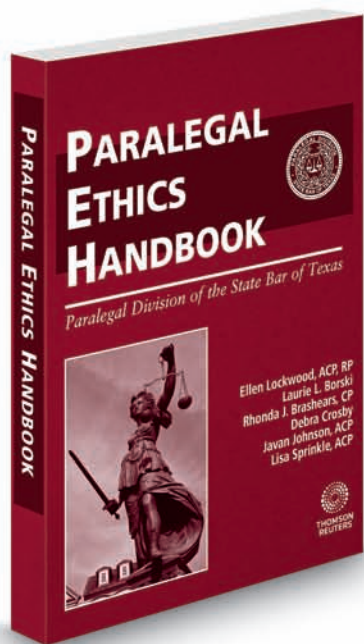


SUMMER 2016 VOL. 22 NO.1

TPIJ

Texas Paralegal Journal





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PARALEGAL ETHICS HANDBOOK



Paralegal Division of the State Bar of Texas

By: Ellen Lockwood, ACP, RP
Laurie L. Borski
Rhonda J. Brashears, CP
Debra Crosby
Javan Johnson, ACP
Lisa Sprinkle, ACP

The Paralegal Ethics Handbook is a resource for all paralegals that addresses ethical considerations for 17 practice areas as well as considerations for in-house, corporate, freelance, administrative, governmental, and regulatory law paralegals.

This title:

- Examines such topics as defining ethics, ethical obligations, and remaining ethical
- Addresses ethical considerations for e-filing, e-discovery, and technology
- Provides resources for state information and paralegal association ethics cannons and related information
- Contains rules and regulations for all 50 states and Washington, D.C.
- Explains how to determine whether an action may be an ethical violation



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PRESIDENT'S *Message*

Erica Anderson, ACP

This is my final message as President for the 2015-2016 term and with it, a sigh of relief to cross another task off of my daunting to-do list for this term. For the past several months, I have been in a time capsule that will soon release me. The incoming 2016-2017 Board of Directors has been elected, and the group is bound to implement new and exciting ideas, as well as have thoughtful discussions for upcoming choices. I wish them well and can only hope that my role this year helped at least one member love the Paralegal Division as I do.

In accepting the position as President, I was wowed by the confidence placed by the Board of Directors in me and the support the membership has placed with its Directors. In truth, I benefited more from the experience than anyone did from my leadership. My paralegal “tool bag” gained new tools that I cannot wait to keep using once I return to my desk after this position as President, but probably not as much as eager as my supervising attorney is for me to return completely to his cases. My motto and theme for this year were teamwork and community: no one issue was decided singularly; it was a concerted group effort.

As Presidents before me can attest, many items are placed on the agenda for you and as President, you must step up to take action. This year has been a tremendous test to my skills as a paralegal to problem solve, oftentimes calling on me to collect my wits, exhibit undue patience, make a decision, and move on to the next item without second-guessing. I look back at many moments during this year and think of some of the ones that have affected my role as a leader, paralegal, and individual, and feel no regrets. With each task, the old adage “it takes a village,” reverberated through my thoughts, sometimes in a harmonic chord, but other times in clashing notes. Many memories of this



year evoke triumph, satisfaction, pride, and a twinge of melancholy that the end draws near. Megan Goor, TBLS-BCP, the incoming President, and I partnered up throughout the various stages of each task to work together and cohesively in order to give our very best back to the members and to the Division. In agreement to not lose a step, we often times over-thought the issues at hand, finally to realize that as paralegals, it is our nature to anticipate and plan from all sides.

The Board of Directors addressed many topics during this term, with more to come, but many of their decisions are the unseen ones in dealing with procedures and items not truly felt by the membership at first. One of those pivotal decisions demonstrates the longevity of the Division: it is time to go digital with the *Texas Paralegal Journal*. This issue and the next will be offered in both print and digital formats, with the following issue completely digital. It is a new time, populated with digital devices and fixes, and the Paralegal Division recognizes it must move forward in order to maintain its’ status as a great association with useful benefits to members and to grab the attention of

younger professionals.

I ask that you seek out your Director and thank him or her for their dedication at the state-wide level, as it is no easy task to juggle home life, work life, and volunteerism. With TAPS 2016 occurring shortly after my term as President, my focus will immediately swing to the 3-day conference set for the Wyndham Riverwalk in San Antonio. Mark your calendars for September 28-30 and be ready to celebrate at TAPS on Track—A Journey to Excellence.

