consequently, a licensee facing the dilemma wrought by the licensor’s bankruptcy has specific rights that protect the continuity of its business.

### **Lessons From The Schiavo Case**

*Candice Kim*



**W**e watched while Terry Schiavo’s life slipped away in the wake of a bitter dispute between her husband and her family. The resounding lesson learned from Terry Schiavo’s death and the enmity that arose

out of attempts to determine who had the right to make her health care decisions, is that the decision should be made by each of us for ourselves.

Oregon allows individuals to memorialize instructions about tube feeding and life support in a document called an Advance Directive. Tube feeding means the provision of food and water artificially supplied by a medical device. Life support means any medical means for maintaining life, including procedures, devices and medications. Oregon’s Advance Directive allows individuals to appoint a health care representative and grant him or her the power to make health care decisions. Thus, the health care representative can decide whether or not life support and tube feeding should be delivered. The individual may provide further health care instructions to his or her health care representative, including instructions about support at various stages of illness such as close to death, permanently unconscious, advanced progress illness or extraordinary suffering. At each of these stages, the individual may instruct the health care representative to allow, to disallow, or act as the individual’s physician instructs with regard to tube feeding and life support measures.

The health care representative is typically a spouse, domestic partner, parent, child, sibling or close personal friend. Some individuals elect to appoint an alternative health care representative in the event the primary health care representative is unavailable. Once an Advance Directive has been executed, copies should be given to the health care representative, the individual and his or her personal physician. An Advance Directive is a statutory form that can be

obtained at most hospitals, online or in our office and requires certain signing formalities.

Other health care decisions are sometimes required to be made by an agent. The health care decisions not authorized under the Advance Directive may be authorized under a Power of Attorney. Health care related decisions that are sometimes included in a Power of Attorney are the powers to make anatomical gifts upon the individual’s death; financial decisions regarding the funding and employment of health care providers; financial decisions regarding hospital, hospice, nursing home or convalescent home care; and in the agent’s discretion, the power to release medical information to family members when necessary.

Please let us know if you would like a copy of the Advance Directive, need our assistance in executing the Advance Directive and/or need our assistance in preparing a Power of Attorney.

### **Protecting the Attorney-Client Privilege**

*Jim Guse*



**C**lients involved in litigation have no doubt been educated on the importance and sanctity of the attorney-client privilege. Without the privilege, opponents would be able to discover all communications between client and lawyer. What everyone should recognize is that the attorney-client privilege is not limited to litigation. In order to appreciate the benefit of protecting the attorney-client privilege, it is important to note how important the privilege is and how easily it can be lost.

The attorney-client privilege protects communications between attorney and client. If the client is an individual, the privilege protects communications between the lawyer, the lawyer's representatives, and the client. The individual is the "client," meaning that if he/she shares privileged communications with third parties, the privilege is lost. While communications with spouses are protected by a marital communication privilege, friends, family members, fiancées, business associates, etc. are not clients, even if the client feels that these individuals are pivotal to the particular business or enterprise being discussed. If an individual client shares information received from counsel with his son or daughter, for instance, the attorney-client privilege has likely been waived.

Corporate clients should note that the corporation is the client, as opposed to executive officers, shareholders, or employees. In Oregon, the attorney-client privilege does not extend to all officers and employees of the corporation. Instead the privilege is generally limited to executive officers and those employees who are relevant/pivotal to the subject matter of the representation.

A client may be tempted to dismiss the impact of waiving the attorney client privilege with respect to isolated meetings, letters, or emails. Unfortunately, the attorney-client privilege, once waived, can be waived for all purposes and without a time limitation. Imagine an opponent (a competitor or buyer of your business who has defaulted on its payment obligations to you perhaps) having access to all conversations and written communications between your corporation and counsel. The situation might prove not

only embarrassing, but financially detrimental. While the potential impact of waiving the privilege is daunting, the ease with which the privilege may be waived is unnerving.

The proliferation and ease of email communication has made the transmission of information effortless. It has also increased the odds of unintentionally waiving the privilege. An illustration proves helpful. Assume that the Vice President of Company, LLC contacts the company's lawyer to get advice on firing a problem employee. The attorney responds via email providing advice on the employee's termination. The email includes the often overlooked "privileged communication" warning at the bottom of the email. Vice President forwards the email to the Human Resources Manager and the supervisor of the soon-to-be-terminated employee. Did the Vice President warn the recipients that the email should not be shared with anyone, or did she assume that these managers would understand the importance of a lawyer's communication? With or without the instructions, perhaps the supervisor gives the email to his secretary for his personal file so he knows what to do in the future. Perhaps the Human Resources Manager forwards the email to a colleague who is facing the same situation at her employment. Do these circumstances seem plausible?

Corporate officers often understand the importance of attorney communications because they are in direct contact with the attorney. Each time another employee within the company receives the communication the employee is once more removed from the attorney and may not understand or even recognize that

there is a pressing need to protect the communication from the company's attorney.

***Here are some tips for protecting the attorney client privilege:***

- Never share attorney-client information with third parties. If you are not sure who is a third party and who the information can be shared with, call us.
- Keep written communications from your attorney separate from common areas that are open and accessible to a large group.
- If attorney-client information must be shared with employees or representatives (assuming they qualify for the privilege), give explicit instructions on protecting the information. Do not give copies of the documents to individuals unless absolutely necessary.
- Do not assume that sharing the information with outside sources will not be discovered. Even though your poker buddy might have absolutely nothing to do with the situation, sharing the communication with him waives the privilege. With broad discovery rules and a thorough lawyer on the other side, the communication may well be discovered.

Remember, an ounce of prevention is worth a pound of cure. If you have questions regarding the attorney-client privilege, a desire to establish a more thorough protocol, or fear that you have waived the privilege, feel free to contact us.