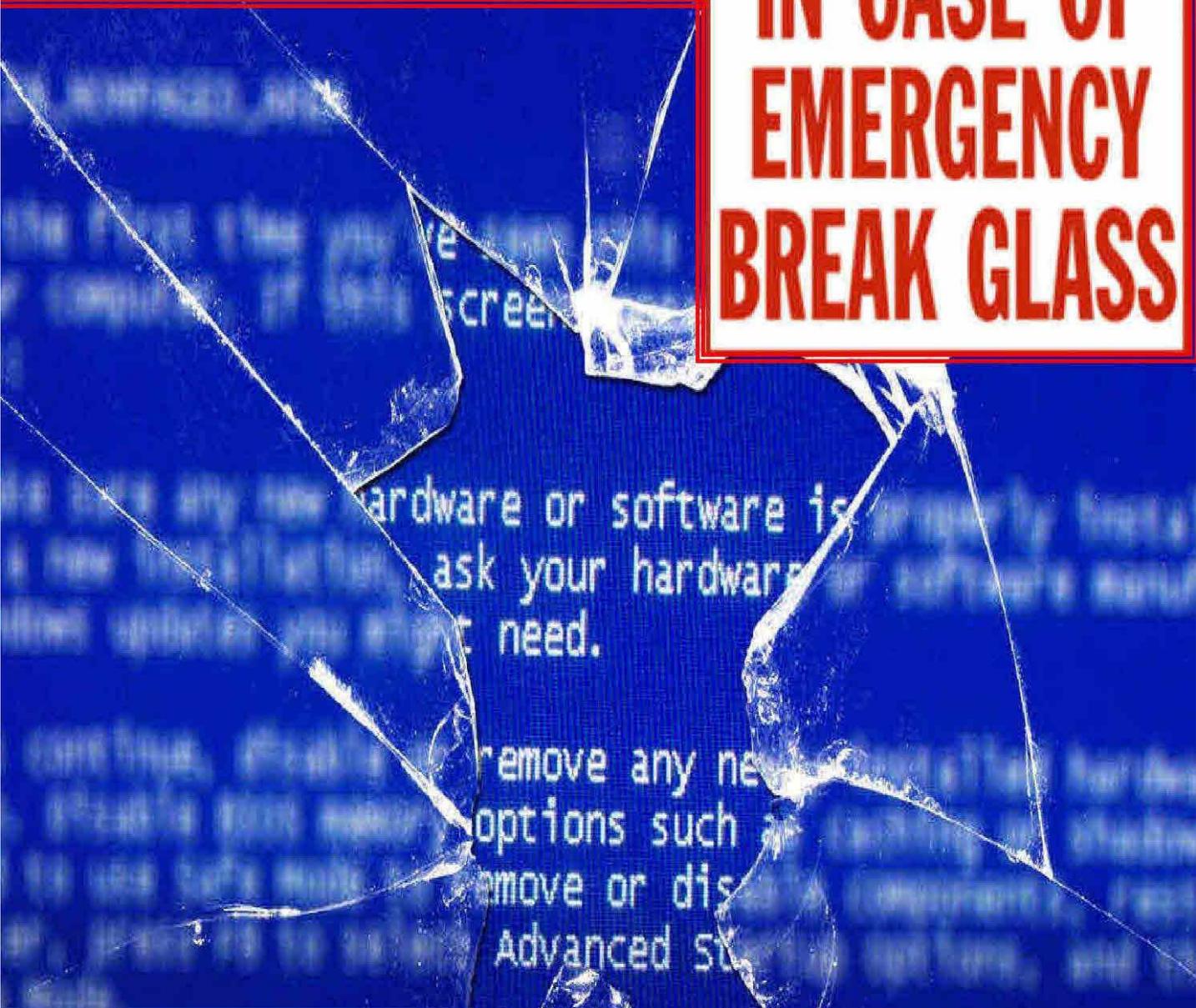


IN CASE OF EMERGENCY BREAK GLASS



The Texas Law Reporter

eMail: gsreports@texindbar.org

Published By

Web Page: www.texindbar.org

Texas Independent Bar Association
Austin, Texas 78767

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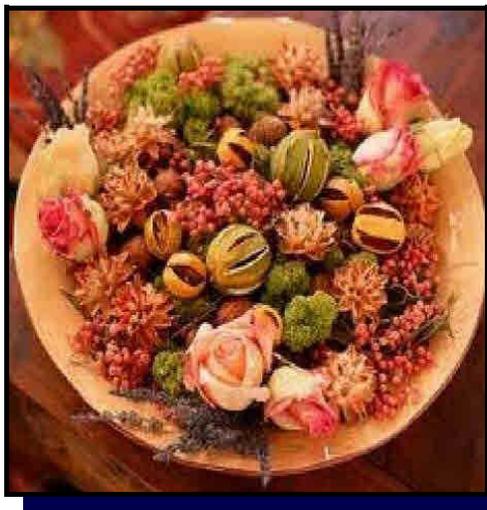
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Volume 22, Number 13 ~ Monday, March 31, 2014 (No. 1005)

March Pot Pie

by David A. Schulman

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pot·pour·ri  *noun* \pō-pu-rē\

noun

1. a mixture of dried petals of roses or other flowers with spices, kept in a jar for their fragrance.
2. a musical medley.
3. a collection of miscellaneous literary extracts.
4. any mixture, especially of unrelated objects, subjects, etc.

Origin:

1605-15; < French: literally, rotten pot, translation of Spanish *olla podrida* olla podrida; see pot¹, putrid

Synonyms

4. melange, pastiche, hodgepodge, mishmash, patchwork.

Dictionary.com Unabridged

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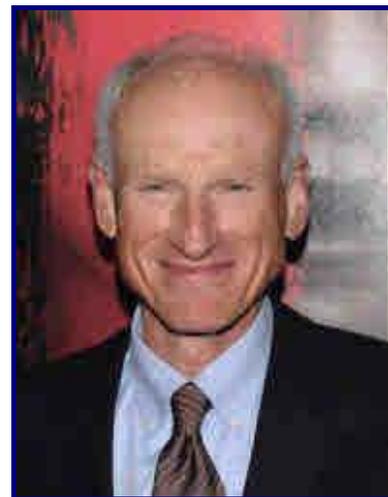
With the appropriate credit and apologies to the Hon. J.Q. Warnick, I am again borrowing his rebadging of “potpourri” for this report.

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James Rebhorn (1948-2014)

Mr. Rebhorn, who died last week, had one of those faces found in cinema which you usually recognize, but whose name you probably never knew. I have a memory for faces and, at least for now, the names that go with them. I noted his passing with the usual sadness experienced on the death of someone you know (or recognize) younger than yourself. The truth is, of course, that I knew little about him beyond the many roles he played.

Following his death, there were several “obits” which I happened to read which cast a different light on him. The truth is also that this journeyman actor, known for playing “suits” - often unlikeable suits, was a very brave and likeable guy. I had no idea





