

Collection News™

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Why are the courts so unfriendly to the self-represented?

Bias Against Pro Per Litigants: What It Is. How to Stop It.

By Stephen Elias

From the moment they first contact the court system, most people who want to represent themselves, without a lawyer, encounter tremendous resistance. Within the closed universe of the courts, this bias is as pernicious as that based on race, ethnic origins or sex.

During my 17 years with Nolo Press, the nation's leading publisher of self-help law books, I have spoken with countless competent people, including many who excelled in demanding occupations—physicians, architects, teachers, dentists, inventors, physicians—who, when using Nolo books to handle their own cases, were treated like stupid children by clerks and judges. To a person, they thought they finally understood what it must often be like to be an African-American in our society. That their perception of bias was objectively accurate cannot be doubted in the face of that most deeply insulting bromide, so popular with lawyers: “He who represents himself has a fool for a client.”

This bias exists in direct contradiction to the Supreme Court's ruling in *Faretta v. California*, that everyone has the constitutional right to proceed without counsel. The reasoning behind that decision means that the Constitution



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requires our justice system to be neutral towards the self-represented litigant. That in turn means that the courts must offer a level playing field for the represented and unrepresented alike, consistent with basic principles of fairness.

The Problem

Are courts really biased against self-represented litigants? Clearly so. Here are just some of the realities non-lawyers are up against when they try to use their courts:

- Procedural requirements are often perversely difficult.
- Strange—and unnecessary—terms are tossed about. Court jargon—

should we call it “lawbonics”?—serves as a means to exclude from the courts anyone who doesn't speak the language or doesn't pay a lawyer to translate.

- Judges and their courtroom personnel are often either condescending or downright rude.
- Court clerks withhold information from non-lawyers that they routinely give to lawyers. If a lawyer's office calls to ask about a particular scheduling procedure, for example, the clerk provides all sorts of answers without thinking twice. But let a self-represented person ask for the same (or even much

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less) information, and it suddenly becomes legal advice. Many clerks' offices feel compelled to post signs saying, "We don't provide legal advice!" Most often, that means that they are unwilling to help unrepresented people get into court or respond to a lawsuit. (Imagine if IRS clerks refused to answer questions about how to file a tax return.)

- Even if the clerk's office has a special "pro per" window, it's no guarantee of real help, or even civility. Recently I saw the clerk at such a window hand out information the way some farmers slop the pigs. When I asked whether she had volunteered for the job, she looked at me as if I were crazy.
- County law libraries--in many states, supported by filing fees paid by non-lawyers—are operated almost exclusively for the convenience of lawyers. Non-lawyers are often made to feel distinctly unwelcome and again are visited with the "we don't provide legal advice" admonition when making a normal request for reference information.
- People who show up without lawyers are singled out and labeled (in Latin, no less) as "pro per" or "pro se" litigants. As is frequently true with other group labels imposed on a group from outside it—"cult" and "handicapped"

come to mind—these terms mask a deeper institutional bias.

Why are the courts so unfriendly to the self-represented? They weren't always that way; in the first 100 years of our history, the courts dealt equally with all comers. But in the late 19th and early 20th century, the courts came to

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serve the needs and interests of the legal profession, which took control of them and built a monopoly over who can appear before them as advocates.

There are probably a number of reasons why lawyers and the courts they control are biased against the self-represented. Among them are:

1. Many people could pay a lawyer but choose not to. Their choice repudiates lawyers and their "special gifts" and takes money out of lawyers' pockets.
2. Because non-lawyers are unfamiliar with court procedures that are set up by lawyers for lawyers, they tend to get in the way of smooth court administration (but no more, it should be noted, than do many lawyers).
3. People who can't afford a lawyer are a rebuke to the organized bar's monopoly over legal services, because that monopoly is morally—if not legally—justified only if the legal profession is able to provide affordable justice for all. The lawyer bias against the self-represented is a clear case of blaming the victim—even though for years, the ABA has admitted that 100 million Americans can't afford lawyers.

A number of recent studies funded by the courts and the ABA have advanced the concept of the multi-door courthouse, where courts would offer potential litigants a menu of possible solutions, many of which would not require a lawyer. This concept assumes courts want to reach out to

prospective users and help them resolve their disputes in a manner appropriate to the dispute and the resources of the parties.

Unfortunately, the ideal of the multi-door courthouse is at odds with how courts traditionally operate: to support and enhance the lawyer business by making it extremely difficult to get through court without a lawyer. As long as courts are institutionally biased against creating a level playing field for the self-represented, it will make no difference how many doors a court has.

