WINTER 2005 VOL. 11 NO. 3

Texas Paralegal Journal

TPJ

Criminal & Family Law

TECHNOLOGY ETHICS EVENTS EDUCATION

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PRESIDENT'S *Message*

Ellen Lockwood, CLAS, RP

Since the focus of the Division this year is ethics, I thought I would provide some information on where ethics information can be found. Although paralegals, unlike attorneys, aren't required to attend ethics CLE each year, it is our responsibility to seek out ethics education in addition to other CLE.

If you have a specific ethics question, the Division has three great sources of answers:

- Check out the Ethics FAQs at *www.txpd.org* by clicking on "TXPD Home" at the top, then clicking on "Ethics FAQs" in the drop-down menu.
- Contact the Division's Chair of the Professional Ethics Committee, Laurie Borski, at *ethics@txpd.org* or 210.250.6041. She can answer your questions as well as direct you to other resources as necessary.
- Search the ethics articles in the TPJ archive. Most of the ethics articles are in the "Scruples" column. Just go to *www.txpd.org*, and put your cursor in the search box on the right-hand side of the page. Type in "ethics" or "scruples," then use the drop-down menu to change the search region to "TPJ."

There are also many sources of ethics CLE and general information:

- Division CLE offerings, including TAPS and District CLE
- Online CLE through the Division's website
- Local paralegal association CLE
- Local bar association CLE events
- Ethics opinions and articles in the *Texas Bar Journal*
- The Division's Code of Ethics (go to *www.txpd.org*, click on "TXPD Home" at the top, then "Professional Ethics in the drop-down menu)
- Ethics information at *www.nala,org* and *www.paralegals.org*

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WINTER 2005 VOL. 11 NO. 2

TPJ Texas Paralegal Journal

Focus on . . .

Criminal & Family Law
By outlining the criminal statutes which would be most likely to arise in the family law setting, this paper is a useful guide in providing the family law practitioner with the information necessary to make sure that both practioner and client are protected.

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Some Fine Points of Legal Drafting, Part 1
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While there is no shame in not knowing the answer to an ethics question, there is **no excuse** for not finding out the correct answer. You should also *not* assume your attorney knows the correct answer. Too often attorneys ask paralegals to do things paralegals are prohibited from doing.

If you cannot locate the answer immediately, here are a few guidelines you could use to try to determine the correct course of action:

If the action requires you to act in a manner that would be representing the client such as signing a pleading (even by permission), then you should not do it as it is likely prohibited. Remember *you do not represent the client*, your attorney does.

If there is no rule that specifically allows a paralegal to do something, particularly something that would be considered representing the client, you would be safer not to do it.

A general guideline is not to tell a client anything that would affect a client's course of action. *Always* ask your attorney if you may provide information that could be considered legal advice and be sure to pass along the information as being from the attorney.

If in doubt, don't. It is never wrong *not* to do something.

As paralegals, we must be familiar with our code of ethics as well as attorney ethics requirements. As members of the Paralegal Division, we should work hard to serve as ethical examples and to help educate our attorneys regarding paralegal ethics.

Board of Directors Meeting
February 24 – 25, 2006
Crowne Plaza Hotel – Near the Galleria Mall, Dallas, TX

2006 Annual Meeting – Celebrate the Division's 25th Anniversary (in conjunction with the State Bar of Texas Annual Meeting)
June 15-16, 2006, Austin, TX

2006 Texas Advanced Paralegal Seminar
September 20-22, 2006
Crowne Plaza Hotel – Near the Galleria Mall, Dallas, TX

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EDITOR'S *Note*

by Rhonda J. Brashears

I hope that each and every one of you had a very Merry Christmas. Wouldn't it be great if this new year went exactly as we wish it would, that life would give us nothing but sunshine and roses, without the thorns? Well, I know we all would take advantage of that opportunity if it was offered, but of course, we never have such a guarantee.

However, there is a way for you to get the most out of life in the next year and that is to set some realistic goals and work towards meeting them. How many times have we made these outlandish resolutions at the beginning of the year, most of which were not obtainable, and just set ourselves up for failure. A realistic goal is much easier to reach than a "pie in the sky" resolution. The added plus is that you when you reach those realistic goals, you will feel good about what you have accomplished and will be ready to set the next realistic goal toward the next step in making your life exactly as you wished it could be. It is not too late to set those goals, even though this magazine may not reach you before New Year's Day.

I wish you a happy New Year, sunshine and roses without too many thorns and most of all the accomplishment of your realistic goals.

2005 Bylaws Amendments Results

Question 1: Article I, Section 3, Definition of Legal Assistant (Change to Paralegal)
Passed: Yes: 199 No: 2

Question 2: Article III, Section 3, Eligibility to Hold Office (as President-Elect/President of the Paralegal Division)
Passed: Yes: 168 No: 33

Question 3: Article III, Section 4, Board of Directors, Districts (Redistricting)
Passed: Yes: 191 No: 10

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DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS AUGUST 15, 2005.

Focus on . . .

Criminal & Family Law

Lynn Kamin

Introduction

The story that hit the news wires around the world last summer, about Clara Harris, the Houston woman who killed her philandering husband by driving over him repeatedly with her car, was one that no doubt struck a nerve with most family law practitioners. Given the raw emotions involved in divorce cases, which can drive even the most grounded participants to irrational behavior, most family law practitioners carry in the back of their mind the fear that a violent episode like that could occur in a case in which they are involved. Thus, when one thinks of criminal law in the context of family law matters, the first thing that usually comes to mind is violence or potential violence against a spouse by a spurned partner.

While criminal violence is occasionally an issue in family law cases, there is a wide array of criminal issues that can arise in the context of a family lawsuit, most of which have little to do with the classic example of inter-family violence. In this paper, we shall examine some of the ways in which either a party or a lawyer in a family law case can find himself in violation of a criminal statute.

II. Gun Laws and Family Law

A. Federal Gun Laws, Standard Mutual Injunctions, and *U.S. v. Emerson*

The most significant recent development in the area of criminal law applicability to family law issues comes in the arena of federal firearm legislation. Federal law makes it a criminal act for certain individuals to possess or obtain firearms. Under 18 U.S.C.A. 6 922, now known more commonly as the "Brady Bill", Congress has outlined a broad collection of restrictions regarding to acquisition or use of firearms for certain classes of individuals.

The section of the act which is most relevant for family law practitioners and their clients is subsection (g). 18 U.S.C.A. 6 922(g) states:

"It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to any controlled substance (as defined in

section 102 of the Controlled Substances Act (21 U.S.C. 802));
(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
(5) who, being an alien—
(A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26));
(6) who has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;
(8) who is subject to a court order that—
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C.A. 6 922(g).

The mutual injunctions that are put in place in most family law cases in Texas contain standard language prohibiting the use or threatened use of violence by one party to the divorce case against the other party. Therefore, it would appear that anyone subject to such an injunction in a divorce case is prohibited from possessing a firearm – even if, as in most cases, the language in question is simple formbook language that is included without any judicial finding that there is a credible threat of domestic violence occurring.

This would seem to be solely a theoretical debate over intent and interpretation, unlikely to ever be addressed in a real world situation, since it is difficult to imagine a situation where a person subject to such an injunction would be indicted and prosecuted under federal gun laws, absent some other aggravating circumstance. However, such a prosecution did take place in Texas in 1998, against a defendant who owned a pistol before a temporary injunction was put in place, resulting in a 2001 Fifth Circuit Court of Appeals decision which should trouble family law practitioners.

The case in question is *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001). In *Emerson*, the husband/defendant, Dr. Timothy Emerson, appeared *pro se* and announced ready at a temporary hearing in his divorce case. *Id.* at 210. Sacha Emerson, Dr. Emerson's wife, testified primarily on financial matters, but also offered uncontroverted testimony regarding a threat by Dr. Emerson to kill Ms. Emerson's paramour. *Id.* at 210-11. On September 14, 1998, after hearing the evidence, the Court issued temporary orders which included enjoining Dr. Emerson from twenty two specifically enumerated acts, including:

"2. Threatening Petitioner in person, by telephone, or in writing to take unlawful action against any person.
4. Intentionally, knowingly, or recklessly causing bodily injury to Petitioner or to a child of either party.
5. Threatening Petitioner or a child of either party with imminent bodily injury."

Id. at 211.

At the time the temporary orders were entered, Dr. Emerson owned a Beretta pistol, which he had purchased a year earlier. *Id.* at 212. Dr. Emerson, apparently, never disposed of the pistol, and on December 8, 1998, a federal grand jury for the Northern District of Texas, San Angelo division, returned a five-count indictment against him. *Id.* at 211. While four of the counts were eventually dismissed, "Count 1 . . . alleged that Emerson on November 16, 1998, unlawfully possessed 'in and affecting interstate commerce' a firearm, a Beretta pistol, while subject to the above mentioned September 14, 1998 order, in violation of 18 U.S.C. 6 922(g)(8)." *Id.*

The district court ultimately dismissed Count 1 of the indictment on Second and Fifth Amendment grounds, and the state appealed. *Id.* at 212. On appeal, Dr. Emerson argued that dismissal was appropriate on statutory grounds, claiming that the statute should be read to apply only in those cases where an express judicial finding is made that there is a credible threat of violence, and that the underlying order must be supported independently by sufficient evidence so as to allow an independent determination regarding the validity of the order. *Id.* at 212-13. The appeals court disagreed, opting instead for a literal reading of the statute, which states only that the Court must explicitly forbid the use of threats or violence against a spouse or minor child. *Id.* at 213-15. Furthermore, the appeals court dismissed Dr. Emerson's claims that the indictment should be dismissed on Second Amendment, Fifth Amendment, and Commerce Clause

grounds, ultimately reversing the trial court's decision and remanding the case to the lower court for prosecution. *Id.* at 264-65.

This decision should raise a red flag for all family law practitioners throughout Texas. Quite simply, the Fifth's Circuit interpretation of 18 U.S.C. 6 922(g) affirms that it a federal criminal offense to possess a firearm while under an injunction, issued after notice and hearing, which contains the standard violence/harassment language which is included in 95% of the mutual injunctions and temporary orders which are entered in family law cases. Given that almost half the households in Texas contain at least one gun, this decision can have very troubling and far-reaching consequences.

First, it should be noted that the Court makes it clear that the law does not apply to an individual served with an *ex parte* temporary restraining order. The *Emerson* Court makes a point of clarifying that an August 28, 1998, temporary restraining order which was served on Dr. Emerson was "not the order alleged in the indictment, and in any event it is not within the terms of 6 922(g)(8)(A) which requires that the order have been 'issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate.' " *Id.* at 211 & n2.

However, if injunctions are put in place as a result of a temporary hearing or after a temporary hearing occurs, the party possessing the firearm is in violation of the federal statute. It would appear that this would be the case even if the parties waive a hearing and enter into agreed mutual injunctions or agreed temporary orders which include the "magic words" regarding threats or violence. Moreover, there are no statutory exceptions included in 18 U.S.C. 6 922(g), so it would appear that once the injunction is in place, the ban on possession is absolute, until further order of the Court.

This ruling places on the family law practitioner the duty to explain the ramifications of the boilerplate injunction language. While previously, mutual injunctions could generally be agreed to with a minimal amount of controversy, now the lawyer must clarify whether or not his client possesses any firearms before agreeing to any injunctions containing such language. Should the client own a gun, it will be necessary to eliminate the language from the injunctions which would trigger the applicability of 18 U.S.C. 6 922(g).

In a scenario where your client owns a gun and the other side is insisting on including the injunctions against violence or threats in any injunctions, you have little choice but to seek a hearing, unless your client agrees to voluntarily relinquish his firearms during the pendancy of the suit. At the hearing, it will be critical for you to spell out specifically for the Court your concerns regarding the applicability of 18 U.S.C. 6 922(g) and the reasons why your client's right to keep his firearms should outweigh the other side's equitable right to an injunction. Should the Court issue an injunction anyway, you should ask the Court to specifically order a date and place by which your client must turn over his weapons, and include language regarding his right to retrieve those weapons upon the expiration of the order. Furthermore, to avoid future complications, once the case is resolved, it may be worthwhile to request the Court to enter an order dissolving the temporary injunctions and specifically authorizing your client to re-gain possession of his weapons.