Matt Damon, Gwyneth Paltrow and James Rebhorn in
"The Talented Mr. Ripley"

that he fought skin cancer for the last 20 plus years of his life. Not that working until you can no longer do so is all that unusual (we've all known lawyers who did that), but it was the idea that, while he was slowly dying of this disease, he worked constantly and continued to develop his craft.

What touched me the most, and caused me to bring his memory to this piece, is the written words he left for his family -- and the rest of us. It turns out that, knowing his death

was approaching, Mr. Rebhorn wrote the obituary which appeared on his church's website, and which has now gotten media coverage world wide. In it, he wrote that his wife and children should mourn him "only as long as necessary," "because they have much good work to do, and they should get busy doing it." He said he was a very lucky man, and that, without his wife and two daughters, his "life would have been little more than a vapor."

Such profound words. If I were to ever write something as moving as that, I would be quite happy.

I shall never again watch one of Mr. Rebhorn's roles with the same lack of recognition for the depth of his real persona. Never again shall I think of him as simply an actor. He was, as my Hebrew ancestors might say, a "Mensch" -- someone to admire and emulate.

The Blue Screen of Death

I have written quite often about the need for having a disaster plan (and good back-up scheme) for your office computer systems. See "Avoiding Long-Term Damage from Catastrophic Events" (see [G&S, Vol. 21, No. 14](#); 04/08/2013), and a follow-up in "June Pot Pie" (see [G&S, Vol. 21, No. 23](#); 06/10/2013). In the latter article, I reported on the physical "crash" we experienced when I dropped the TIBA laptop on the floor, and how disruptions in day-to-day operations are frustrating, regardless of how well you have planned.