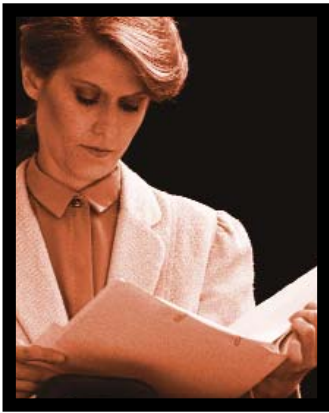
Individual lawyers almost always find it difficult to actually see the bias against the self-represented that pervades our courts, just as a few years ago, judges who complimented woman lawyers on their looks were shocked when they were labeled as sexist. Few lawyers are able or willing to come to terms with the fact that a significant portion of their livelihood is based squarely on barriers to self-representation that the courts erect and enforce.

Some Solutions

Lawyers and their bar associations who do get a glimmer of the access problem tend to think that it's strictly a money issue. They focus their efforts on pro bono services or what legal services programs still exist. This clearly confuses the forest for the trees. Poor and rich alike have a right to use the courts without an intermediary. Or to use a popular means of expressing a fundamental point: It's the monopoly, stupid. It probably is no coincidence that by directing their efforts towards the poor,

lawyers are addressing the access problem only for people who can't afford to pay lawyers.

What to do? Here are 10 suggestions for reforming the way courts deal with self-represented individuals. A few are already being implemented (usually hesitantly and on a small scale) here and there by isolated courts. And there has been one truly magnificent effort, by the Family Law Division of the Superior Court for Maricopa County, Arizona to throw open court procedures to non-lawyers. For the most part, the suggestions set out here require not money but changes in attitude, rules and procedures.



1. *Recognize that bias exists.* As with other forms of bias (against women or minority lawyers, for example), the first step to eliminating bias against non-lawyers is to recognize that it exists.

The best way for a lawyer to understand bias against the self-represented litigant is to become one, an experience I recently went through in a civil proceeding. Even before the judge examined my papers or knew what I was seeking (and whether I was

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on track to achieve it), he expressed deep skepticism that I could competently handle the case myself. After I stood my ground, the judge warned me that I would be held responsible for meticulously complying with every court rule. Lawyers can also learn a lot by coaching a self-



represented person through a judicial procedure. Very quickly, most lawyer-coaches come to appreciate how badly the self-represented are treated by court clerks and judges.

2. *Accept the right of the self-represented to equal access.* Because lawyers and courts are so intertwined, it seems almost reasonable to legal professionals that lawyers are needed for meaningful access. And yet, in a democracy (the rule of law, not men), lawyers should never be necessary to obtain justice.

3. *Adopt the principle of helpfulness underlying the multi-door courthouse.* Courts should actively help people find an appropriate resolution process. For example, a great many disputes could be sensibly and quickly settled without lawyers if courts encouraged mediation (which is happening in more and more courts).

4. *Use existing community legal resources to staff the multi-door courthouse.* Many retired lawyers and judges would probably volunteer to:

- help parties assess and sharpen the issues once the pleadings are on file, and
- counsel the parties on appropriate dispute resolution alternatives

Law students and paralegals could also be trained to perform these tasks.

5. *Make plain-English information about how to navigate in the court available to the public.* All court procedures can be explained in plain English. Nolo Press, other self-help law publishers and the Maricopa County Superior Court have proven that this is so. Unfortunately the courts systematically refuse to inform self-represented litigants about available private-sector publications, apparently on the ground that they don't want to be seen endorsing them. Fair enough. But the courts should then follow the lead of the Maricopa County Superior Court and make plain-English guides available to all.

6. *Unleash court clerks.* Clerks should be free to provide the same information to the self-represented as they do to lawyers and their staffs. If clerks were retrained and instructed that their responsibilities included helping non-lawyers and dispensing procedural information, one large barrier to access would disappear.

7. *Make courthouse law libraries user-friendly.* Like court clerks, law librarians are often afraid to answer even simple questions from non-lawyers. Librarians, like the court clerks, should be encouraged to help non-lawyers, and should be reassured that doing so doesn't constitute practicing law without a license.