For clients whose occupations require that they be armed, such as law enforcement officers, avoiding having such an injunction imposed by the Court obviously takes on much greater significance. If your client has engaged in behavior that would appear to make him a clear and present danger to the other party or the child, your chances of avoiding the "magic words" from the Court would appear to be slim. If, however, your client's behavior has not risen to such a level, the fact that the imposition of such an injunction would basically strip him of his livelihood should be enough to prevent the Court from making such a draconian ruling, so long as you make it clear to the Court what the consequences of such a ruling would be, in light of the *Emerson* decision. If the Court chooses to enter such an injunction anyway, it would appear that mandamus would be the most applicable remedy to pursue.

While the author agrees that, practically speaking, it would be extremely unusual for a federal prosecutor to pursue an indictment against an individual for possessing a firearm while injunctions are in place in a divorce case, where no violence has been, it nevertheless is an issue that, in light of *Emerson*, one should need. Obviously, the consequences for an individual who is charged with a crime based on such a misunderstanding would be severe; and similarly, the liability for an attorney who allowed such an injunction to be issued without contesting it or advising the client of the possible consequences would be great, as well.

B. Other Consequences of Gun Laws

The State of Texas has also set out provisions in the penal code restricting the possession of firearms by individuals involved in family violence:

> "(b) A person who has been convicted of an offense under Section 22.01, punishable as a Class A misdemeanor and involving a member of the person's family or household, commits an offense if the person possesses a firearm before the fifth anniversary of the later of:
> (1) the date of the person's release from confinement following conviction of the misdemeanor; or
> (2) the date of the person's release from community supervision following conviction of the misdemeanor.
> (c) A person, other than a peace officer,

as defined by Section 1.07, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision, who is subject to an order issued under Section 6.504 or Chapter 85, Family Code, under Article 17.292, Code of Criminal Procedure, or by another jurisdiction as provided by Chapter 88, Family Code, commits an offense if the person possesses a firearm after receiving notice of the order and before expiration of the order."
Tex. Pen. Code 6 46.04(b)-(c).

Tex. Pen. Code 6 22.01, referenced in the excerpt above, is the code section criminalizing assault. Thus, an individual convicted of assault on a family member cannot legally possess a firearm until five years after his release from jail or the end of his probation period.

If an individual is subject to a protective order under 6 6.504 of the Texas Family Code, he is also prohibited from possessing a firearm. This is covered both by state law, under Tex. Pen. Code 6 25.07(a)(4), and by federal law, under 18 U.S.C.A. 6 922(g)(8). While violation of a protective order is a criminal offense, as discussed in more detail below, the existence of both federal and state criminal statutes which prohibit an individual subject to a protective order from even possessing a firearm is a detail which family law practitioners must be aware of.

III. Information Crimes and Family Law

A. Communications Interception

The Texas Penal Code prohibits the interception of communications as follows:

"(b) A person commits an offense if the person:
(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;
(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
(3) intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if the person knows or is reckless about whether the information was obtained through the interception

of a wire, oral, or electronic communication in violation of this subsection;
(4) knowingly or intentionally effects a covert entry for the purpose of intercepting wire, oral, or electronic communications without court order or authorization; or
(5) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when the device:
(A) is affixed to, or otherwise transmits a signal through a wire, cable, or other connection used in wire communications; or
(B) transmits communications by radio or interferes with the transmission of communications by radio."

Tex. Pen. Code 6 16.02(b).

The definitions of the terms used in 6 16.02 are set out in Tex. Crim. Proc. Art. 18.20. The unlawful interception of a communication under 6 16.02(b) is a second degree felony. Tex. Pen. Code 6 16.02(f).

While this statute applies to non-consensual recording of conversations, it is not necessary for both parties to the conversation to consent for the recording to be legal. So long as one party to the conversation consents to the conversation being recorded, the act of recording is consensual. *Esterline v. State*, 707 S.W.2d 171, 173 (Tex. App. – Corpus Christi 1986, pet. ref'd).

On the other hand, some people seem to believe that recording conversations involving one spouse that occur within the household, or on phones that are maintained in the household, are exempt from the wiretapping statute, this is not the case. Texas courts have repeatedly rejected the argument that a party is entitled to intercept the communications of a spouse through electronic means. *See, e.g., Kent v. State*, 809 S.W.2d 664 (Tex. App. – Amarillo 1991, pet. ref'd); *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. – Houston [1st Dist.] 1995, *writ denied per curiam*, 923 S.W.2d 569 (Tex.1996)); *Duffy v. State*, 33 S.W.3d 17 (Tex. App. – El Paso 2000, no writ).

The interception of communications is also a violation of federal law, under 18 U.S.C.A. 6 2510(5). The Texas penal provision is not pre-empted by the federal statute. Op.Atty.Gen.1982, No. MW-463.

B. Pen Registers and Trap and Trace Devices

Through the marvels of modern technology, private individuals are now able to purchase electronic devices that seem to be straight out of a James Bond movie. One of those devices is a "pen register". A pen register is defined under Texas law as a "device that attaches to a telephone line and records or decodes electronic or other impulses to identify numbers dialed or otherwise transmitted on the telephone line". Tex. Crim. Proc. Art. 18.20.

Texas law provides that:

"(a) A person commits an offense if the person knowingly installs or uses a pen register or trap and trace device to record or decode electronic or other impulses for the purpose of identifying telephone numbers dialed or otherwise transmitted on a telephone line."

Tex. Pen. Code 6 16.03(b).

Violation of this statute is a state jail felony. Tex. Pen. Code 6 16.03(d).

C. Stored Electronic Communications

As our society advances technologically, more and more sensitive information is being sent and stored electronically. As a result, however, such information is vulnerable to remote attack or access by technologically savvy third parties, particularly when the information is being stored by someone who does not anticipate an attack or is not aware of the vulnerabilities of their electronic security system. The legislature has made improper access to stored electronic communications a crime as follows:

"(b) A person commits an offense if the person obtains, alters, or prevents authorized access to a wire or electronic communication while the communication is in electronic storage by:
(1) intentionally obtaining access without authorization to a facility through which a wire or electronic communications service is provided; or
(2) intentionally exceeding an authorization for access to a facility through which a wire or electronic communications service is provided."

Tex. Pen. Code 6 16.04(b).

Electronic storage is defined as "(A) a temporary, intermediate storage of a wire or electronic communication that is incidental to the electronic transmission of the communication; or (B) storage of a wire or electronic communication by an electronic communications service for purposes of backup protection of the communication." Tex. Crim. Proc. Art. 18.20. Violation of this statute is a state jail felony. Tex. Pen. Code 6 16.03(d)

This is a relatively new area of the law, and it remains to be seen how the courts will administer it in the domestic context. Something to keep in mind, however, is that this criminal statute would appear to be applicable in cases where one spouse accesses the email account of another spouse, and reads and/or downloads the email messages. Electronically stored data is discoverable and should be requested by the family law practitioner in a case where the data may be relevant.

D. Tracking Devices

One of the elements of science fiction which has recently come to life and been made available to the common person is

vehicular tracking devices. These have become quite common in our society, as companies such as Lojack promote the installation of devices on cars which can allow the company to use satellite technology to locate the car with precision anywhere in the world.

However, while these devices are promoted as a way to eliminate car theft, they can also be used by for less wholesome purposes by someone who wishes to simply track the whereabouts of another person. This issue has been recently addressed by the Texas legislature, and the Texas Penal Code now provides:

> "(b) A person commits an offense if the person knowingly installs an electronic or mechanical tracking device on a motor vehicle owned or leased by another person."
>
> Tex. Pen. Code 6 16.06(b).

A "mechanical tracking device" is defined as "a device capable of emitting an electronic frequency or other signal that may be used by a person to identify, monitor, or record the location of another person or object." Tex. Pen. Code 6 16.06(a)(1). Violation of this statute is a Class A misdemeanor.

One gray area that appears to exist in this law is its applicability in a divorce case. The statute prohibits the installation on a vehicle "owned or leased" by another. However, in a hypothetical situation where a community property vehicle is in the name of husband, but driven by wife, it could be argued that husband, legally, may install the tracking device on wife's car and monitor her movements, as he is the "owner" of the car.

IV. Physical Crimes and Family Law

A. Assault

The Texas Penal Code statute relating to assault is as follows:

> "(a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
>
> (b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
>
> (1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant; or
>
> (2) a member of the defendant's family or household, if it is shown on the trial of the offense that the defendant has been previously convicted of an offense against a member of the defendant's family or household under this section.
>
> (c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor, except that an offense under Subsection (a)(3) is a Class A misdemeanor if the offense was committed against an elderly individual or disabled individual, as those terms are defined by Section 22.04.
>
> (d) For purposes of Subsection (b), the actor is presumed to have known the person assaulted was a public servant if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant.
>
> (e) In this section:
>
> (1) "Family" has the meaning assigned by Section 71.003, Family Code.
>
> (2) "Household" has the meaning assigned by Section 71.005, Family Code.
>
> (f) For the purposes of this section, a defendant has been previously convicted of an offense against a member of the defendant's family or a member of the defendant's household under this section if the defendant was adjudged guilty of the offense or entered a plea of guilty or nolo contendere in return for a grant of deferred adjudication, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision."
>
> Tex. Pen. Code 6 22.01.

The primary point for the family law practitioner to be aware of is the provision under (a)(2), criminalizing credible, immediate threats against the family. While there is often a misconception that mere threats are not actionable, they can constitute criminal assault if there is an immediate danger to the victim. Moreover, by bringing charges and obtaining a conviction under such a circumstance, should actual violence against the family occur at a subsequent point in time, the statute heightens the new charge from a misdemeanor to a felony. On that new charge, all that the court must find is that there has been a previous conviction of assault against a family member; it is not necessary to re-litigate the previous criminal case as part of the subsequent case in order for the state to prove that there has been previous family violence. *State v. Eakins*, 71 S.W.3d 443, 444-45 (Tex. App. – Austin 2002, no writ).

B. Harassment

So what remedy does a person have if their spouse or ex-spouse has not acted in a way that gives rise to a criminal assault charge, but has instead behaved in a generally obnoxious manner? The legislature has codified a set of behaviors which, if directed towards another person, can give

rise to criminal prosecution for harassment. The Texas Penal Code states that:

> "(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> (1) initiates communication by telephone, in writing, or by electronic communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;
>
> (2) threatens, by telephone, in writing, or by electronic communication, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family or household, or his property;
>
> (3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
>
> (5) makes a telephone call and intentionally fails to hang up or disengage the connection;
>
> (6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."
>
> Tex. Pen. Code 6 42.07(a).

An offense under this code section is a Class B misdemeanor, unless the defendant has previously been convicted under this section for another act, in which case it is a Class A misdemeanor. Tex. Pen. Code 6 42.07(c).

Obscenity is defined within the statute, and covers a standard laundry list of acts which would be considered an "ultimate sex act". Tex. Pen. Code 6 42.07(b). Threats, on the other hand, are judged by an objective standard, and need not be express, but rather, can be veiled or implied, and still be actionable. *Manemann v. State*, 878 S.W.2d 334, 337 (Tex. App. – Austin 1989, pet. ref'd).

This section covers a variety of actions which also are commonly covered in a temporary restraining order or temporary injunctions. A party who believes that the court will not be sympathetic to a contempt action brought for such behavior may feel that seeking relief through the criminal justice system may be a better alternative. Additionally, a party who is harassed in a circumstance where, for whatever reason, injunctions are not in place may only be able to turn to the criminal justice system in order to achieve some results.

C. Stalking

In the wake of various well-publicized stalking episodes, various states, including Texas, have adopted stalking statutes. While stalking episodes are rare in the family law context (most of the time, each party wants to *avoid* the other party, rather than obsessively follow her), when it does occur, it can be a frightening, traumatic experience for both the party and her attorney. Thus, it is important to be familiar with the parameters of behavior forbidden by the Texas stalking statute, and be prepared to counsel your client as to what actions can be taken in such a situation.

The criminal stalking statute states:

> "(a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct, including following the other person, that:
> (1) the actor knows or reasonably believes the other person will regard as threatening:
> (A) bodily injury or death for the other person;
> (B) bodily injury or death for a member of the other person's family or household; or
> (C) that an offense will be committed against the other person's property;
> (2) causes the other person or a member of the other person's family or household to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person's property; and
> (3) would cause a reasonable person to fear:
> (A) bodily injury or death for himself or herself;
> (B) bodily injury or death for a member of the person's family or household; or
> (C) that an offense will be committed against the person's property."
>
> Tex. Pen. Code 6 42.072(a).