As the Division approaches its 35th Anniversary, my partner in crime, Megan Goor, incoming President for 2016-2017, is a great leader with fantastic skills to motivate new volunteers. I look forward to cheering from the sidelines during her year while she comes into her own. With that, I leave you as I started, with my personal playlist reflecting my journey:

- I Feel Good (James Brown)
- We Built this City (Starship)
- Moments Like This (Afters)
- Hall of Fame (Script)
- The Show Must Go On (Queen)
- It's Time (Imagine Dragons)
- Send Me on My Way (Rusted Root)
- Bittersweet Symphony (Verve)
- Don't You Forget About Me (Simple Minds)
- I'll Remember (Madonna)
- Come Sail Away (Styx)

Erica Anderson, ACP
NALA Advanced Certified Paralegal

TPIJ

Texas Paralegal Journal

Focus on...

Don't Let the Grass Grow Under Your Feet

A couple of infrequent instances where, if you don't move quickly, you'll waive your Complaint, and a couple of other helpful tips

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EDITOR'S *Note*

By Heidi Beginski, Board Certified Paralegal, Personal Injury Trial Law, Texas Board of Legal Specialization

Most paralegals know that time is of essence in our work, usually. I can't be the only one who has awakened in the night thinking "Did I miss that deadline?" Some deadlines we deal with on a daily basis, but some apply only in special instances. This issue's cover article by Steven K. Hayes with assistance by Constance Hall, provides practice tips and reminders for those easy-to-forget instances.

While most paralegals may be crystal clear on the overtime pay policies that apply to our profession, our family, friends or clients may not be so certain, especially in light of a recent 5th Circuit case addressing unreported overtime hours. Mike Loftin gives us an update in his article, "Avoiding Exposure for Unreported Overtime: A Belt and Suspenders."

Now that Texas law allows for licensed persons to openly carry firearms in public, it's time to get educated on guns in the work place. Marcus Norris provides an outline of options for private employers in his article, "Regulation of Employee & Customer Guns by Private Employers" in this issue.

Did you know the Federal Rules of Civil Procedure now allow less time to serve a defendant? Brandy Kempf, of PD's Committee on Professional Development, gives an overview of the FRCP changes that took effect December 1, 2015 in this issue.

More employers are realizing the need for pre-employment testing, but as Monica Narvaez indicates in her article "Pre-Employment Testing: One Size Does Not Fit All."

Please take the time to read about a new "twist" to this year's TAPS in this issue: PD is partnering with the San Antonio Food Bank to help fight hunger in Texas.



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Don't Let The Grass Grow Under Your Feet

A Couple of Infrequent Instances Where, if You Don't Move Quickly, You'll Waive Your Complaint, and a Couple of Other Helpful Tips

by Steven K. Hayes. Copyright 2015. Edited by Constance Hall, but don't blame her for suggestions Steve didn't accept.

As we've discussed before, preservation of error requires us to make our complaint on the record in a timely fashion, in compliance with the pertinent rules, in a manner sufficiently specific to make the trial court aware of our complaint, and to get a ruling on the complaint, either express or implied (and to object if such a ruling is not made). TRAP 33.1. That general set of requirements applies universally, save for complaints which do not have to be raised to be preserved.

Easy enough said—but some issues simply do not come up that frequently, and we sometimes stumble when applying the universal rule to the specific situation. Following are examples where not timely acting can cause waiver.

In case you intend to disqualify opposing counsel, move to do so as soon as you know the grounds for disqualification. Disqualification of counsel is never a happy event. Pots of ink have been spilled (and megabytes of data occupied) by articles concerning such disqualification. See, e.g., Hollenbeck, Russell, and White, Shelley, DISQUALIFICATION OF COUNSEL & ARBITRATORS, State Bar of Texas 37th Annual Advanced Civil Trial Course (2014); DuCloux, Claude, CONFLICT OF INTEREST AND ATTORNEY DISQUALIFICATION, State Bar of Texas 8th Annual Patent Litigation Course (2012).