Another step would be to fundamentally redesign the *Continued on page 5...*

An Official Workshop of the CAJP/Continuing Education Committee

The Fundamentals of a Successful Asset Investigation

featuring
Ronald L. Mendell MS, CISSP

Saturday, April 14, 2007

San Jose, California

Register online at www.cajp.org

9:00 am – 5:30 pm

Registration 8:30 am

(Lunch included)



**California Association of
Judgment Professionals**

601 Van Ness Ave, Suite E3
San Francisco, CA 94102
Voice/Fax: 877-874-8986

info@cajp.org

www.cajp.org



**DOUBLETREE®
HOTEL**

SAN JOSE

2050 Gateway Place
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Questions?

E-mail: pwith@mac.com

*CAJP reserves the right to
revise the course outline or
faculty if circumstances are
beyond our control.*

Asset investigations are the core of a judgment collection business. This workshop covers the fundamentals of asset investigations in today's privacy-sensitive environment. The techniques discussed include pursuing paper and digital trails in finding assets. Registrants will receive a copy of *How To Do Financial Asset Investigations*, (Third Edition, 2006) by Ronald Mendell. The full day of classroom time will serve to reinforce and expand on the textbook's content. In addition, students will receive handouts to aid in summarizing the material and to provide an investigative roadmap for future use.

Dealing with a Growing Paperless Society

- The identity theft crisis
- Disappearing financial records in paper format
- Impacts on investigators
- Avenues of information access in the Digital Age
- Investigative techniques in the Digital Age

Traditional Methods

- Basic identifiers
- Relatives and associates
- Basic records: Individuals and Businesses
- Dumpster diving
- Finding hidden assets
- Advanced techniques: Individuals and Businesses
- Case management of an asset investigation

Investigating Using Computer Technology

- Digital devices as the ultimate recorders of transactions
- Introduction to computer forensics
- The increasing role of computer-based evidence in asset investigations
- When an asset investigator may access a subject's digital device
- Slack space, metadata, and "hidden files" on computers and PDAs
- Digital dumpster diving
- Preserving evidence
- Forensic examination by an expert
- Recapping Internet methods

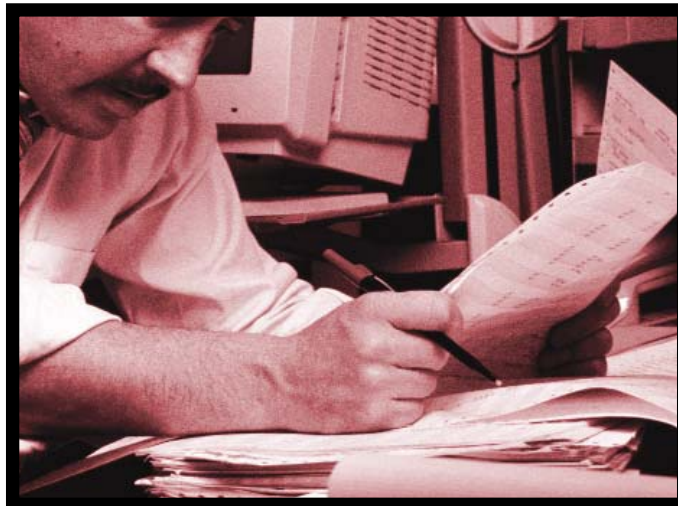
What You Will Learn

- The various types of electronic documents used to store asset information
- Strategies for discovering those documents
- Investigative methods for the Internet
- How to do basic and advanced asset investigations for individuals and businesses
- Following a paper trail
- Locating hidden assets
- About seeing trash as clues in an investigation
- Managing an asset investigation
- Understanding the role computer forensics can play
- Digital dumpster diving
- Preserving computer evidence

Ronald Mendell writes, researches, and consults on computer security, investigative matters, industrial espionage, and business intelligence topics. He recently joined the faculty of



Our Lady of the Lady University in San Antonio, Texas and also does technical writing for a high-tech company in Austin, Texas. Mr. Mendell has contributed to *Security Management*, *SecurityPortal.com*, *White-Collar Crime Fighter*, *PI Magazine*, and *SecurityFocus.com*. He has four published books, the first of which was *How to do Financial Asset Investigations* published by Charles C. Thomas. He has worked as a legal investigator for thirteen years inquiring into diverse cases ranging from product liability to medical malpractice to financial investigations. Holding a B.S. degree in the Humanities from the University of the State of New York Mr. Mendell completed computer security training at Ohio University, the University of Texas at Austin and criminal investigation coursework at the University of Oklahoma. He was granted a Master of Science degree in Network Security in 2005. In addition, he earned the Certified Information Systems Security Professional (CISSP) designation in November 2005.