The heightened significance placed by the state on stalking is reflected in the classification of a conviction under the statute. A violation of the stalking statute is considered to be a third degree felony, unless the stalker has previously been convicted under the stalking statute for another act, in which case it is a second degree felony. Tex. Pen. Code 6 42.07(b).

The stalking statute is relatively new, having only been enacted in 1997. Nevertheless, the statute has survived challenges to its constitutionality. *Sisk v. State*, 74 S.W.3d 893, 901-02 (Tex. App. – Fort Worth 2002, no writ); *Battles v. State*, 45 S.W.3d 694, 702-03 (Tex. App. – Tyler 2001, no writ). Obviously, it is only is certain rare circumstances that a criminal stalking complaint may be brought; in such circumstances, it would also be advisable for the family law practitioner to concurrently seek a protective order in the family courts.

V. Violations of Court Orders

A. Interference With Child Custody

While failure to respect a valid order in regards to access and possession of a minor child can lead to sanctions from the trial court in the form of a contempt action, it can also give rise to criminal charges. Texas law provides:

> "(a) A person commits an offense if the person takes or retains a child younger than 18 years when the person:
> (1) knows that the person's taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody; or
> (2) has not been awarded custody of the child by a court of competent jurisdiction, knows that a suit for divorce or a civil suit or application for habeas corpus to dispose of the child's custody has been filed, and takes the child out of the geographic area of the counties composing the judicial district if the court is a district court or the county if the court is a statutory county court, without the permission of the court and with the intent to deprive the court of authority over the child.
> (b) A noncustodial parent commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, the noncustodial parent knowingly entices or persuades the child to leave the custody of the custodial parent, guardian, or person standing in the stead of the custodial parent or guardian of the child."
>
> Tex. Pen. Code 6 25.03(a)-(b).

This offense is classified as a state jail felony. Tex. Pen. Code 6 25.03(d).

This provision of the penal code gives a parent an additional avenue to pursue when attempting to bring a recalcitrant spouse or former spouse to heel. However, it should be noted that a party who is convicted on criminal contempt charges for interfering with the custody of a child cannot be later prosecuted in a separate criminal action under 6 25.03 for the same act. *Ex parte Rhodes*, 974 S.W.2d 735, 741-42 (Tex.Crim.App – 1998). Once the criminal contempt is prosecuted, jeopardy attaches, and therefore, the defendant is exempt from prosecution on the criminal charge on double jeopardy grounds. *Id.*

Thus, from the standpoint of the attorney representing the aggrieved spouse, consideration should be made as to whether the client is better served by pursuing a contempt action, or by seeking to have the case prosecuted in the criminal courts. On the other hand, from the standpoint of the attorney representing the misbehaving spouse, awareness of the double jeopardy defense can provide the client with some leverage in certain circumstances.

B. Criminal Nonsupport

Much like with interference with child custody situations, the failure to properly support a minor child makes a parent subject to criminal prosecution. Moreover, it

is irrelevant whether or not the support is court ordered. Texas law states:

> "(a) An individual commits an offense if the individual intentionally or knowingly fails to provide support for the individual's child younger than 18 years of age, or for the individual's child who is the subject of a court order requiring the individual to support the child.
> (b) For purposes of this section, "child" includes a child born out of wedlock whose paternity has either been acknowledged by the actor or has been established in a civil suit under the Family Code or the law of another state."
>
> Tex. Pen. Code 6 25.05(a)-(b).

An offense under 6 25.05 constitutes a state jail felony. Tex. Pen. Code 6 25.03(f). Although an inability to pay may be raised by the defendant as an affirmative defense, Tex. Pen. Code 6 25.03(d), this statute nevertheless appears to be quite draconian. Indeed, it has been suggested that the statute is meant to impose criminal liability on every parent who fails to timely pay child support ordered by a court. *Belcher v. State*, 962 S.W.2d 653, 657 (Tex. App. – Austin 1998, no pet.) (citing 6 Michael Charleton, *Texas Criminal Law* 6 14.5 at 177 (Texas Practice 1994)). Nevertheless, getting the state to bring forth criminal charges would appear to be difficult in all but the most egregious circumstances.

The *Belcher* case provides an interesting case study in an area where the case law has been sparse over the last few decades. In *Belcher*, the husband was ordered to pay $70 per week in child support for his two children. *Belcher*, at 655-56. Although a wage withholding order was issued, and husband's employer withheld $70 per week from his pay for most of the period in question, some support payments apparently were not timely made, and husband ultimately accrued over a fourteen month period a total support arrearage of $1,073.29. *Id.* at 656. A jury ultimately determined that he knowingly failed to provide the support he had an obligation to give, and found him guilty, resulting in a punishment of two years' imprisonment, probated for four years, as well as 150 hours of community service, restitution of $3,906.57, and a fine of $500.00. *Id.* at 656.

The appeals court noted that, although the child support order is relevant evidence of what an appropriate level of support should be under 6 25.05, it is not necessarily conclusive evidence of the amount of support that should be provided. *Id.* at 657-58. In this case, in some of the months in question, the arrearages were just $23.33 per month. *Id.* at 659. Nevertheless, the appeals court ultimately found that the husband had notice of the fact that there were arrearages, and that he had a court ordered obligation to pay a certain amount of child support, which, taken together, were sufficient to uphold the jury's conviction. *Id.* at 660.

Again, this would appear to be a situation where, in the absence of extenuating circumstances, it would appear unlikely that prosecution would ensue. Nevertheless, it is important to keep in mind that, at least theoretically, any failure to timely pay a child support obligation could subject one to criminal prosecution.

C. Violation of a Protective Order

Seeking a protective order is an act which one does not enter into lightly in a family law case. Moreover, given the standards which an applicant must meet, a trial court will generally not enter a protective order unless it has serious concerns about the safety of the applicant and the danger posed by the opposing party. Therefore, the violation of a protective order is an action which generally will produce a more rapid response from both police and prosecutors than some other criminal offenses outlined herein. The

Texas Penal Code provides:

> "(a) A person commits an offense if, in violation of an order issued under Section 6.504 or Chapter 85, Family Code, under Article 17.292, Code of Criminal Procedure, or by another jurisdiction as provided by Chapter 88, Family Code, the person knowingly or intentionally:
>
> (1) commits family violence or an act in furtherance of an offense under Section 42.072;
> (2) communicates:
> (A) directly with a protected individual or a member of the family or household in a threatening or harassing manner;
> (B) a threat through any person to a protected individual or a member of the family or household; and
> (C) in any manner with the protected individual or a member of the family or household except through the person's attorney or a person appointed by the court, if the order prohibits any communication with a protected individual or a member of the family or household;
> (3) goes to or near any of the following places as specifically described in the order:
> (A) the residence or place of employment or business of a protected individual or a member of the family or household; or
> (B) any child care facility, residence, or school where a child protected by the order normally resides or attends; or
> (4) possesses a firearm."
> Tex. Pen. Code 6 25.07(a).

Violation of the statute is a Class A misdemeanor, unless the defendant has been convicted of violating a protective order two or more times, or violated the protective order by committing an assault or "stalking", in which case the offense is a third degree felony. Tex. Pen. Code 6 25.07(g).

Again, one of the important issues to note is that a party subject to a protective order cannot, under any circumstances, possess a firearm. Once a protective order is issued, the family law practitioner has a duty to ensure that her client does not own any firearms, or if they do, that they are turned over to some other party for safekeeping until the protective order expires.

Moreover, a restriction against going "to or near" the applicant's residence or place of business is one which a party subject to a protective order does not always understand is absolute, absent a specific exception contained in the order. A protective order, for example, which forbids someone from going to a party's residence, but which then provides that the individual may go to the residence for a specified purpose (i.e., picking up a child), is considered to be enforceable, and not inherently contradictory. *Collins v. State*, 955 S.W.2d 464, 467 (Tex. App. – Fort Worth 1997, no pet.).

Finally, it should be pointed out that the party protected by a protective order does not subject himself to criminal liability by violating the protective order himself. Tex. Pen. Code 6 25.07(e). Additionally, agreements between the parties to ignore or disregard the protective order, in whole or in part, does not alter the enforceability of the order. Tex. Pen. Code 6 25.07(d). Thus, if you represent a

client who informs you that his spouse has agreed to drop the protective order, you must get that protective order dissolved before you allow your client to take any action which would be in violation of that order.

VI. Crimes Within the Judicial Process

A. Bribery and Improper Gifts

Bribing, or attempting to bribe, a judge, whether done by an attorney or a client, is not only unethical behavior; it is also criminal behavior. Under Texas law:

> "(a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:
> (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;
> (2) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding;
> (3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official; or
> (4) any benefit that is a political contribution as defined by Title 15, Election Code, or that is an expenditure made and reported in accordance with Chapter 305, Government Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercise of official discretion would not have been taken or withheld but for the benefit; notwithstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision."
>
> Tex. Pen. Code 6 36.02(a).

An offense under this section of the penal code is a second degree felony. Tex. Pen. Code 6 36.02(e).

Bribery is something which most people know is inappropriate; however, even more subtle attempts at influence which fall short of out-and-out bribery can still be subject to criminal prosecution under the penal code. The applicable statute states:

> "(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law."
>
> Tex. Pen. Code 6 36.04(a).

An offense under this code section is a class A misdemeanor. Tex. Pen. Code 6 36.04(c).

While prosecutions under this statute are rare, they do occasionally occur. *See, e.g., City of Stephenville v. Texas Parks & Wildlife Dep't*, 940 S.W.2d 667, 671 (Tex. App. – Austin 1996, no pet.). Most often, it would seem that prosecutions brought under 6 36.04 are brought in conjunction with an action under 6 36.02, as a fallback position in case the higher standard under 6 36.02 cannot be met at trial.

While it is hoped that bribery or attempts to influence the judiciary are rare, more common among family law attorneys is the giving of gifts, at holidays or at other times, to Judges or their staff. While the sentiment behind such gifts is almost always pure, it nonetheless can subject the giver to criminal sanctions. The relevant Texas Penal Code section relating to gifts to judges states:

> "(a) A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting."
>
> Tex. Pen. Code 6 36.09(a).

Such an infraction is a Class A misdemeanor. Tex. Pen. Code 6 36.09(b).

Since a judge is prohibited from accepting a gift from a person who is interested in, or is likely to become interested in, any matter in that Judge's court, Tex. Pen. Code 6 36.08(e), attorneys face potential criminal charges if they give any sort of gift to a Judge. While 6 36.10 does provide for a few exceptions to 6 36.08, including campaign contributions and non-cash gifts with a value of less than $50, this nonetheless is a little-known pitfall that could result in an attorney inadvertently facing criminal charges over what he perceived to be an innocent Christmas gift.

B. Witness Tampering

Either an attorney or his client can be subject to criminal charges if they improperly influence a witness in a proceeding. The Texas Penal Code states:

> "(a) A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding or coerces a witness or prospective witness in an official proceeding:
> (1) to testify falsely;
> (2) to withhold any testimony, information, document, or thing;
> (3) to elude legal process summoning him to testify or supply evidence;
> (4) to absent himself from an official proceeding to which he has been legally summoned; or

(5) to abstain from, discontinue, or delay the prosecution of another."

Tex. Pen. Code 6 36.05(a).

A conviction under this statute is a state jail felony. Tex. Pen. Code 6 36.05(d).

It is important to note that this does not include just "paying off" a witness. The statute also prohibits the use of coercion against a witness. Thus, a family law attorney who, for instance, suggests to a witness that a client will lose custody of his child if the witness does not testify the way that the attorney wants could be subject to criminal prosecution under this statute. Frightening a witness to the extent that he refuses to testify also can lead to criminal prosecution under this statute. *Kober v. State*, 988 S.W.2d 230, 233 (Tex. Crim. App. – 1999).

C. Evidence Tampering

An attorney or a party who tampers with evidence to a civil proceeding can also be subject to criminal prosecution. The relevant code section states:

"(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

(1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding."

Tex. Pen. Code 6 37.09(a).

A violation of this statute is a third degree felony. Tex. Pen. Code 6 37.09(c). Documents subject to a privilege claim are exempt from this rule, however. Tex. Pen. Code 6 37.09(b).

While most people inherently know it is wrong to do any of the things described in the above passage, most people do not realize that taking such action can subject the actor to a felony charge. Given the existence of the statute, the attorney has a duty to explain to the client that not only must all evidence be turned over, but that, should the client destroy relevant evidence, he could be subject to criminal prosecution.