But in the event that you face a situation where you feel disqualification is called for, you may waive the right to complain if you do not move for that disqualification as soon as “the conflict became apparent” to you. *In re Trujillo*, 2015 Tex. App. LEXIS 11394, *4-5 (Tex. App.—El Paso Nov. 4, 2015). Cases indicate that waiting even 4 to 8 months will waive the disqualification. *Id.*, citing “*Buck v. Palmer*, 381 S.W.3d 525, 528 (Tex. 2012)(unexplained delay of seven months amounted to waiver); *Vaughan v. Walther*, 875 S.W.2d 690, 691 (Tex. 1994) (delay of six and a half months constituted waiver); *Enstar Petroleum Company v. Mancias*, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989, orig. proceeding) (finding waiver where party waited four months to file motion to disqualify).” Waiting three and a half months may not be too long to wait to file the motion to disqualify—if the rest of the facts surrounding the delay are in your favor—but why run the risk. See *In re Kahn*, No. 14-15-00615-CV, 2015 Tex. App. LEXIS 12199, *6-7 (Tex. App. Houston 14th Dist. Dec. 1, 2015) (orig. proceeding). Sometimes it's tricky to know when the disqualifying conflict became apparent to the party, but the courts will look at the discrete, specific facts of your case to see if they are consistent with you knowing that the conflict exists—and will be especially attuned to whether the timing of your

motion “indicate[s] that the motion to disqualify was used as a tactical weapon.” *Trujillo*, at *8. If you question whether a disqualifying conflict exists, immediately do what you need to do in order to answer the question and, if the conflict exists, file the motion. Failing to do so in very short order can lead to a waiver of the right to pursue the disqualification.

Disqualification of counsel or recusal of a judge is not the only time when you need to move as soon as you know you have grounds to do so. For example, **if you intend to challenge an order granting a motion for new trial, do so immediately, or run the risk of laches barring your ability to do so.** We all know that the law has shifted dramatically over the last few years in terms of a party having the ability to challenge, via mandamus, a trial court granting a motion for new trial. But one thing that has not changed is that laches can bar your mandamus if you wait too long to file your petition. For example, if you wait 17 months between the signing of the order granting new trial before filing your petition for writ of mandamus, laches will probably bar your petition. *In re Timberlake*, No. 14-15-00109-CV, 2015 Tex. App. LEXIS 12279, *6 (Tex. App.—Houston [14th Dist.] Dec. 3, 2015). In fact, as *Timberlake* notes, there are cases which have held that delays of even 4 and 6 months will result in laches barring a



mandamus. So even if it takes 6 months to get the record, and even if you are busy and also running for a judicial position, and the petition requires extensive time to draft and revise, don't wait to file the mandamus petition, because the foregoing will not excuse your delay. *Id.* Having said that, laches will not bar mandamus relief concerning a void order.

There are a couple of other recent error preservation decisions which do not have anything to do with having to move quickly to preserve error, but which provide helpful guidance in an area which lawyers face regularly. **For example, here is an example of a court holding that an offer of proof was sufficient enough to preserve a complaint about a trial court excluding deposition testimony.** Most cases dealing with this subject address the unfortunate situation where the party complaining about an exclusion of evidence failed to make any offer of proof. But in *PNS Stores, Inc. v. Munguia*, 2015 Tex. App. LEXIS 12849, *11-12 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015), the Court held that the offer of proof, which was made, in fact preserved a complaint about the trial court's exclusion of the deposition testimony. In that case:

- the offering party offered the deposition and exhibits attached to it;
- “the court questioned the parties at length concerning [the deponent's] qualifications and the basis for her anticipated testimony;”
- the offering party described the deponent's educational background, her “significant experience with respect to product display and marketing, and noted that Harper had firsthand stocking experience,” which “included ensuring whether similar products in similar big box stores were displayed in a safe manner and at a safe level, whether warnings or barricades were needed during stocking, and whether stocking should be done at certain times of day.”

This led the Court to “conclude that PNS's attorney adequately summarized the substance of Harper's proposed testimony to preserve the issue for appeal.” *Id.*

I've mentioned before that to preserve error you ought to engage the trial court in a conversation on the issue—and listen to what the court says. Here is an example showing the importance of listening to what the court says, and to not just rely on the fact that you have filed something with the court. The Dallas Court recently reaffirmed that “we cannot expect them to comb through the parties” pretrial filings to ensure that the resulting document comports precisely with their request—that is the parties' responsibility.” *Shamoun & Norman, LLP v. Hill*, 2016 Tex. App. LEXIS 744, *54-55 (Tex. App.—Dallas Jan. 26, 2016). But here, in holding that a party had not preserved concerning a jury charge, the Dallas Court pointed out that “the trial court indicated on the record it was not taking the time to read through Hill's submitted objections [to the charge] and the only ‘objection’ Hill provided on the record [“There was Question Number 6, we had a different way to present the question.”] did not timely and plainly make the trial court aware of the complaint he now raises on appeal.” *Id.* And so the Court held error was not preserved. So when the trial judge tells you that it has not read or taken into consideration previously filed materials, you need to present the portions of those materials to the court which you intend to argue on appeal.