BIAS*Continued from page 3...*

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law libraries so that non-lawyers would feel more comfortable with:

- user-friendly orientation aids to the library's resources
- special shelves and collections of materials that self-represented litigants commonly need, and
- assistance in using online resources.

8. *Accept all complaints, petitions and responses filed, in whatever form, and create user-friendly forms.* Among the most obvious of barriers to equal access are rules governing the form of the papers people need to start a lawsuit or defend themselves if they are sued. Complicated pleading rules definitely operate to deny equal access. In fact, a simple plain-English statement of claim (as is used in many small claims courts) or a fill-in-the-blanks, check the boxes type of complaint form used in California courts is all that's needed in most common kinds of cases. Later, the legal and factual issues can be sorted out by a mediator or judge. The Superior Court of Maricopa County has created a number of easy-to-use forms for its Family Court, and by all accounts, people are able to handle them with little help from court personnel.

Fee waivers should be granted upon request for the purpose of filing a response and preventing a default. Later in the case, the defendant's ability to pay can be sorted out. (This is the typical procedure used by the criminal courts when a defendant requests a court-appointed lawyer.)

9. *Use small claims court techniques in bench trials.* Most states have revamped court rules and procedures to accommodate non-lawyers very well in one place: their small claims courts. Small claims cases are not simple; many are conceptually difficult. (Lawyers have been willing to accommodate the small claims court system because those cases present little or no potential for fees.)

When cases go to trial before a judge, there is no reason to insist on formal procedures or evidence rules. The judge should facilitate each side's presentation as is done in small claims court, rather than sit back and make the parties present their cases under arcane rules that take years to master. This approach would not violate due process, because judges would base

their decisions on competent and relevant evidence.

10. *Encourage lawyer coaching.* Many self-represented litigants are willing to pay lawyers to coach them through their cases—that is, give them information about the ins and outs of court and the substantive issues—without taking the case over. Yet, few lawyers are willing to enter into this type of relationship because of ethical concerns about participating in a case they don't control, and fear of being held liable for issues that are beyond the scope of the coaching relationship. The organized bar should address these concerns by:

- defining the ethical duties of a lawyer coach, and
- sponsoring legislation that would create a standard contract defining the rights and responsibilities of the lawyer coach and the self-represented litigant. ■

Stephen R. Elias is an attorney and former associate publisher at Nolo, as well as current President of National Bankruptcy Law Project.



He is the author of many Nolo books, most recently *The New Bankruptcy: Will It Work for You?* Other titles include *Special Needs Trusts: Protect Your Child's Financial Future*, *How to File for Chapter 7 Bankruptcy*, and *Legal Research: How to Find and Understand the Law*. He is also one of the original authors/designers of Nolo's best-selling *WillMaker* software. Steve holds a law degree from Hastings College of Law and was a practicing attorney in California, New York and Vermont before joining Nolo in 1980. He has been featured in such major media as *The New York Times*, *The Wall Street Journal*, *Newsweek*, *Good Morning America*, *20/20*, *Money* magazine, and more.



Inside CAJP *What's New*



Membership

CAJP membership has hit an all-time high at 180 members. The rise in membership can be attributed to a number of factors, including CAJP's high-ranking website, a growing number of new member benefits and a successful continuing education program, all of which spreads the word of our 100% volunteer organization, dedicated to serving its judgment collectors. If you know of an associate in the judgment collection industry who would appreciate receiving CAJP's newsletter, e-mail californiajrs@aol.com to add them to the mailing list.

Welcome, Jay.



CAJP has a new honorary member! Jay D. Adkisson joins the elite team of honorary members which include the Honorable James Brown and attorneys Ron Sargis and Richard Enkelis. Jay is an attorney in private practice with the firm of Riser Adkisson LLP, with main offices in Atlanta, Geor-

gia. He is also the Director of Private Client Services of Select Portfolio Management, Inc., having offices in Aliso Viejo, California. Mr. Adkisson received his B.A. and J.D. degrees from the University of Oklahoma, and was a member of the Oklahoma Law Review. He is admitted to the Oklahoma Bar Association and the State Bar of Texas, as well as various federal district and appellate courts nationwide. Mr. Adkisson concentrates his practice on creditor-debtor planning and commercial litigation. Mr. Adkisson is one of the authors of "Asset Protection: Concepts and Strategies" (McGraw-Hill 2004), and a regular lecturer at American Bar Association and state and local bar association conferences on the topic of wealth preservation planning. Jay is internationally known as the creator of Quatloos.com, an Internet website that exposes tax and financial scams, and he has twice been an expert witness to the U.S. Senate Finance Committee regarding tax scams. He has also been the feature of articles in *Forbes*, the *Wall Street Journal*, the *Financial Times*, and has appeared on ABC's 20/20. Having earned his private pilot's license after losing an eye to cancer, Mr. Adkisson has also authored "Lost Eye: Coping with Monocular Vision" and "Equity-Indexed Annuities: The Smart Cons".
www.assetprotectionbook.com
www.jayadkisson.com
www.quatloos.com