D. Perjury

As the tribulations of William Jefferson Clinton made clear, lying about something as seemingly trivial as an affair can lead to perjury charges. In the family law context, perjury charges are rare, but they can arise. Perjury is defined as follows:

"(a) A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning:

(1) he makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath; or

(2) he makes a false unsworn declaration under Chapter 132, Civil Practice and Remedies Code."

Tex. Pen. Code 6 37.02(a).

For simple perjury, materiality is irrelevant; an individual can be found guilty of perjury regardless of whether the false sworn statement was in regards to a material issue in the case. *Vaughn v. Texas Employment Commission*, 792 S.W.2d 139, 143-44 (Tex. App. – Houston [1st Dist.] 1990, no writ). Simple perjury is a Class A misdemeanor.

Aggravated perjury is more serious. Aggravated perjury occurs when a party makes a statement defined as perjury under 6 37.02(a) in an official proceeding regarding a material fact or issue. Tex. Pen. Code 6 37.03(a). A statement is deemed to be material, regardless of admissibility, if it could have affected the course or outcome of the official proceeding. Tex. Pen. Code 6 37.04(a). A belief that a statement is immaterial is not a valid defense to an aggravated perjury charge. Tex. Pen. Code 6 37.04(b). Aggravated perjury is a third degree felony. Tex. Pen. Code 6 37.03(b).

Perjury charges are rarely brought in conjunction with family law cases, but they do occasionally occur. *See, e.g., Mayes v. Stewart*, 11 S.W.3d 440, 446 & n.1 (Tex. App. – Houston [14th Dist.] 2000, pet. denied); *Hutcheson v. State*, 980 S.W.2d 237, 237-38 (Tex. App. – Eastland 1998, pet ref'd). The family law practitioner should ensure that the client understands what perjury is and the penalties for perjury.

VII. Conclusion

While some attorneys do handle both criminal and family law cases, most family law practitioners generally deal with criminal law only on those rare occasions when it arises in the context of a family law case. We hope that, by outlining the criminal statutes which would be most likely to arise in the family law setting, this paper is a useful guide in providing the family law practitioner with the information necessary to make sure that both practioner and client are protected.

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Focus on...

Some Fine Points of Legal Drafting

Ten Things Legal Drafters Should Know, Part One

Wayne Schiess

> It is difficult to convince the profession in general that drafting is a special skill that requires intense application.
>
> —Robert C. Dick, *Legal Drafting* 4 (2d ed., Carswell Co., Ltd 1985).

> [E]very lawyer occasionally gets involved in legal drafting of some sort—even if it's only a settlement agreement—and every lawyer should become familiar with these principles.
>
> —Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 89 (U. Chicago Press 2000).

Summary

his article takes the approach that legal drafting is an important intellectual pursuit. The article presents ten things that every lawyer should know to be expert at the skill of legal drafting.

Introduction

Do you draft? Let me clarify that I am using the term *drafting* in a narrow and specific way to refer to the writing of instruments, agreements, and rules. I do not use the term *drafting* to refer to the writing of letters, memos, briefs, or court documents. Drafting is a specialized type of legal writing—a field in itself.

But many lawyers might say "I don't draft. I'm not a transactional lawyer." But do you write settlement agreements in litigation? Do you prepare text for employee-benefit manuals? Have you ever written a website disclaimer? Then you draft.

If you draft then you can benefit from the ten points here.

1. Drafting education—original and continuing

Many law schools do not offer training in legal drafting. Those that do offer it usually do so as a small part of the first-year course in legal research and writing. That course focuses on analytical and persuasive writing, as it should, so legal drafting often receives very little coverage. Only a few law schools offer a required course in legal drafting, and only a few more offer an optional course. Legal-writing expert Joseph Kimble labels the situation a "sickening failure."

Why would this be so? One reason is that gaining expertise in legal drafting and teaching it are tedious activities. The subject is a little dry. For most writing professors, if you have a choice to teach an advanced course on persuasive writing or an advanced course on legal drafting, you'll choose to teach persuasive writing. It's more interesting; it allows for more literary-style creativity. Drafting, on the other hand, is dull.

Besides, isn't legal drafting "just forms"? That's what one of my students said when I asked why students did not insist on legal-drafting courses. That perception is strong. Too many believe that legal drafting in practice means finding a form and changing the names and dates. But it's not always that easy.

Legal drafting is a legal academic subject like any other: torts, trial practice, mediation. It is a subject worthy of independent study and practice. It has a history, it has a scholarly literature, it has experts, and it has a future: yes, legal drafting evolves and changes. And it's evolving and changing rapidly today.

Those who draft legal documents daily in their practice ought to make legal drafting a pursuit. They ought to stay current. They ought to know the best sources in the field and the names of the experts. They ought to commit to learning all they can about legal drafting. Those who draft only occasionally—and that's nearly all lawyers—should learn about the field as well, though they might be excused from the same level of commitment.

To succeed in the pursuit of legal-drafting expertise, you will need to include legal drafting in your continuing legal education, promote better legal drafting at your office, and incorporate legal drafting books and articles into your professional reading.

Names in the field

Once you make the commitment to study up on legal drafting, you'll begin to recognize the names of the experts in the field. I'm taking a bold stance here, but I say that anyone who drafts legal documents for a living ought to at least know who these people are. The first three are dead, but their influence survives:

REED DICKERSON

I consider him the "father of American legal drafting" because he was the first prominent law professor to devote focused study on legal drafting. He also published at least six texts on the subject*: Cases and Materials on Legislation, The Fundamentals of Legal Drafting, Legislative Drafting, Materials on Legal Drafting, The Interpretation and Application of Statutes*, and *Professionalizing Legislative Drafting: The Federal Experience.*

DAVID MELLINKOFF

The author of *The Language of the Law* devoted much of his career to the history of legal words and provided great insights for legal drafters. If you run across a troubling legal word, Mellinkoff probably has a history of it in his book. His views on forms and litigation-tested legal language were ahead of their time and are still not widely acknowledged.

RUDOLF FLESCH

The guru of readability had a lot to say to lawyers who must draft for nonlawyers, and most of it is not kind. If you draft legal documents that nonlawyers must read and understand, whether website disclaimers, hospital regulations, or insurance policies, Flesch will help. Get his book *How to Write Plain English.*

These next three legal-drafting experts are working today:

THOMAS HAGGARD

This law professor is the author of five books on legal writing, three of them devoted to legal drafting. His *Legal Drafting in a Nutshell* is an excellent book that, despite the simple-sounding title, will benefit any legal drafter, no matter how experienced.

JOSEPH KIMBLE

Professor Kimble is the leading expert on plain English in the United States. He has published a dozen articles on the subject and is the Editor-in-Chief of the *Scribes Journal of Legal Writing.* He has also served as the drafting consultant on several projects, most notably the redraft of the Federal Rules of Criminal Procedure.

Professor Kimble always backs up what he says with research and reliable authorities, so any one of his articles is like a primer on good legal drafting. For starters, I recommend these:

Answering the Critics of Plain Language, 5 Scribes J. Leg. Writing 51 (1994–1995).
Plain English: A Charter for Clear Writing, 9 Cooley L. Rev. 1 (1992).
The Great Myth that Plain Language is not Precise, 7 Scribes J. Leg. Writing 109 (1998–2000).
Writing for Dollars, Writing to Please, 6 Scribes J. Leg. Writing 1 (1996–1997).

BRYAN GARNER

A leading expert on legal writing, legal drafting, legal usage, and English usage, Garner's name is one to know in legal-writing circles. His *Dictionary of Modern Legal Usage* contains more good legal-drafting advice than many books devoted entirely to legal drafting.

Sources to know

Besides the leading experts, you should know and study the best sources. There are not a lot of great books on legal drafting, but here are a handful I recommend:

Barbara Child, *Drafting Legal Documents: Principles and Practices* (2d ed., West 1992).
Bryan A. Garner, *Guidelines for Drafting & Editing Court Rules*, 169 F.R.D. 176 (1996).
Howard Darmstadter, *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting* (ABA 2002).
Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* (Quorum Books 2001).
Thomas R. Haggard, *Legal Drafting in a Nutshell* (2d ed., West 2002).
Negotiating and Drafting Contract Boilerplate (Tina L. Stark, ed., ALM Pblg. 2003).

I urge you to treat legal drafting as a diffi-

cult but crucial professional skill.

2. Forms: consistency, accretion, and style
Should legal drafters even use forms?

Yes. They're a necessity. No legal drafter can get by in a typical practice today without using forms. The time and expense that would result from drafting everything from scratch would be enormous. That's why better legal drafters know that it's not *whether* you use forms, but *how*. Forms have at least four drawbacks.

First, forms foster haste and laziness because they can be used so easily. David Mellinkoff said that "[t]hey are a quick, cheap substitute for knowledge and independent thinking." For example, if the current transaction seems the same as a previous transaction, the "form" from the earlier transaction can be converted to a draft for this transaction very quickly. It really is just a matter of changing the names and the dates. But just because it can be done quickly does not mean it should be. The belief that any form can be adapted to a new transaction quickly isn't wrong, but it produces a sense of ease—often a false one. That sense of ease is one of the biggest drawbacks of forms.

Second, forms often contain outdated language and formats. A cardinal rule: you might trust the form to be right on the law or the necessary terms, but you shouldn't trust the form to be well drafted. According to Thomas Haggard, "[t]he best thing about [form] books is often not the language they suggest for specific provisions (which is usually atrocious), but rather the factual checklists they contain." In truth, forms are notorious for wordy, archaic usage and for excessive formality.

Third, forms often contain language and provisions created by several different drafters. The result is a patchwork of legal-drafting styles. That may not seem such a terrible thing in a genre of writing that Kimble says is supposed to be "devoid of any writer's voice." But the problems run deeper than voice: "[V]erbatim inclusion of a clause lifted from someone else's document can and will create anomalies of style that not only offend the artistic sensibilities . . . but frequently lead to confusion and ambiguity." The original drafter of a term or provision in your form may have been representing a completely different type of client or may have been working under now-unknown constraints. A form might contain language from different stages of a transaction or different stages of several transactions.

Fourth, forms often contain unnecessary terms, irrelevant language, and problems of accretion. In other words, as Howard Darmstadter says, lawyers never seem to cut language from a form; they only add: "Forms tend to grow by accretion, with many persons adding paragraphs and clauses without much understanding of what has gone before. The result is frequently a form whose numerous intricacies and subtleties are invisible to all sides." Besides, it gets longer and longer and looks worse and worse. Consider this example from *Working with Contracts* by Charles M. Fox; he calls it "accretive drafting":

2a. Issuer shall not pay any dividends or make any distributions in respect of Capital Stock, or repurchase, redeem or otherwise acquire for value any Capital Stock.

First a parenthetical is added (accretions are italicized):

2b. Issuer shall not pay any dividends or make any distributions in respect of Capital Stock (*except for dividends paid in additional Capital Stock*), or repurchase, redeem or otherwise acquire for value any Capital Stock.

Now a proviso is used to tack on more language:

2c. Issuer shall not pay any dividends or make any distributions in respect of Capital Stock (except for dividends paid in additional Capital Stock), or repurchase, redeem or otherwise acquire for value any Capital Stock, *provided, however, that Issuer may repurchase Capital Stock from members of management in an amount not to exceed $1 million in any year.*

And a second proviso is added. The paragraph is now much more difficult to digest:

2d. Issuer shall not pay any dividends or make any distributions in respect of Capital Stock (except for dividends paid in additional Capital Stock), or repurchase, redeem or otherwise acquire for value any Capital Stock, provided, however, that Issuer may repurchase Capital Stock from members of management in an amount not to exceed $1 million in any year, and *provided further, that such repurchases shall not be permitted at any time an Event of Default has occurred and is continuing.*

Despite the risks, drafters will continue to use forms and use them a lot. So whether you are using a commercial formbook or a previous transaction document from a colleague, here are four recommendations for using forms.

Never include language you don't understand.
It may seem like common sense, but it's common sense many young lawyers ignore. Certainly, the drafter thinks, this language is in there for a reason—a good reason. So find the reason, whether it means researching the law, researching the drafting guides, or asking your supervisor. As Bryan Garner advises, if you don't understand what certain language in the form means or why it is there, you'd better gain the understanding or leave it out.