Finally, let's talk for just a moment about how specific our complaints have to be. Rule 33.1 speaks in terms of making the complaint “with sufficient specificity to make the trial court aware of the complaint.” There are a number of cases (I won't cite them here) which have held that error was not preserved because the argument made on appeal did not “comport” with the complaint made at trial. You would think the converse would also be true—that is, if a complaint made on appeal did comport with the complaint

made at trial, it was preserved. Having said that, I have yet to find a case where the court used the “comport” test to hold that error was preserved. Two recent cases have dealt with whether a complaint in the trial court was specific enough, and both used different specificity tests, neither of which are—pardon the play on words—specifically mentioned in Rule 33.1. In *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 2016 Tex. LEXIS 98, *29-30 (Tex. 2016), the Supreme Court held that a party had preserved error because a party's “objection to the contract question and its argument in the court of appeals are similar in substance.” *Emphasis supplied.* The Supreme Court noted that the party “contended both at the charge conference and on appeal that the May 19 agreement was not binding and that the issue of contract formation should have been submitted to the jury.” Juxtapose that holding with a recent decision from the Eastland Court, in which the court held error was not preserved because the arguments made on appeal were “[i]n sophistication . . . well beyond the arguments that [Appellant] presented to the trial court.” *0.089 Acres of Land Blk: 015 v. State*, No. 11-13-00306-CV, 2015 Tex. App. LEXIS 13056, *8-9 (Tex. App.—Eastland Dec. 31, 2015, pet. pending), *emphasis supplied.* The Appellant argued on appeal that the trial court erred when it did not apply Arizona law to the trust. *Id.* At trial, when the trial court said “Well, I would assume that Arizona law is the same as Texas law unless you told me it's different,” Appellant's counsel said “Who knows? And I'm not saying that it isn't, Judge.” *Id.* These holdings emphasize the need to anticipate and plan, when possible, how you will articulate your position on the issues that will come up at trial so that you don't have to walk an error preservation tightrope on appeal.

Steven K. Hayes is with the Law Office of Steven K. Hayes in Fort Worth.

Constance Hall is with the Law Office of Constance K. Hall, PLLC in Arlington.

PARALEGAL DIVISION ANNOUNCES TAPS 2016 SCHOLARSHIP

For the upcoming 2016 Texas Advanced Paralegal Seminar (TAPS), a three-day CLE seminar, the PARALEGAL DIVISION of the State Bar of Texas will award up to two (2) educational scholarships for the three-day registration to attend the TAPS 2016 seminar, "TAPS on Track: A Journey to Excellence." Below please find the guidelines and application for applying for this scholarship.

1. The Recipient must be a member (or apply for membership) of the Paralegal Division of the State Bar of Texas.
2. To apply for a TAPS scholarship, the applicant is required to give a written essay on the following:
Coming together is a beginning. Keeping together is progress. Working together is success. -Henry Ford

When you run a part of the relay and pass on the baton, there is no sense of unfinished business in your mind. There is just the sense of having done your part to the best of your ability. That is it. The hope is to pass on the baton to somebody who will run faster and run a better marathon. -N. R. Narayana Murthy, chairman and CEO, Infosys Technologies

Setting the pace, keeping on track, and teamwork. As paralegals, we set the pace running the first leg of the law firm relay race and keep things on track. From intake to litigation to trial, including events in between and beyond, paralegals are poised to research and prepare the attorney in a myriad of areas and to work together as a team for the benefit of the client. State how you currently contribute or would contribute to the law office to "set the pace" to effectively increase the role and utilization of the paralegal in an attorney-paralegal team.

The essay must be two (2) pages in length and double-spaced.