Changing of the Guard

On January 2 Vice President Travis Farnsworth was installed as CAJP's seventh President in an online board meeting. Travis has a decade of experience in judgment collection; however, CAJP's new president got into the business by accident. In 1996 Travis owned a semi-conductor company that obtained in excess of \$400,000 in judgments against its customers. Realizing that the attorneys who won the judgments were unable to collect the judgments, Travis made it his mission to learn how to collect from the debtors who had run off with his working capital. After collecting most of what was owed, Travis founded Judicial Revenue Service, a Southern California based judgment collection firm that has been collecting judgments ever since.

Travis' productivity has been evident from the moment he joined the Board of Officers in 2006. During his first year he was instrumental in the development of www.cajpforum.org, a members-only forum where CAJP members can quickly search through the more than 23,000 archived judgment enforcement articles and downloadable files that have accumulated since the inception of the organization. The forum hosts the voting for CAJP's annual elections and provides the Board of Officers with resources to keep track of online motions. It is also the portal to LoisLaw, where members can log on to access

treatises and conduct legal research, a free member benefit. Travis also implemented a CAJP Webinar system where members will be able to attend live Internet educational conferences on topics directly related to judgment enforcement. He is also working on implementing CAJP's own case management software program tailored for judgment professionals which is scheduled for release in 2007, free of charge to CAJP members in good standing. In addition to being a key member of CAJP's prolific Continuing Education Committee, Travis is working on implementing a state-of-the-art Internet library system for the CAJP. The virtual library will be exclusively available to members, providing online legal research, reference guides, public records, and more.

Annual Conference 2006



CAJP's annual conference opened to a packed audience which was more than double the previous year. The conference was held October 14-15 at the Doubletree Hotel in San Jose. A wide range of

judgment enforcement topics were covered by speakers which included Travis Farnsworth, Ron Sargis, Esq., Stephen Elias, Esq., Raymond Goldstein, Esq., Patrick Bulmer, Richard Enkelis, Esq., Bill Fason and Jaime Holmes, CPA, JD, CVA, ABV and Walter 'Meany' Steinmann. Attendees received two full days of classroom time, as well as lots of 'networking' and good food. CAJP's Master of Ceremonies, Al Jones, deftly kept the packed agenda moving along with good humor.

Conference sponsors and donors included Datafax-inc.com, IRB Search, LLC, Totality Software, Merlin Data, Nolo Press, The Rutter Group, CEB, Aspen Law, Peter Gilboy and Tiffany Salls. Thanks to all the speakers and sponsors whose contribution made this conference highly successful.

2007 Continuing Education Events

April 14, 2007

How to do Financial Asset Investigations/San Jose

April 2007 Workshop



Ronald Mendell, author of "How to do Financial Investigations" will

present a full-day workshop for CAJP on conducting financial investigations at the Doubletree Hotel in San Jose, California on Saturday, April 14th. Students will receive the latest edition of Mr. Mendell's book.

To register, visit the Events section of www.cajp.org. Special rates are available for early registration.

April 15, 2007

Judgment Recovery for Beginners/San Jose

(Above items see 'Events' at cajp.org to register.)

October 2007

Conference

Southern California – TBA

October 2007

Judgment Recovery for Beginners – TBA

Judgment Enforcement Part I and II

by Richard Enkelis, Esq. – TBA

Still not registered for www.cajpforum.org?

Notice to All Members:

CAJP has migrated from the Yahoo Groups to the CAJPFForum where the new message list is being hosted. You *must* register at the Forum for uninterrupted access to the CAJP message board!

Get the most from your membership by registering. The Forum is a free benefit of membership:

- Access miscellaneous files posted by other members
- CAJP Photo gallery
- Motions and pleadings
- Court Forms
- Portal to Lois Law—research case law in all states, access to treatises, including "Judgment

Enforcement" by Hon. James Brown

- Sophisticated search function. Search the CAJP message archives for your topic of interest ...and more!

How to register for CAJPFORUM

1. You must be an active member of the CAJP in order to register for www.cajpforum.org.
2. Go to www.cajpforum.org.
3. Click "enter" to enter the forum.