Edit and revise thoroughly.
Naturally, you will edit and revise the forms you use. But my point is that you edit and revise not just to adapt the form to the current transaction, but also to adapt the form to your own drafting approach. Make the document your own. Master it. Eliminate the inconsistencies and the irrelevant provisions. Integrate the accretions into the draft coherently.

Preserve a "starting place" form.
What form should you use to begin the negotiations for a transaction? Too often, lawyers use as a starting place a document from a previous transaction, in its final, negotiated form. That may not be the best document to start with. A document that was actually used to close a transaction is the product of negotiation, of give and take, and—most likely—of a power struggle. It may not be useful as a starting place.

So experts recommend that you use a "starting place" form. Kenneth Adams suggests using "whenever possible, the first draft of an agreement." He suggests that the best document to work with might be the first version that was sent to the other side in a previous transaction. By starting with that form, you might be spared reading, comprehending, and editing the myriad changes that certainly occurred during the last transaction's negotiations.

Learn to draft from scratch when you must.
Take advantage of you chances to draft without a form. Contrary to conventional wisdom, there is *not* a form for everything. When you don't have a form, apply the knowledge you have gained from studying legal drafting to create modern, professional-level drafts.

Even when you're using a form, question it. If you see form language that seems outdated, poor, or wrong, fix it. A great to way to improve your drafting is to identify the problems in forms and fix them. Apply the drafting knowledge you are gaining by improving every form you use.

3. Legal-drafting myths: precision and nonambiguity

Legal drafting has its own mythology, and two myths more than any others have contributed to the style of legal drafting. These are the myths that legalese is more precise than other types of writing and that legalese eliminates ambiguity. Depending on how you look at it, these myths either (1) support the precise and unambiguous legal drafting we often see today or (2) prevent legal drafting from

becoming clear and functional. I'm behind number 2.

No language, let alone legal language, can ever be perfectly precise or perfectly unambiguous. Numerous authorities have suggested this truth for years. I address both myths below.

Ambiguity

Consider these quotations from the experts:

> Ambiguity, despite what many lawyers seem to believe, inheres in all writing.
>
> Elaboration in drafting does not result in reduced ambiguity. Each elaboration introduced to meet one problem of interpretation imports with it new problems of interpretation.
>
> Unfortunately, every text, no matter how carefully constructed, is inherently ambiguous. We always depend upon a reasonable reader to make a reasonable interpretation, supplementing from context and common sense where necessary.

Ambiguity means that a single word, phrase, or provision is capable of two different meanings. Ambiguity is different from vagueness, which means a lack of specificity. Ambiguity is highly undesirable in legal drafting and should never be intentionally included. Vagueness, on the other hand, may be desirable or necessary. For example:

3a. Ambiguity: The buyer must pay the contract price by 12:00. (Noon or midnight?)

3b. Vagueness: The buyer must pay all reasonable shipping costs. (What is reasonable?)

Given that ambiguity is likely to arise despite the efforts of the legal drafter, what should we do about it? Two things:

First, keep trying to be as clear as possible. Read and reread your draft to find ambiguities. Where possible, eliminate them. Avoid excessive elaboration, which invites ambiguity.

Second, be aware of some common types of ambiguities. Two common types involving modifying words and phrases are discussed in section 7 of this chapter. For a thorough discussion of ambiguities, see Haggard*'s Legal Drafting in a Nutshell.* Of particular note are these:

and/or

Often criticized by judges, this phrase has caused many headaches. Experts recommend saying what you mean—*and* or *or*—or using "A or B or both."

not . . . because

A negative construction followed by *because* can be ambiguous. For example: "Buyer cannot reject goods because of prior contractual obligations." This could mean either (1) Buyer is unable to reject the goods, and the reason Buyer is unable is prior contractual obligations, or (2) Buyer cannot use prior contractual obligations as a reasons to reject the goods. Choose one.

provided that; provided, however that

Experts have criticized provisos because it is not clear whether they create an exception, an addition, or a condition. Be precise about which you mean.

until

In a provision that "buyer has until January 15, 2004, to reject the goods," may the buyer reject on January 15? Courts are not uniform in their responses. Better to say "before January 16" or "on or before January 15."

Modern, plain English is as capable of precision as traditional legal English. The truth is that many people, lawyers included, buy into the fallacy that there must be a great deal of precision in legalese.

Precision

Here the myth is that legalese is more precise than everyday English. Often, this myth rests on the idea that many legal words are terms of art. That's not true; terms of art are fairly rare, according to Mellinkoff. Sometimes the myth rests on the idea that legal words have been construed by a court and given clear meanings. Mellinkoff debunks that myth effectively in *The Language of the Law*, and refers to *Words and Phrases*, where judicial definitions of words are collected, as an "impressive demonstration of lack of precision in the language of the law."

So get it out of your head that legalese is more precise than everyday English. Usually, it's not. And question the archaic legalisms in your documents. Here's what the experts say:

> Modern, plain English is as capable of precision as traditional legal English.
>
> The truth is that many people, lawyers included, buy into the fallacy that there must be a great deal of precision in legalese.
>
> Legal drafters tend to use portentous language that smacks of spurious accuracy. Most of this language could easily be replaced with more familiar words. It gives a document the appearance of a special or technical meaning that it does not, in fact, have. Even among lawyers themselves, ponderous language may create an illusion of precision.

4. Sentence length and density

Legal drafters create too-long and too-dense sentences for two reasons.

First, some legal drafters believe the

ancient myth that all the qualifiers to a single idea must be in the same sentence as that idea. You don't have to take my word for the falsity of this notion; the experts know better:

> When a general statement is subject to an exception or two, why do drafters feel that the exceptions must be packed into the same sentence as the general statement?
>
> They think that in order to achieve clear understandings, they must stuff every related idea into a single sentence between an initial capital letter and a final period. They are, of course, wrong.
>
> Often, overlong sentences are the result of the drafter attempting to address, in one fell swoop, all facets of a given provision by stringing together clauses that could constitute sentences in their own right and piling on exceptions, qualifications, and conditions. Breaking such sentences down into their constituent components often makes them easier to read and does not affect meaning.

Second, many lawyers are simply in the habit of drafting long sentences. They are used to seeing them in other agreements and in judicial opinions. They are used to reading sentences packed with too much information. And they are used to writing long sentences—perhaps because they are using "accretive drafting" in forms.

The best way to fix long sentences is to break them up. Decide on a sentence-length goal—25 to 30 words per sentence is great for legal drafting—and then use your word processor to calculate the average sentence length of your draft. If it comes in at 35 or 40, get to work breaking up the longest sentences.

Another way to fix both sentence length and sentence density is to keep ideas parallel or to number or tabulate them. That way, even if the grammatical sentence is long, the reader still has a chance of following it. For example:

4a. If gas produced from the leased premises is processed in a hydrocarbon recovery plant for the recovery of liquid hydrocarbons, and if such plant is not owned in whole or in part by lessee or by any subsidiary or affiliate of lessee, and if lessee receives plant products or revenue attributable thereto or other benefits therefrom, then lessor shall receive the applicable royalty percentage of the market value of all such plant products, revenue and other benefits received by lessee or any subsidiary or affiliate of lessee attributable to gas produced from the leased premises, and, in addition thereto, the applicable royalty percentage of the market value of all residue gas at the point of sale.

This provision has 116 words per sentence. That is, it is a single sentence of 116 words. Look what happens when we break it up (and re-order it):

4b.1. If gas produced from the lease premises is processed in a hydrocarbon-recovery plant for the recovery of liquid hydrocarbons, then—
- (a) the lessee must pay the applicable royalty percentage of the market value of all plant products, revenue, and other benefits received by lessee—or any subsidiary or affiliate of lessee—attributable to gas produced from the leased premises, and
- (b) the lessee must also pay the applicable royalty percentage of the market value of all residue gas at the point of sale.

2. But lessee must pay the amounts in 1(a) and 1(b) only if—
- (a) the lessee receives plant products or revenue attributable to the hydrocarbon-recovery plant or other benefits from the hydrocarbon-recovery plant, and
- (b) the hydrocarbon-recovery plant is not owned in whole or in part by lessee or by any subsidiary or affiliate of lessee.
- (c) the lessee receives plant products or revenue attributable to the hydrocarbon-recovery plant or other benefits from the hydrocarbon-recovery plant.

This provision now has 23 words per sentence. As you can see, if you reduce sentence length and density, you'll get three benefits:

First, you and the other lawyers working on the document will be better able to read and understand it.

Second, the nonlawyers who must operate under the document or carry it out will be better able to read and understand it.

Third, by breaking up sentences, you'll naturally eliminate some ambiguity and confusion, and you'll probably notice and be able to cut some inconsistencies and irrelevancies. Besides, as writing expert Steven Stark says, "The more complicated your information is, the shorter your sentences should be."

Mr. Schiess is the director of the legal-writing program at the University of Texas School of Law in Austin and teaches legal writing, legal drafting, and plain English. He is also a frequent and favorite seminar speaker on those subjects. He has published more than a dozen articles on practical legal-writing skills, plus the book Writing for the Legal Audience. He is also an associate editor for the Scribes Journal of Legal Writing. He graduated from Cornell Law School, practiced law for three years at the Texas firm of Baker Botts, and in 1992 joined the faculty at the University of Texas School of Law.

This article is reprinted from Schiess's latest book, Better Legal Writing: 15 Topics for Advanced Legal Writers (2005), by permission of the publisher, William S. Hein & Co.

Recollections of the Beginning

Michele Boerder, CLA, Paralegal, Dallas, TX
25th Anniversary Committee

The following article is dedicated to Tom Hanna, former Executive Director of the State Bar of Texas, and Bob Towery, former Director of Institutes and Courses and staff liaison to the Standing Committee on Legal Assistants, without whom, a Paralegal Division of the State Bar of Texas would not exist today.

In 1977, the State Bar of Texas established a Special Committee on Legal Assistants. The purpose of the committee was to explore how legal assistants might perform work that would assist licensed attorneys. This followed the 1971 establishment by the American Bar Association of a similar Special Committee on Legal Assistants.

The State Bar staff liaison to the Committee was Bar attorney Bob Towery who was Director of Institutes and Courses for the State Bar and also served on the ABA Committee. Towery, now retired in Ft. Worth, Texas, credits then Bar Executive Director Tom Hanna with the "idea" of starting a Division of the Bar for Legal Assistants. "I remember that Tom returned from a meeting in New Orleans with this idea for a Legal Assistants Division of the Bar and was quoted in the Bar Journal. I recall I read that and rushed down to Tom's office to confirm he was serious and get a green light to proceed. The Bar already had a Division for Law Students, so another Division was not such a foreign idea."

It was the Committee that considered and eventually recommended the Division proposal to the State Bar of Texas Board of Directors. Tom Hanna, former Executive Director of the Bar (1978 to 1981) recalled that the Bar had gone through its first Sunset review before the Legislature and said, "During the course of 'self-review' for Sunset, there were questions about how to better serve the profession and the practice of law, and, to acknowledge those who were in the field of law, but were not lawyers."

Hanna said that while the Bar had the Division for Law Students, law students would one day become lawyers and then be subject to regulation by the Supreme Court. "At the time, we saw the paralegal as an unlicensed professional who helped provide legal services to the public, but should operate under the supervision of a licensed attorney to assure that the public is protected in the dissemination of legal services. Therefore, in a Division of the State Bar of Texas, paralegals could coordinate with and assimilate into the integrated bar as it developed into its own profession with standards, and, eventually, licensed status."

Towery recalled that proposing a new Division was one thing, implementing it was another. "Selling the concept was not a 'slam dunk" and for several years the Special Committee had been rather passive," according to Mr. Towery. However, "Things began to turn around when George Robertson of Houston was appointed to fill the unexpired term of committee chair. George was very interested in the utilization of legal assistants, and he convinced the President of the State Bar to appoint a legal assistant to the committee. That person was Gerry Malone of Dallas, formerly of Louisiana, who brought to the committee a considerable amount of experience as a working legal assistant. George declined appointment to a full term as chairman, and Wayne Fisher of Houston, the new President of the State Bar, appointed Dick Poehner of Dallas as the new chairman. Wayne was very supportive of the concept and our efforts, and he appointed several legal assistants to the committee. This is when the movement really took off," Towery remembered.