3. To apply for a TAPS scholarship, the applicant is required to provide two (2) letters of personal references, which describe the applicant's involvement in the paralegal profession.
4. Financial need shall be a contributing factor, but not a requirement. However, if two or more applicants are tied in meeting the criteria for the scholarship, financial need shall be the determining factor.
5. Recipient(s) are required to volunteer a minimum of three hours on-site during the event.

Other

1. No money will be sent directly to the recipient.
2. The scholarship for TAPS shall cover the cost of the three-day registration.
3. The scholarship selection committee for reviewing scholarship applications for TAPS shall be composed of the Chair of the TAPS Planning Committee, one Planning Committee Sub-Committee Chair, and the Board Advisor to the TAPS Planning Committee.

The Paralegal Division of the State Bar of Texas will award scholarships for TAPS 2016 which will cover the cost of registration in accordance with the TAPS scholarship guidelines.

TAPS 2016 SCHOLARSHIP APPLICATION

IMPORTANT: ALL APPLICATIONS FOR A SCHOLARSHIP FOR TAPS 2016 MUST BE RECEIVED BY TUESDAY, JULY 12, 2016. DATE OF TAPS 2016: September 28-30, 2016, San Antonio, TX

Name _____ PD Membership No. _____

Home Address _____

Home Telephone _____ E-mail Address _____

Work Address _____

Work Telephone _____ Fax Number _____

Employer _____

Are you a member of a local paralegal organization that offers a scholarship award? _____

Give a detailed description of your reason for seeking a scholarship to TAPS 2016: _____

Give a detailed description, if any, for your reasons for financial need: _____

Attach two (2) personal references and your written essay to this application. Applications should be mailed to: Megan Goor, Scholarship Chair of the TAPS Planning Committee, The Brender Law Firm, 600 Eighth Avenue, Fort Worth, TX 76104-2020 or email to: taps@txpd.org Scholarship recipients will be notified by letter or email by August 1, 2016.

Applicant's Signature

Attach any additional explanations

Avoiding Exposure for Unreported Overtime: A Belt and Suspenders

by Mike Loftin

A recent 5th Circuit decision illustrates how two simple policies protect an employer from FLSA exposure for unreported overtime hours. *Ambrea Fairchild v. All American Check Cashing, Inc.* 2016 WL 1085747 (2016).

Ms. Fairchild admitted not obtaining authorization to work the claimed overtime hours, but said she believed that All American condoned her overtime work when it was necessary in order to "get the job done." She relied on All American's employee computer usage reports to show that she had often continued to work after "clocking out." She did not report the claimed overtime hours shown on the computer usage reports—because she knew that All American prohibited unauthorized overtime—but argued that the



computer usage reports showed that All American had constructive knowledge that she was working unauthorized overtime hours in order "to get the job done."

All American had two straightforward written policies concerning overtime: 1) all overtime hours must be authorized in advance by a supervisor, and 2) all overtime hours must be reported through the timekeeping system. The Court held that Ms. Fairchild's failure to follow these two policies was fatal to her claim.

The Court acknowledged prior decisions holding employers liable for unauthorized and unreported overtime hours by virtue of these employers "standing idly by" and permitting employees to work overtime hours in violation of written policies. But the Court found that "mere access" to computer usage reports for employees was not sufficient to impute constructive knowledge of unauthorized and unreported overtime hours to All American. (Note that access to employee computer usage records might be sufficient to impute constructive knowledge if a plaintiff-employee could show that the employer regularly reviewed these records.)

Mike Loftin is a shareholder in the Underwood Law Firm's Amarillo office.

Regulation of Employee & Customer Guns by Private Employers

by Marcus Norris

When the government enacts laws that affect children, pets, or firearms, get ready for controversy! In case you haven't heard, effective January 1, 2016, Texas law allows for licensed persons to openly carry a firearm in public under the same kind of licensing that has been used to allow concealed carry for twenty-one years.¹

What are the rights and options available for private business owners to regulate firearms brought into the workplace by employees, customers, or vendors? To

allow or not to allow, that is the question. This article will explore several alternative approaches that a private employer may take on this matter.

EMPLOYEES

Every employer needs a written policy statement on this topic. This policy may be stated in a special memorandum that is distributed to each current employee and to all subsequently hired employees. Or, it may be an amendment to the company's personnel manual.