This week, at least part of my life could be called the "Computer System Blues." Now, as you know, all good blues songs begin with the phrase, "woke up this morning . . ." Well, although it was not exactly when I woke up Monday morning, but, rather,





when turned on the monitors for our primary computer system. When I performed this usually mundane chore, I was greeted by three very gray monitors and one “blue screen of death” -- that which is often referred to in the parlance as a “stop error.” In essence, this is the on-screen warning one receives when their Windows computer has stopped.

To this case, our system had really stopped. Although we have planned our back-up scheme well and did not lose any client data, etc.,¹ we knew it was the start of a

long week. Completely replacing a drive and an operating system is a pain no matter how you parse it. It is also something that, even with more than 40 years of an on-again off-again relationship with computers, I sometimes lack the patience to do. After alerting all concerned that the system was down (for the count) and there would be no new data stored on the system, the first external call was to our “IT System” -- soft terminology for our independent computer geek. Our version of “Jim Dandy to the rescue.”



In 1995, my primary computer caught a virulent version of the “stoned monkey” virus. What a disaster. Since that time, I have operated as if catching a virus was tantamount catching the bubonic plague . . . or at least a sexually

transmitted disease. I never wanted to go through what I went through with that virus. In some ways, I can say it has never happened again. In fact, the last significant loss of data we experienced was in 2010, when we made the conscious decision to shred client files in which there had been no activity for 10 years or more. I'm not sure how many files went to the commercial shredding service we used, but we



¹ As near as can be told, the only “data” which may have been lost was eMail received between noon on Sunday the 23rd and whenever the hard disk crashed, which was probably 3:30 a.m. on Monday the 24th.



have a receipt showing that there were more than 1400 pounds old school physical files shredded.

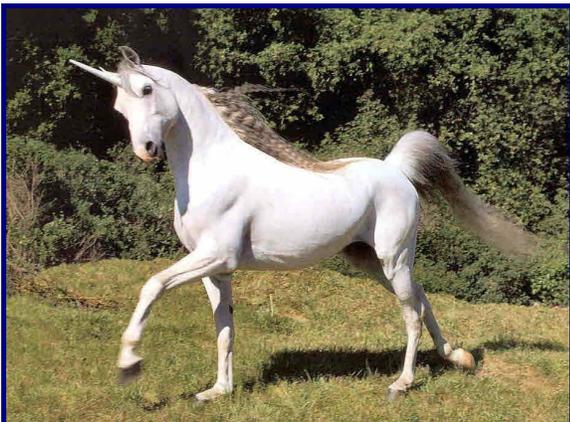
Even with a good back-up plan, installing a completely new operating system (we're not talking a simple "upgrade" here) is the same as getting a new computer. Almost everything has to be reinstalled. Nevertheless, knowing what we were bound to experience, we opted to start over.

We decided to go with a "RAID" system to replace the main drive we had been using. A "RAID system utilizes multiple computer drives to create a redundant automatic back-up system. In theory, this means we won't have go through this catastrophe again, but that remains to be seen . . . and I remain skeptical.

In any event, simply obtaining the two new drives and getting them to the IT guy wasted the first day. Other than distributing the daily and weekly reports, nothing was accomplished that day. The boring details are not important, but restoring our system to its fully working capacity (i.e., reinstalling the hardware and several hundred programs / applications regularly used) took several days. I believe we got back to speed on Friday. Anyway you cut it, this was no fun..