Towery also said that there was considerable discussion about what to call the Division: "This highly qualified employee... should it be legal assistant, paralegal, or even sub-lawyer as a few suggested." Also, said Towery, "The State Bar wanted to make it abundantly clear that legal assistants could function only under the direct supervision of attorneys and not independently. The term 'paralegal' was an adjective and not a noun. Therefore, the State Bar adopted the term 'legal assistant.' I believe this was a very important statement of the attorneys of Texas in the development of the Division."

Since Towery was involved in the State Bar continuing legal education effort, he was in a unique position to implement a series of educational programs for legal assistants. "For instructors we selected attorney/legal assistant teams in most presentations which had the dual benefit of legal education and the experience of observing a team working together. It portrayed the respect that the attorney held for the legal assistant. Not only were these programs highly successful for legal assistants, but we had a number of attorneys attend and learn how to effectively utilize the services of a highly qualified staff person, no matter what title the person had." said Towery.

Towery gave credit to the early leaders of the Division: "In my opinion the early success of the Division was due to the dedication of the initial members of the Division's board of directors. We made a concerted effort to select individuals from large and medium size law firms and from the offices of sole practitioners. We invited some who had been legal secretaries and evolved into legal assistants, and we invited others who had college degrees with no experience as secretaries. I was particularly proud of Kathryn King Richards of Houston whom I personally selected to be nominated as the first chairperson of the board. Subsequent directors were elected by local legal assistants in the various districts."

Bob Towery also credits Sandy Keaton Hardin with an enormous contribution to the State Bar's efforts. She was a graduate of the outstanding legal assistant program at what was then called Southwest Texas State University in San Marcos, headed by Dale Hardin. "When I called Dale looking

for a new assistant on my staff, I asked if he had a recent graduate who was not yet employed. He replied, 'One that I know of and she would be a great asset to the State Bar.' I got in touch with Sandy, and the rest is history. Incidentally, she and Dale were married several years later."

Education for legal assistants was also a forefront issue at the time the Division began. Hanna said, "The Bar was looking at education for legal assistants and what role the Bar should have in setting standards." Hanna noted, "At the time, there were some 'fly-by-night schools' that preyed on persons with overblown assurances of career opportunities and training which did nothing to prepare the graduate." These problems pre-dated the ABA standards and were being addressed by the Bar before the creation of the Division. The ABA began to set standards for educational programs and an approval process for those programs.

In 1981 the "idea" became a reality when the State Bar of Texas created a Division for Legal Assistants on October 23, 1981. Then State Bar President Wayne Fisher made the following comments in the first address to the newly created Division:

> Your presence here today confirms my belief that the time has come for the legal profession to recognize the paralegal profession and for us to move forward in cooperation and mutual support to provide better services to the public we serve…We realize that what we are doing will have an impact…We only ask that your Division be given a chance to show what that impact will be. Active participation by the membership will have a direct effect on that impact…I challenge you to fight for what you believe in…

Sandy Hardin, State Bar of Texas Staff Liaison to the Division commented: "Legal Assistants are now, and will continue to be, a very vital part of the practice of law by attorneys. This backing grew out of respect for the contributions that legal assistants make in better serving those who are in need of legal services. We know that without lawyers there would be no legal assistants, but more and more lawyers are saying that they become better lawyers with the contributions of legal assistants. The establishment of the Division is a formal recognition by the lawyers of Texas that legal assistants not only exist, but also that a very high value is placed on their contributions to the quality and integrity of the profession of law…"

Today, 25 years after the Division was established, the name has been changed to the "Paralegal Division of the State Bar of Texas" (April 8, 2005 vote of the State Bar of Texas Board of Directors and May 2005 Bylaws vote of Division members) and changed the definition to use the term "Paralegal" exclusively:

> A paralegal is a person, qualified through various combinations of education, training, or work experience, who is employed or engaged by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such person, an attorney would be required to perform the task. (Adopted by the State Bar of Texas Board of Directors, April 8, 2005)

Last-Minute Tax Tips

Craig Hackler, Financial Advisor, Raymond James Financial Services

Here's a potpourri of rules and ideas that are important for year-end planning.

Securities Sales

To realize a gain or loss in 2005, the trade date must occur on or before December 31, 2005. Settlement date is irrelevant for publicly traded securities.

The limit on the deduction of capital losses in excess of capital gains is $3,000. Any net capital losses in excess of $3,000 are carried over into 2006. Both short- and long-term losses are counted on a dollar-for-dollar basis. A few years ago, long-term losses were worth only $.50 on the $1. No longer.

The holding period to achieve a long-term capital gain or loss is now more than twelve months. Count the period from trade date to trade date. Whether a gain is short- or long-term does make a difference. The date a long-term gain is realized also makes a difference. In general, net short-term gains are subject to a 35% maximum rate, while net long-term gains are taxed at a maximum of 15%. However, some gains may be subject to a 25 or 28% rate, such as gains on the sale of art or collectibles and gains on certain depreciated real property.

Retirement Plans

If you are a calendar year taxpayer, the deadline for establishing a qualified retirement plan for deductions against 2005 income is December 31, 2005. The contribution need not be made until the tax filing deadline of the taxpayer's return. Note; however, that a SEP plan can still be established for 2005 deductions up until the return due date in 2006.

In order for a distribution to qualify as a lump sum distribution, 100% of the balance to the credit of the employee must be distributed in one taxable year. If you have retired this year, make sure that you

received (or will receive by year-end) everything you have coming under your former employer's qualified retirement plan.

Charitable Contributions

Many people make their annual charitable contributions during the holidays. If you're going to make a cash contribution, mail the check by December 31, 2005 to qualify for a 2005 deduction. Giving a personal note or I.O.U. to the charity won't qualify for a deduction; but, donating with a credit card does.

Making gifts of securities is a very effective way to make charitable contributions. Charities are happy to receive odd lots. Donations of long-term capital gain property are deductible based on fair market value. It doesn't make sense to donate short-term capital gain property; your deduction will be limited to your basis. Also, it doesn't make sense to donate securities with losses; sell the stock and donate the cash. To claim a 2005 deduction, the security must actually be transferred to the charity before December 31, 2005.

Check in with your financial planner near the end of the year to see what deadlines and opportunities apply to your particular financial situation.

Craig Hackler holds the Series 7 and Series 63 Securities licenses, as well as the Group I Insurance license (life, health, annuities). Through Raymond James Financial Services he offers complete financial planning and investment products tailored to the individual needs of his clients. He will gladly answer your questions. Call him at 512.894.0574 or 800.650.9517

ET *al.* . . .

2005 Texas Advanced Paralegal Seminar, Austin, Texas

Nan Gibson, Marketing Chair, Houston, TX

Even Hurricane Rita couldn't stop, Lisa Sprinkle, CLAS, TAPS Planning Committee Chair and former Paralegal Division President, along with 11 committee chairs and their volunteers, and Coordinator/Meeting Planning, Norma Hackler, in their exceptional efforts to present the annual three-day, multi-track continuing education for Texas Paralegals this year. Even with a category 5 hurricane spinning in the Gulf of Mexico, 244 of the 253 registrants attended the seminar in Austin this year. The Texas Advanced Paralegal Seminar (TAPS) was held in Austin, September 21-23, 2005. From Brownsville to Lubbock, and El Paso to Beaumont, attendees arrived looking for legislative updates, the latest information in their respective fields, and social interaction with their peers across the state. From the evaluation reports and member feedback, it is apparent everyone felt as if they'd gotten what they came for.

The annual seminar offers up to 14 hours of continuing legal education in many fields of law including Civil, Personal Injury, Environmental, Elder, Family, Estate Planning, Criminal, Real Estate, Immigration, Employment, Bankruptcy, Oil & Gas, and Corporate. There were also legislative updates in Family, Personal Injury, Civil, Environmental, Probate and Estate Planning Law.

Below are personal remarks from several attendees regarding the CLE:

I was on the family track and without exception the topics were very informative, the speakers were wonderful and the information I received was advanced, relevant, and helpful. I have told everyone that was not fortunate enough to attend that it was without a doubt one of the best seminars I have attended (and given my many, many years in the legal profession...) that's saying something!

Charlyne Ragsdale, Austin

The topic, "Drug Testing and Its Limitations" by Robert B. Luther, Austin Attorney, and Dr. James Hefner, Austin, on hair testing was very informative. The speaker was lively and provided a list of frequently asked questions that I will pass on to my clients. Excellent content and handouts!

Pat Hammer, Fort Worth

I particularly enjoyed "Some Fine Points of Legal Drafting" by Professor Wayne Scheiss. It was not only very informative, but was interesting, educational and entertaining. Dr. Scheiss actually made the "what's, whys, and wherefores" of legal writing entertaining. I almost didn't stay for the lecture because I that "Oh, yawn, a legal writing lecture". I was very glad I did. It was a unique experience. As I sat at the back of the room, I could not help watching the other attendees, (and the classroom was full) who appeared to be as receptive as I was to the lecture. It was one of the many excellent lectures held at 2005 TAPS.

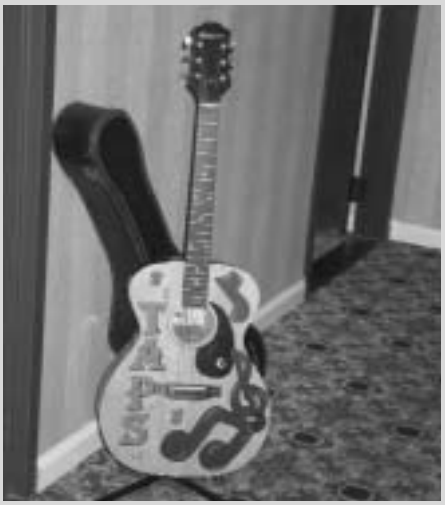
Nan Gibson, Houston

Thoughts on "Optimizing the Attorney/Paralegal Relationship in Complex Litigation" presented by Mike Slack, Austin Attorney, was worth waiting for. Anonymous

Best seminar I've ever attended. First class seminar all the way. Speakers and materials were great. Hats off to committee and volunteers. Anonymous.

The seminar was held at the Omni SouthPark Hotel in Austin, which had deluxe accommodations. And a fabulous buffet!

The socials were phenomenal. On the evening of September 21, 2005, at Maggie Mae's on 6th Street, we listened to the "Damn Good Texas Band", who was just that, and learned that some of our members are line dancing fools. If line dancing was not your forte, you could head on upstairs to play a little 5-card hold 'em, and dip a strawberry in the chocolate fountain. At each social event gift drawings were held. This year's door prizes were exceptional, ranging from candles and t -shirts, to digital cameras with docking stations and $600 travel gift cards. For Thursday, September 22, 2005's social, what could be more entertaining than attorneys making fun of themselves? The *Bar & Grill Singers*, a group of Austin-



based attorneys who have formed a singing group, which rewrites popular lyrics from well-known songs. The end result is hilarious. For example, they took Cyndi Lauper's "Time After Time" and changed the chorus to, "If you call, at my office or at my home.....I'm billing time." At the close of their performance, while taking the opportunity to thank several of the members for such an entertaining evening, many commented that we were the best audience they'd ever had, and were, "a lot more fun than performing for our peers."

But the contest that Javan Johnson, TAPS Social Chair, planned following the *Bar & Grill Singers* showed the true spirit of the paralegal. The object of the game was to find an object in the purse, bag, or

on the "person" of your "group" and the first one to the front with the object scored a point for the team. "Hilarious" doesn't begin to describe it. If you were there, you were laughing. If you were not, close your eyes and imagine a room full of competitive paralegals all fighting to be first. It was a circus, and like a circus, no one left the hall without the memory of a belly laugh.

Please mark your calendars for next year (Fall, 2006 – in Dallas). It will be just as informative and entertaining as this year. The contacts you make during this seminar may not only provide much needed assistance in some other county, but also lifelong friends. The Paralegal Division of the State Bar of Texas also makes it possible through this seminar, to accumulate all of the CLE you need to maintain certifications, and do it in a manner that is fun and educational. REMEMBER that if finances have precluded you from attending the seminar in the past, go online and apply for a scholarship. See? There really is no excuse for not attending. We look forward to seeing you next year – The 2005 Planning Committee

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Door Prizes
Jennifer Barnes
Maureen Peltier & Associates
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NOTICE OF NOMINATIONS/ELECTION OF PRESIDENT-ELECT

Pursuant to Standing Rule XIV of the Paralegal Division of the State Bar of Texas, notice is hereby given of an election for the office of 2006-2007 President-Elect. This election will be held by mail during the month of January 2005 by the Board of Directors.