Here are the possible positions a private employer may take:

1. **Allow both concealed and open carry** in the workplace and company-provided vehicles by those employees who are licensed by the state to do so and conduct themselves in accordance with applicable laws (such as, concealed means not readily discernible to a casual observer, and open carry requires use of a belt or shoulder holster).
2. **Allow only concealed carry**, in the workplace and company-provided vehicles by those employees who are licensed to do so. TEX. LAB. CODE sec. 52.062(b). However, state law does not allow a private employer to prohibit an employee, who is lawfully licensed, from possessing a firearm or ammunition in a locked, *privately owned motor vehicle* in a parking lot, parking garage, or other parking area the employer provides for employees. TEX. LAB. CODE, sec. 52.061.²
3. **Prohibit employees from carrying** or

possessing firearms in the work place and company- provided vehicles, whether carried concealed or openly, whether licensed or not. TEX. LAB. CODE, sec. 52.062(b). However, state law does not allow a private employer to prohibit an employee, who is lawfully licensed, from possessing a firearm or ammunition in a locked, *privately owned motor vehicle* in a parking lot, parking garage, or other parking area the employer provides for employees. Texas Labor Code, sec. 52.061. (See Fn. 2)

4. If an employer desires to prohibit concealed, open, or both forms of carrying a firearm, then the policy statement needs to incorporate the language required for the signs discussed in the next section (Penal Code sections 30.06 and 30.07)

Texas law limits certain liability exposure and duties of an employer. Where the employer is required by law to allow firearms on the property (the parking areas) then, except in cases of gross negligence, an employer, principal, officer, director, employee, or agent, is not liable for personal injury, death, property damage, or any other damages resulting from or arising out of an occurrence involving a firearm. The mere presence of a firearm or ammunition on an employer's property in accordance with law does not by itself constitute a failure to provide a safe workplace. (TEX. LAB. CODE, sec. 52.063)

It is also significant that an employer has no duty: (1) to patrol, inspect, or secure any parking area provided for employees or any privately owned motor vehicle located in a parking area; or, (2) to investigate, confirm, or determine an employee's compliance with laws related to the ownership or possession of a firearm or the transportation and storage of a firearm or ammunition. (TEX. LAB. CODE, sec. 52.063).

CUSTOMERS / VENDORS / PUBLIC

An employer may have the same or a different policy concerning its employees and the public when it comes to firearms. Thus a company could have one rule for all, or it might allow employees to carry openly

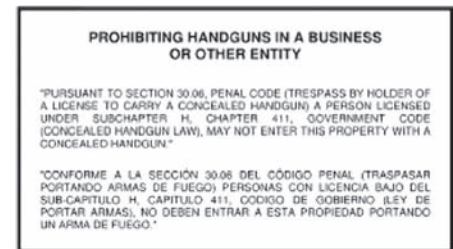
or concealed, but not allow such for others entering the business, or vice versa.

If a company desires to prohibit customers and other non-employees from carrying a firearm either concealed, openly, or both, then the company must post special signs at all entrances. The law requires strict compliance, both as to the content and appearance of each sign.

1. To prohibit *concealed carry*, then the business will need to post this sign:
"Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun."
2. To prohibit *openly carried* firearm, then the business will need to post this sign:
"Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly."
3. To prohibit *both*, then the business must post both signs.
4. Each sign posted must meet the following criteria to be lawful and enforceable:
 - Be in both English and Spanish;
 - Be in contrasting colors [referring to the background and letters] with block letters at least one inch in height;
 - Displayed conspicuously & clearly visible to the public at each entrance to the property.

Because the text of the 30.06 and 30.07 signs is almost identical, it is tempting to combine them, with slight edits, into a single sign. However, the statute says each sign must contain "...language identical to the following..." Thus we advise against altering or combining the prescribed text for each sign, until further guidance is received from the courts or attorney general. However, the signs may be placed together (above, below, or side-by-side).

Here is an example of a lawful 30.06 sign; a 30.07 sign will be similar:



We trust this general legal information is helpful to you. However, no single article can possibly cover every possible scenario. This article is no substitute for you obtaining specific legal advice about your situation. We invite you to contact us to discuss your specific situation and receive advice suited to your situation.