Expunctions, "Time Cuts" and Other Modern Day Unicorns

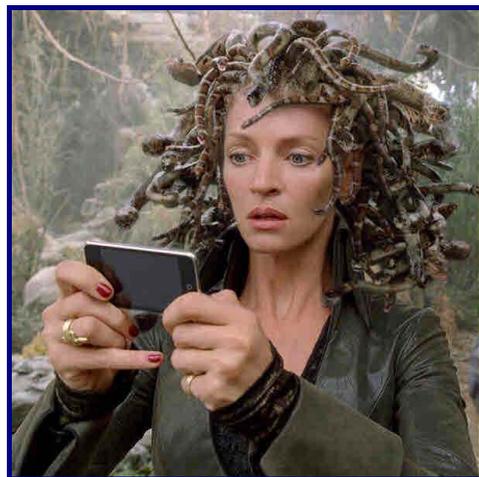
We received hundreds of letters each year from TDCJ inmates. Many of them request free copies of John Jasuta's booklet on habeas corpus. Many are inquiring about obtaining representation in a habeas corpus proceeding. Many, however, are seeking help in obtaining a "time cut." You see, there is this myth, which exists inside prison walls, that there is a procedure to get one's sentence changed to a lesser amount of years. I call it a myth because it simply doesn't happen. Sadly, we have received several letters discussing money paid to lawyers to obtain a time cut.



In theory, the Governor has the authority, upon recommendation from the Board of Pardons and Paroles, "to grant reprieves and commutations of punishment and pardons . . ." The problem is that, in addition to requiring the approval of 2 of the 3 trial officials (Judge, Prosecutor or Sheriff), any commutation in sentence must be based "upon facts directly related to the facts of the cases and in

existence, but not available to, the court or jury at the time of the trial,” and must be to a specific term of years. These are almost insurmountable requirements.

I am aware that, during the years I have been practicing, there have been at least two commutations of sentences from death to life, but, as far as I am aware, all but two of those were juveniles at the time of their particular offense and commutation was a given. The other two were Kenneth Foster (commuted in 2007 by Gov. Perry because he wasn't the shooter), and Henry Lee Lucas (commuted in 1998 by Gov. Bush “because of lingering doubts about his guilt in the so-called ‘Orange Socks’ slaying”). I am not aware, however, of anyone ever having received a reduction in sentence that did not involve a reduction to what was, in essence, time served. It simply doesn't happen.



While there really is no such thing as a time cut, expunctions are real. They happen all the time. The problem, in my opinion, is that they aren't worth the time or money to the people seeking them. When I was a law clerk, more than 30 years ago, trial judges had at least a limited amount of discretion in this area.

That changed some time early on in my career. Where once a trial judge could order an expunction when or if she wanted to do so, now you're either entitled to expunction or you're not. That's regardless of anything else. However you categorize them, expunctions are more difficult to obtain than they were 30 years ago. More importantly, in my opinion, is that the Internet has, for all intents and purposes, rendered expunctions pretty much useless.



Even as late as the mid-1990s, if a lawyer obtained an expunction for his or her client, they would have obtained an enforceable Order requiring all Texas law enforcement and judicial agencies to purge their records pertaining to the arrest of the client. Sometime around 1997, however, private companies began collecting and selling data related to arrests and judicial orders. In my mind, that was the beginning of the end.

Lawyers who have obtained expunctions for their clients tell them that they may deny the occurrence of the arrest and the existence of the expunction order. Under Chapter 55, C.Cr.P., this is correct. Unfortunately, many employers obtain records from on-line services and

are able to obtain expunged information. If a person has obtained employment and told the employer that they have never been arrested -- and the employer later obtains information to the contrary, I know of nothing that prevents that employer from terminating the employer for not having been truthful on the employment application.

Although most of the entities purchasing public information for subsequent sale comply with expunction orders so as not to lose the future ability to obtain the records, that's not the end of the story. I don't think the State of Texas can order "secondary" entities which have already purchased records from one of the public providers to purge their records. So, for example, if a large national employer such as Walmart were to be purchasing arrest records from one of the primary reporting agencies and storing them for future use, an expunction order won't be of any use.

Additionally, because of the wide-spread use of expunctions, many employment applications, rather than asking, "have you ever been arrested," now ask something like "have you ever been arrested, regardless of subsequent court dismissal, sealing, non-disclosure or expunction order." I believe that, as time marches on, an expunction order will mean less and less.



David A. Schulman, one of the founders of TIBA, has been a co-author of this report for many years. He was a member of the Court of Criminal Appeals' staff in 1991-1993, and has been lead counsel in hundreds of direct appeals and habeas corpus proceedings. David reviews every published criminal case from the Court of Criminal Appeals and every Court of Appeals on a daily basis. He has been Board Certified in Criminal Law since 1991 and was one of the first attorneys to become Board Certified in both Criminal Law and Criminal Appellate law. See his website at www.davidschulman.com.