Qualifications for serving as President Elect of the Paralegal Division are contained in Standing Rules XIV as follows:

XIV. OFFICERS
B. ELIGIBILITY

1. Any current or past Director who is currently an active member of the Division is eligible to be elected as President or President-Elect.

Any qualified individual who is interested in running for office of President Elect should forward a one-page resume, together with a letter of intent to run, to the nominations committee at the following address **NO LATER THAN JANUARY 15, 2005.**

Patricia J. Giuliano
Cox Smith Matthews Incorporated
112 East Pecan, Suite 1800
San Antonio, TX 78205
pgiulian@coxsmith.com

In the event the Board elects an individual who is currently serving as a Director, a vacancy will be declared in the district in which that individual serves. An election will be held to replace the outgoing Director (President Elect) at the time the elections for the Board of Directors are regularly scheduled.

NOTICE OF NOMINATIONS/ELECTION OF BOARD OF DIRECTORS

Jennifer Fielder
Elections Committee Chair
512/236-9955
jfielder@riewelaw.com

The election of directors to the Board of Directors of the Paralegal Division of the State Bar of Texas from District 2, District 4, District 6, District 8, District 10, District 12, District 14, and District 16 will be held April 17, 2006, through May 2, 2006. All active and freelance members of the Paralegal Division of the State Bar of Texas in good standing and registered to vote as of February 1, 2006, will be eligible to vote online at the Paralegal Division's website (in the Members-Only section). All voting must be completed on or before 11:59 p.m., May 2, 2006.

Each potential candidate must satisfy the following requirements:

a. Eligibility Requirements. The candidate must satisfy the eligibility requirements of Article III, Section 3 and Article IX, Section 1 A and Section 4 of the Bylaws and Rule V B, Section 5c of the Standing Rules.
b. Declaration of Intent. The candidate must make a declaration of intent to run as a candidate for the office of director through an original nominating petition declaring such intent that is filed with the Elections Subcommittee Chair in the candidate's district pursuant to Rule V B, Section 5 of the Standing Rules.
c. Nominating Petition. The original nominating petition must be signed by and must be submitted to the Elections Subcommittee Chair in such district, on or before March 17, 2006. The number of signatures required on the original nominating petition shall be as follows:

Number of Registered Voters Within District	Number of Signatures Required
0 - 50	5 signatures
51 - 100	8 signatures
101 - 150	10 signatures
151 - 200	12 signatures
201 - 250	15 signatures
251 - 300	18 signatures
301 +	20 signatures

Beginning on February 16, 2006, each Elections Subcommittee Chair shall prepare and forward, upon request, the following materials to potential candidates for director in their respective district at any time during the nominating period:
a. A copy of the List of Registered Voters for their district;
b. A sample nominating petition; and
c. A copy of Rule VI of the Standing Rules entitled "Guidelines for Campaigns for Candidates as Director."

To request information from the Elections Subcommittee Chair for your district, please contact:

District 2: Donna Sorensen, 214/880-7642 (County of Dallas) dsorensen@munsch.com
*Ellis County

District 4: Jennifer Fielder, 512/236-9955 (Counties of Bastrop, Blanco, Burnet, Caldwell, Gillespie, Hays, Kimble, Lee, Llano, Mason, McCulloch, Menard, San Saba, Travis, and Williamson) jfielder@riewelaw.com
*Bell, Bosque, Brazos, Brown, Burleson, Coleman, Coryell, Falls, Hamilton, Hill, Lampasas, McLennan, Milam, Mills, and Robertson Counties

District 6: Kay Daniel, 806/796-7332 (Counties of Bailey, Borden, Cochran, Cottle, Crosby, Dawson, Dickens, Fisher, Floyd, Gaines, Garza, Hale, Hockley, Kent, King, Lamb, Lubbock, Lynn, Motley, Scurry, Stonewall, Terry and Yoakum) kdaniel@mhbg.com

District 8: Wanda Logan, 361/575-0551, (Counties of Aransas, Bee, Calhoun, DeWitt, Duval, Goliad, Jim Wells, Kleberg, Live Oak, McMullen, Nueces, Refugio, San Patricio and Victoria) wlogan@cce-vic.com

District 10: Ledena Howard, 409/886-7766 (Counties of Chambers, Grimes, Hardin, Jasper, Jefferson, Liberty, Montgomery, Newton, Orange, Polk, San Jacinto, Tyler and Walker) ledenah@hotmail.com

District 12: Lisa Bowles, 940/387-1600 (Counties of Archer, Baylor, Callahan, Clay, Cooke, Denton, Eastland, Foard, Hardeman, Haskell, Jack, Jones, Knox, Montague, Palo Pinto, Parker, Shackelford, Stephens, Taylor, Throckmorton, Wichita, Wilbarger, Wise and Young) lisa@dentonfamilylaw.com
*Grayson

District 14: Linda Slayter, 903/597-8311 (Counties of Anderson, Angelina, Bowie, Camp, Cass, Cherokee, Collin, Delta, Fannin, Franklin, Grayson, Gregg, Harrison, Henderson, Hopkins, Houston, Hunt, Kaufman, Lamar, Marion, Morris, Nacogdoches, Panola, Rains, Red River, Rockwall, Rusk, Sabine, San Augustine, Shelby, Smith, Titus, Trinity, Upshur, Van Zandt and Wood) lindaslayter@potterminton.com
*Freestone, Leon, Limestone, Madison, and Navarro Counties & removal of Grayson County

District 16: Donna Crafton, 915/533-2943, (Brewster, Culberson, El Paso, Hudspeth, Jeff Davis and Presidio) dcra@scotthulse.com

*Lists counties included/excluded in that district for the Director Election if proposed Bylaw is passed in Fall 2005.

The following timetable is provided to guide you through the election process.

February 1, 2006: In accordance with the Standing Rules V B, Section 5e, the voter registration deadline shall be February 1 of each year.

February 16, 2006: Contact the Elections Subcommittee Chair for your district and request a nominating petition and, at your option, prepare a short resume to attach to such nominating petition.

Brochure or Resume: A brochure or resume pertaining to each candidate for director may be posted on the Paralegal Division's website (in the Members-Only section) and shall be prepared and furnished to the Elections Subcommittee Chair at each candidate's own expense. Such brochure or resume shall be received by the Elections Subcommittee Chair or the Paralegal Division Coordinator on or before April 10, 2006 (7 days prior to the posting of the ballots) to be included in the mailing of the ballots. Such brochure or resume shall not exceed two 8 1/2" x 11" pages or one 8 1/2" x 14" page.

Campaigning: After the signatures on the Nominating Petition have been verified (March 17, 2006), the nominee may begin actively campaigning. Solicitation by mail is proper, provided that any mailing is on personal stationery or employer letterhead (provided that the employer's permission has been obtained), or any mailing or communication by electronic mail is conducted by a member of the Paralegal Division. No mailing or communication can be conducted by any individual/entity not a member of the Paralegal Division. Candidates themselves, in addition to the above, may campaign by personal solicitation. The full expense of such mail solicitation shall not exceed the sum of $500. However, to the fullest extent possible, all communications and solicitations, whether by letter or card or telephone, should concentrate on the candidate's merits and should avoid criticism of the other candidate or candidates. The excessive use of telephone solicitation by persons other than candidates through the use of WATS lines and similar organized solicitation is discouraged. Directors running for re-election cannot use Director communication as a form of campaigning. Any incumbent director must conduct his/her campaigning by personal, separate communication. Candidates shall avoid personal campaigning prior to 30 days before the date designated to mail or post ballots or the next following business day when the signatures on the nominating petitions for Director have been verified.

March 17, 2006: Return your Nominating Petition, properly completed, and at your option, with a resume or brochure (for posting to the Paralegal Division's website) to the District Subcommittee Chair. (Any petition received after March 17, 2006, will not be accepted. Faxed, Xeroxed, or telecopied nominating petitions cannot be accepted as proof of a candidate's eligibility for nomination.)

March 27, 2006: Elections Subcommittee Chair, after verifying signatures on the Nominating Petition, will forward a draft of the ballot to the Elections Chair.

April 5, 2006: Elections Committee Chair shall forward ballots to the Paralegal Division Coordinator for posting.

April 17, 2006: Postcards mailed for Director Election. Voting begins online.

May 2, 2006: Deadline for voting for Director Election. All voting must be completed on or before 11:59 p.m., May 2, 2006.

May 3, 2006: The Paralegal Division Coordinator with the Elections Subcommittee Chair for District 4 will cause such ballots to be tabulated and notify the active candidates of such election results.

If you do not have access to the Internet at home or the office, you can access the Paralegal Division website at your local library. If you have any questions, feel free to contact the Elections Subcommittee Chair for your district.

Active Membership Replacement Certificate

Order a replacement Active Membership certificate for $15.00 (includes sales tax and shipping cost). The certificate is the same quality as the original Legal Assistants Division Active certificate.

Print the pdf order form from the Division's website at www.txpd.org. Go to the Members-Only section, sign in, and choose "Active Membership Certificate" from the drop down menu.

Scruples

A Paralegal Change of Employment

and the Duty to Protect Client Confidences
Part 1

Laurie Borski, Ethics Chair

This is a two-part article. In this first installment, we present Ethics Opinion 472 and begin to unpack the committee's conclusion with a discussion of paralegal obligations under the Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas and the definition of "confidential information" under Texas Disciplinary Rules of Professional Conduct. In Part 2, we will conclude our discussion with the definitions of "conflicts of interest" and "former client conflicts of interest" followed by a summary of the opinion, the definitions and the ethical obligations for protecting client confidences.

During the course of a career, paralegals will change employment, switching law firms, governmental entities or corporate legal departments, perhaps even leaving the legal field entirely. Paralegals do not have clients because they do not practice law. Even so, does a paralegal have an ethical duty to protect confidential information regardless of whether they are currently employed by the client's attorney? The answer is yes.

Our Code of Ethics and Professional Responsibility says that we are to know the provisions of the attorneys' code and are to "avoid any action which might involve an attorney in a violation of that code or even the appearance of professional impropriety." [1] So, even though the Texas Disciplinary Rules of Professional Conduct my not govern us directly, we are governed by it through a supervising lawyer.

Our Code of Ethics and Professional Responsibility also states that:

> A legal assistant shall preserve and protect the confidences and secrets of a client.

See Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas, Canon 4.

To understand the reasoning that gives rise to this duty, consider the fiduciary relationship between a lawyer and client. Both lawyer and client need the ability to freely discuss matters related to the representation in order for the lawyer to be fully informed of his client's situation and for the client to fully understand the choices available under our legal system. Potential clients would be reluctant to seek legal assistance if they believed their personal information would not be held in confidence or, even worse, used against their interests or in order for the lawyer's personal financial gain.

This issue was addressed in Texas

Ethics Opinion 472 [2], where the question presented dealt with whether a law firm should be disqualified following the change of employment of non-lawyer staff. (The opinion refers to the staff in turn as "secretary," "legal assistant" and "secretary/legal assistant" as if the terms were interchangeable. For the purposes of this article, the non-lawyer staff will hereafter be referred to as "paralegal"). During a lawsuit, one of the attorneys fires his "right hand" paralegal, with bad feelings existing between them. The former paralegal soon takes employment as a paralegal at the opposing law firm. Both firms are small, with less than five attorneys. The Ethics Commission concluded that so long as the supervising lawyer of the paralegal complied with Rules 1.05 concerning client confidences and complied with 1.06 and 1.09 concerning conflicts of interest and former client conflicts of interest so as to ensure the paralegal's conduct was compatible with the professional obligations of a lawyer, then under the Disciplinary Rules, the new law firm was not ethically required to disqualify itself from representation of a party adverse to the former employer's client. [3]

To unpack this ethics opinion, we consult Rules 1.05, 1.06 and 1.09 of the Texas Disciplinary Rules of Professional Conduct wherein the confidences of a client or "confidential information," "conflicts of interest" and "former client conflicts of interest" are defined.

Confidential Information

According to Rule 1.05(a):

> Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

See Rule 1.05(a), Texas Disciplinary Rules of Professional Conduct.

It is important to remember that both privileged and unprivileged client information is to be protected. Unprivileged information by definition is broad in scope and includes *any* information relating to or furnished by the client during the course of representation. Unless it is a matter of public record or widely known, even the fact that the lawyer or firm has been consulted by or has decided to represent the client should be held in confidence as unprivileged information.

Rule 1.05(b) sets out the instances under which a lawyer may knowingly reveal confidential or privileged information of a client or former client.