¹ According to the Texas Department of Public Safety, in 2013 there was a total of 50,869 convictions for all violations of Texas criminal laws, of which 158 persons were licensed to carry a handgun (0.3106%). In the event an employer does not yet have a desired policy and/or required signs in place for employees or customers by January 1, there is a statistically low probability of there being a violation of law committed by a licensed person carrying a firearm. <https://www.txdps.state.tx.us/RSD/CHL/Reports/ConvictionRatesReport2013.pdf>

² The mandate to allow firearms in the parking lot does not apply to certain employers: where prohibited by state or federal law; a company owned or leased vehicle; a school district; an open-enrollment charter school; a private school; property that is subject to a valid, unexpired oil, gas, or other mineral lease that contains a prohibition of firearms on the property; or property owned or leased by a chemical manufacturer or oil and gas refiner with an air authorization under Chapter 382, Health and Safety Code, and on which the primary business conducted is the manufacture, use, storage, or transportation of hazardous, combustible, or explosive materials, except in regard to an employee who holds a license to carry a concealed handgun under Subchapter H, Chapter 411, Government Code, and who stores a firearm or ammunition the employee is authorized by law to possess in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees that is outside of a secured and restricted area: (i) that contains the physical plant; (ii) that is not open to the public; and (iii) the ingress into which is constantly monitored by security personnel. TEX. LAB. CODE, sec.52.062(a)

Marcus Norris is an attorney with the Underwood Law Firm in Amarillo.

FRCP Amendments

by Brandy Kempf, PD Committee on Professional Development

Eleven Rules of the Federal Rules of Civil Procedure were amended, effective December 1, 2015. The changes include, but are not limited to:

Rule 4(m)—the time limit for the service of defendant has been shortened from 120 days after the filing of the complaint to 90 days. This change is not applicable to service in a foreign country under Rule 4(f) or 4(j)(1), nor to service of a notice under Rule 71.1(d)(3)(A).

Rule 16 Conference—the scheduling conference must now be held in person, by teleconference, or any other electronic means. District Courts may no longer conduct the scheduling conference via

“mail, or other means” as was previously provided.

Rule 16(b)(2)—the scheduling order must now be entered on or before the earlier of (a) 90 days after any defendant has been served, or (b) 60 days after any defendant has appeared.

Rule 16(b)(3)(B)—three new items were added to the Permitted Contents of the Scheduling Order, including language providing for the disclosure, discovery, or preservation of ESI.

Rule 26(b)(1)—under the amendment, information is discoverable if it is relevant to any party’s claim or defense and is proportional to the needs of the case as opposed to the previous language of “rea-

sonably calculated to lead to discoverable information.”

Rule 26(d)(2)—Rule 34 requests may now be delivered to another party more than 21 days after that party has been served even if the parties have not yet held the required Rule 26(f) conference. Delivery in this case does not constitute service; rather, service is considered effected at the first Rule 26(f) conference. Response deadlines will run from the date of service.

Rule 37(e)—outlines what actions the Court may take if it is found that ESI has been spoliated.

The foregoing is certainly not an exhaustive listing of all amendments and, as such, it is imperative that you take the time to read the amended Rules (1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84) and all accompanying Notes on the same.

Brandy Kempf is a paralegal at the Ayers Law Office in Addison.

Pre-Employment Testing: One Size Does Not Fit All

By Monica Narvaez

In today’s market, it is imperative for employees to operate quickly and efficiently. Erratic performance and turnover have a tremendous impact on the bottom line so employers are increasingly looking for “fit” when hiring. One way to assess fit is through pre-employment testing.

In general, pre-employment tests can measure whether potential hires possess certain traits or the likelihood they will engage in those traits. The “trait” is that which the company deems crucial to the success of the business and the employee.

If used properly, pre-employment testing can be a valuable tool for a hiring manager. However, the risks are great so it is important to not only assess the test for negative impact to a protected class, but continue to assess periodically during its use and modify as needed.



There are numerous types of pre-employment tests. Cognitive tests assess traits such as reasoning, memory and perception, and skills such as math and reading comprehension. Sample job task assessments measure performance and aptitude. Medical and psychological tests measure medical and mental fitness.

And, finally, personality tests measure the degree to which a person possesses certain traits or dispositions, or the likelihood that person will engage in certain behavior.

Pre-employment testing opens the door to action by the Equal Employment Opportunity Commission (EEOC) or Texas’ equivalent, the Texas Workforce Commission. Both agencies look for tests resulting in a negative impact on the basis of race, color, national origin, religion, age, gender or sex and disability. It is important to note that tests not intended to negatively impact a protected individual still may be illegal. These tests have a “disparate impact,” and the lack of intent to discriminate is not a defense.