4. Click the red "Register" link in the upper right corner.

5. Fill out the registration form. Be sure to include your full signature block.

6. To insure prompt approval, be sure to set your username as "first name last name". Usernames not conforming to this format will result in delayed approval.

7. Wait for an e-mail confirmation that your application has been approved.

CAJPFForum requires manual approval by the moderators. The approval process is usually less than 24 hours; however, in some cases it may take several days.



California Association of Judgment Professionals

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California Association of Judgment Professionals

601 Van Ness Avenue, Suite E-3
San Francisco, CA 94102
Voice/Fax 877-874-8986
info@cajp.org • www.cajp.org

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Ramona Featherby, *Editor*
Laura Lamar/MAX Design Studio,
Design and Production
Judgment Collection News
welcomes your submissions.
E-mail to Californiajrs@aol.com
Submissions may be edited.

Pretexting Update

By Ramona Featherby

Definition:

"the use of false pretenses, including false statements and impersonation, to obtain consumers' personal or financial information."

Criminal penalties: Fine in accordance with Title 18 of US Code and/or imprisonment up to five years

It's been all over the news. Since when has pretexting become such a hot topic? It appears to have gotten a giant kick start from a most unlikely candidate, Hewlett-Packard's (HP) Chairwoman Patricia Dunn. Fed up with leaks to the media from HP's Board of Directors, Dunn covertly acquired the phone records from its board members to obtain a pattern of contacts and calling. Although eavesdropping was not involved, the unauthorized access of records touched off a public relations disaster for HP. Not only did Dunn become Newsweek's cover girl, a warrant was triggered for her arrest. It was a sad chapter in the brilliant career of a cancer survivor with humble beginnings in Las Vegas. In addition to fines, the four counts in the felony complaint carry prison sentences of up to three years.

But does the punishment fit the crime? Dunn did something stupid and unquestionably wrong. Was the crime so egregious in nature or had the world's largest technology company—with 150,000 employees and one billion customers in 170 countries—become an irresistible target? This question may have been answered on December 7, 2006 when Attorney General Bill Lockyer

announced that HP entered into a \$14.5 million settlement to settle his civil suit and that HP will "finance a new law enforcement fund to fight violations of privacy and intellectual property rights." With state funds drying up, a review of the past year reveals that the attorney general has indeed been scoring legal touchdowns while finding alternative ways to secure new funding.

(In an ironic twist, the private information (date of birth, address, etc) of Patricia Dunn and her fellow co-conspirators was made public when their arrest warrants were posted on the Internet by the Office of the Attorney General of California.)

The HP scandal pointed out the need to tighten up privacy laws, as pretexting is expressly prohibited to obtain financial information but phone records fall into a gray area. "Stealing someone's private phone records is a criminal act, but it can't be prosecuted," Senator Charles Schumer has remarked. "Phone information and call logs should be protected with the same safeguards as financial data or medical records. With pretexting companies popping up across the country, law enforcement needs the tools to track down these criminals and put this industry out of business."

On December 11, 2006 Schumer's TRAPP bill passed Congress. The TRAPP Act will make it a federal offense, punishable as a felony, to obtain customer information from a telephone service provider by false pretenses or access a customer account on the Internet to obtain billing information without authorization.

But in a surprise turn, a few days earlier, Senator Debra

Bowen's SB 1666, California's tough anti-pretexting bill, went down in flames after sailing through the Senate. The demise was due in large part to the effective lobbying by the Motion Picture Association of America. The MPAA was able to convince legislators that pretexting was necessary to discover the source of illegal downloading. It was a disappointment for the ambitious Bowen, a consumer rights advocate with sights set on the office of the California Secretary of State.

There is a lesson here for judgment collectors. Just how clean is the data you are purchasing? Dunn maintained she was assured that 'only legal means' would be used to obtain records. Plausible deniability didn't work. There can be little sympathy for those data companies who brazenly offered records for sale on the Internet and are now the subject of a criminal investigation. In California there is no legal way to purchase phone records from data brokers. Furthermore, there never has been.

Unlike Dunn, judgment creditors have the legal right to personal information—if properly obtained. Not only must your debtor deliver phone records and even more sensitive data when properly subpoenaed, you can charge back your costs for obtaining this information on a Memo of Costs. But pretexting to get those same records remains illegal—even when you have a permissible purpose.

Ramona Featherby is a judgment enforcement specialist in San Diego and Past President of CAJP.