> (b) [A] lawyer shall not knowingly:
> (1) Reveal confidential information of a client or a former client to: (i) a person that the client has instructed is not to receive the information; or (ii) *anyone else*, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm. [*Emphasis added.*]
> (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.
> (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
> (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

See Rule 1.05(b), Texas Disciplinary Rules of Professional Conduct.

You can see that without the client's permission, a lawyer may not reveal *any* confidential client information, including unprivileged information, to *anyone* other than the client, the client's representatives or the lawyer's firm. In some instances, the client may choose to restrict the dissemination of this information to only certain members and employees of the lawyer's firm. Even if the client were not to restrict the dissemination of its confidential information to only certain persons within the lawyer's firm, the best way to safeguard confidential information is by disseminating it only on a "need to know" basis.

A lawyer is permitted to reveal unprivileged information in certain instances, such as when the lawyer has reason to believe it is necessary in order to carry out effective representation, to defend the lawyer against claims of wrongful conduct, to respond to allegations in proceedings concerning the lawyer's representation or to prove the legal services rendered or the value of those services in an action against someone other than the client who is responsible for payment. [4]

A lawyer is permitted to reveal confidential information in certain instances as well, such as when the client is likely to commit a criminal or fraudulent act resulting in death or substantial bodily harm, or in instances where breach of duty by either the lawyer or the client to the other is claimed. [5] The requirement of confidentiality also applies to government lawyers who may disagree with the policy goals that their representation is designed to advance. [6]

This brings us to an understanding of the first portion of the Ethics Committee's conclusion. The supervising lawyer of the paralegal must comply with Rule 1.05 to protect client confidences. A client confidence is any information about the client

gained during the course of representation. The fact that the client consulted the attorney or, in the absence of public record or being widely known, that the lawyer was representing the client could be construed as a client confidence. A paralegal has an ethical duty to safeguard both privileged and unprivileged client information regardless of whether they are currently employed by the client's attorney.

Citations for Parts 1 and 2:

[1] Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas, Canon 4.

[2] Tex. Comm. On Professional Ethics, Op. 472, V. 55 Tex. B.J. 520 (1992).

[3] Texas Disciplinary Rules of Professional Conduct, Rules 1.05, 1.06 and 1.09.

[4] *Id.*, Rule 1.06(d).

[5] *Id.*, Rule 1.05(d).

[6] *Id.*, Rule 1.05, Comment 5.

[7] *Id.*, Rule 1.06, Comment 1.

[8] *Id.*, Rule 1.06, Comments.

[9] *Id.*, Rule 1.09, Comment 4.

[10] *Id.*, Rule 1.09, Comment 4A.

Laurie Borski is Chair of the Professional Ethics Committee of the Paralegal Division, State Bar of Texas. She has served on the Division's Annual Meeting and Election Committees and is a past president of the Alamo Area Professional Legal Assistants in San Antonio. You can reach her at 210.250.6041 or laurie.borski@strasburger.com.

Opinions TO THE EDITOR

The TPJ wants to hear from you! The Publications Committee will poll members concerning their thoughts on some of the "hot topics" of the day. During each quarter, the Committee will draft a question, which will be distributed to membership, through the Directors. Each question will direct you as to where to send your response. We will print the responses in the following TPJ, reserving the right to edit for space considerations. While we prefer to print a name and city with each response, we understand that some of you may prefer that we not print your name. We will honor this request, so long as the response is not contrary to the objectives of the Paralegal Division or the Publications Committee.

We hope that this column provides a way for PD members to express themselves, constructively, on issues that impact our profession, our communities and our country.

Question of the Quarter:
Should nominees to the United States Supreme Court have previous judicial experience? Why is such previous experience beneficial or what benefit does one bring to the Court in not previously being part of the judiciary?

RESPONSE 1: While certainly previous judicial experience might be helpful, other professional experience would be just as vital. Certainly, a thorough understanding of Constitutional law, experience in the legal field, and life experience might weigh in more heavily than judicial experience. A keen grasp of the laws of the land, tempered with an even-tempered and analytical mind would be helpful.

—Jane Middleton

RESPONSE 2: Hopefully with age comes wisdom, integrity, knowledge and good luck every now and then. Yes, I feel that if a person has a complete understanding of the judicial process and fully understands the US Constitution and what it all stands for, then we might have a chance of getting someone in office who may stand up for what is judicially right in representing our country.

— Kay Smith, Lubbock

RESPONSE 3: I don't think Supreme Court nominees have to have judicial experience. I believe that if the Supreme Court's job is to interpret the constitution, then he or she needs only to be able to read and interpret what they think the founding fathers wanted us to do when they wrote the constitution. It might be refreshing to have new viewpoints about things other than the slant the judges may have based on their own careers and decisions. I believe the best Supreme Court judge would be one who is smart, knowledgeable and caring. Then we will get the decisions we need on the most pressing issues.

— Lu Poole, Houston

RESPONSE 4: Yes. Although a certain amount of skill with regard to abstract legal thinking is inherent in law school education, our laws have become so complex that, in my view, it takes more than just the basic legal skills that one needs to graduate law school, even coupled with some experience in trying cases, to be an effective Justice on the Supreme Court. Prior judicial experience should be required as a prerequisite to confirmation in order that the public and members of the Judiciary Committee will have some level of knowledge as to how the nominee is viewed by his or her peers and legal

scholars in terms of the nominee's ability to be a fair an impartial judge and that person's ability to truly understand the issues presented, particularly at the federal court level. Prior judicial experience would also be a means of assessing whether or not the nominee has the propensity to decide cases in accordance with the laws of the land (and whatever legal precedents existed at the time the decisions were made), rather than decide cases based upon that person's own personal value system. I do not want to diminish the importance of a Justice on the U. S. Supreme Court having some life experiences and being able to relate to the day-to-day world of the mainstream of our country's citizenry, but that person should also be a superior legal scholar. In my opinion, it would be difficult to assess all of the above mentioned attributes of a nominee without that nominee having prior judicial experience.

—Lou O'Hanlon

RESPONSE 5: I think appointing someone to the Supremes who has never been a jurist, is rather akin to seeing a dermatologist for a broken leg. They both went to med school, but their specialties are not even related. So, I guess if we want skin cream for a broken leg, there is no problem. *— Nan Gibson, Houston*

RESPONSE 6: Yes, nominees to the United States Supreme Court should definitely have previous judicial experience. A Supreme Court Justice has the responsibility to be an authority on the law in respect to the United States Constitution. An attorney may be extremely knowledgeable in constitutional law, but our Justices should possess the experience of reviewing cases and delivering concise opinions. A nominee who has argued only one side of an issue, regardless of that nominee's successes, will not command the expertise to objectively review the important, and potentially landmark, constitutional issues that will be presented to the Court.

— Harry Jackson, Houston

RESPONSE 7: Nominees to the U.S. Supreme Court, the highest court in the land, must be our best and brightest. It is essential that they possess a deep and abiding respect for the Constitution, have experience in dealing with constitutional issues, possess a thorough knowledge of constitutional law (to include the Federalist papers, the anti-Federalist papers, news articles and other writings of the period), an ability to write clearly, have a body of work that can be studied and the ability to argue persuasively. If a nominee possesses these qualities but does not have prior judicial experience, they should not be held back from consideration. Absent the qualities outlined above, however, it is not in the best interest of the court or the country to nominate someone for the position of associate justice, regardless of whether they have prior judicial experience. It would be even worse to nominate someone who is not otherwise qualified for the position solely on the basis of gender or a claim of wanting to "bring diversity to the court."

Nominees who are otherwise qualified but have no previous judicial experience can bring talents and abilities that enhance the Court. Such is the case with many former justices, most recently Chief Justice Rehnquist, who had no prior judicial experience before being nominated as an associate justice to the Supreme Court. Some in the business community were hoping that a nominee with prior commercial litigation experience but no judicial experience would bring a real-world perspective to the court on how its opinions impact society. As much as I might agree with this position in some respects (i.e., *Kelo v. City of New London*), I believe this hope was mistaken. A nominee with a deep respect for the Constitution would not have ruled for the City of New London no matter their prior experience, on the bench or arguing in front of it.

—Laurie Borski, San Antonio

Sustaining Members—Paralegal Division, 2005-2006

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IMPORTANT NEWS

Continuing Legal Education

ONLINE CLE
The Paralegal Division offers online CLE via the PD website. To participate in online CLE, please go to www.txpd.org and select CLE/Events.

CLE REQUIREMENT
ACTIVE AND ASSOCIATE members of the Paralegal Division are required to obtain six (6) hours of CLE (2 of which can be self-study). CLE hours must be obtained between June 1 – May 31 of each year.

CLE CALENDAR
A statewide CLE calendar can be found on the PD website at www.txpd.org under Upcoming Events/CLE. You can find a variety of CLE programs offered around the State. Please check the PD website often because the calendar is updated weekly.

Membership Information

CHANGES TO MEMBER INFORMATION
Paralegal Division members can now change their credentials, addresses, email addresses, preferred mailing address and/or phone numbers via the State Bar of Texas website. Go to www.texasbar.com; click on MyBarPage (top of home page). If you have never visited this page, you will need to set up a pin/password. Your password to set up your **NEW Pin/password** is the last four digits of your social security number **(if the State Bar does NOT have your social security number on file, you will not be able to use this area nor will you have access to MyBarPage);** once you set up the new pin/password, you will be able to enter this section of the website to update your member records. If you have any problem accessing this page, please contact the Membership Department at 1/800-204-2222, ext. 1383.

MEMBERSHIP CERTIFICATE (Active Members Only)
Need to replace your membership certificate? Please complete the order form found on www.txpd.org and follow instructions. The cost to replace an Active Membership Certificate is $15.00.

MEMBERSHIP CARD
Need to replace your membership card? Please send $5.00 made payable to the Paralegal Division along with a letter requesting a new membership card to the Membership Department, State Bar of Texas, P. O. Box 12487, Austin, TX 78711.

Were you ever issued a membership card? If no, please contact the Membership Department of the State Bar of Texas at 1/800/204.2222, ext. 2114 or email at jmartinez@texasbar.com

DELL COMPUTER DISCOUNT
The number assigned to the Paralegal Division by Dell Computer Corp is: SS2453215. This is the number you should use to receive the 10% discount for purchase of computers. However, Dell **does not** have the 10% discount special continuously. Dell sends a notice when the discount is offered to our members at which time it is forwarded to the PD members via the PD E-group. You may try to use this number anytime, but there are no guarantees that you may receive the discount at the time of access. Notices will continue to be forwarded to the PD E-Group when the discount is offered by Dell Computer Corporation.

PD Website Information

MEMBER DIRECTORY ONLINE
A membership directory is set up on the PD website under the Members Only area. By default, your membership information is listed in the online membership directory. If you would like to suppress showing your listing to other members, go to the Members Only "Edit My Profile" function to display your listing and then uncheck the "publication" box. If you haven't already done so, you might want to include info about adding member specialties through the same interface. If you need changes made to the online membership directory, you must make those changes using the procedures set out in the above *CHANGES TO MEMBER INFORMATION* procedures.

MEMBERS ONLY AREA
The Members Only area of the PD website is for current members of PD only. If you are a member of the Paralegal Division and cannot access this area, please send an email to pd@txpd.org with your particular problem. Access is automatically given to members of the Paralegal Division. Access to the members-only area is available within two weeks from the date of the acceptance notice mailed to the individual by the Paralegal Division Coordinator.

PD E-GROUP
How do I sign up for the PD E-Group?
Going to trial in a "foreign" jurisdiction and want some tips from those who have gone before? Need a form but do not know where to turn? Then you need to sign up for the PD E-group! This is a members-only group and a benefit of being a member of the Paralegal Assistants Division (PD).

To sign up, go to www.txpd.org, click on Members-Only and choose E-Group. There will be directions on how to sign up. **You will be required to respond to an email confirmation**. Once you have completed the signed up, you will begin receiving emails from the members of PD.
For those who prefer not to be interrupted with email notifications, select "digest" for the PD email exchange. Emails are collected and distributed one time a day in one email.

How Do I change my PD E-group email address?
Instructions:
The PD E-Group created by the member is Password-protected, only the member has access to change a member's PD E-Group email. Go to www.txpd.org, click on Members-Only, click on PD E-Group, enter your password, unsubscribe the current email address, and create a new email address where you want to receive your PD E-Group messages.

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