In 2008, the Ford Motor Company paid \$8.55 million in monetary relief and \$1.6 million in attorney’s fees and expenses because of its cognitive reasoning test. The test had a statistically significant negative effect on minorities. Recently, Target agreed to pay \$2.8 million dollars to settle a claim with the EEOC that three of its pre-employment tests disproportionately screened out female and disabled applicants for exempt-level professionals in violation of Title VII and the Americans

with Disabilities Act ("ADA"). In late 2015, a trucking company settled with the EEOC for an undisclosed amount over allegations that its physical strength tests improperly discriminated against women and older applicants.

Personality testing, a popular way to measure work culture fit, is useful but buyer beware. The ADA prohibits medical examinations before an offer of employment has been extended. Testing for honesty, work habits or ability to get along with others is *not* considered a medical test. However, using a test designed to measure overall mental health and not specifically to look for those traits is a medical test and illegal if required pre-offer. Similarly, post-offer medical tests may be improper if they screen individuals with a disability, unless the test is shown to be job-related and consistent with busi-

ness necessity.

Additionally, tests such as English efficiency or comprehension may disproportionately screen applicants from other countries and therefore violate Title VII's prohibitions against discrimination based on national origin.

Testing should be used only to measure for traits determined to be critical for success or essential to the job. In order to predict success, employers should keep abreast of changes in minimum job requirements and the actual duties, and should update the test specifications or selection procedures accordingly. **Therefore, an accurate and current job description is crucial.**

In order to minimize legal exposure, employers should purchase or develop tests that are "validated." Many test providers advertise their tests as validated,

but ultimately the liability rests with the employer so it is important to verify the claims. The EEOC provides different ways employers can demonstrate that their employment tests are job-related and consistent with business necessity through its Uniform Guidelines on Employee Selection Procedures. Modeling tests under this guidance may help an employer defend its test. Similarly, employers may also defend themselves by using tests that were "approved" through litigation, or those which the EEOC has given its seal of approval.

Monica Narvaez is a shareholder in the Underwood Law Firm's Fort Worth office.

¹ 29 C.F.R. Part 1607

Education Tips

Ways to Win BIG in your Career: Educate, Advocacy, and Awareness

"Injustice anywhere is a threat to justice everywhere."—Martin Luther King, Jr.

Reprinted with permission of NALA, The Association of Legal Assistants/Paralegals, and by Toya J. Walker, Paralegal, the article originally appeared in the May/June 2016 Facts & Findings. The article is reprinted here in its entirety. For further information, contact NALA at www.nala.org or phone (918) 587-6828.

This issue of NALA *Facts and Findings* focuses on family law.

As I prepared my thoughts for the education column in this edition, I pondered on my professional experience regarding family law matters and I thought of human trafficking. What is human trafficking? "According to the Office of Refugee Resettlement¹, "victims of human trafficking are subjected to force, fraud, or coercion for the purpose of commercial sex or forced labor." It exists in rural,

suburban, and urban locations. Human trafficking is sometimes known as modern day slavery. "It usually occurs in the United States when people from other nations are brought in illegally to serve as free labor."²

Texas Governor Greg Abbott declared January 2016 as Human Trafficking Awareness month in Texas.³

Since this article will focus on education, awareness, and advocacy, I will take you on my journey surrounding human trafficking. If you recall, I mentioned in a previous Ways to Win Big in Your Paralegal Career article that my most notable *pro bono* service experience thus far occurred when I joined Sabre GLBL Inc. I noticed that the company has a Passport to Freedom sector wherein the organization assists victims of human trafficking and domestic violence. During the fall of 2014, my managing attorney and I discovered ways that the legal team could serve the Passport to Freedom sector and that way was through *pro bono* service.

Education

We coordinated and attended an in-house training CLE hosted by Mosaic Family Services and the Human Rights Initiative of North Texas wherein the Sabre legal team in Southlake were trained on how to apply special immigration relief (including visas) and provide other legal services for human trafficking victims. This was the first step in the team's own initiative to provide *pro bono* work in support of two local organizations focused on the issue: the Human Rights Initiative of North Texas and Mosaic Family Services, a non-profit that assists refugees and immigrants.

Advocacy

Thereafter, I quickly got involved by assisting with the planning, coordination, and implementation of Sabre's first Inaugural *Pro Bono* Legal Advisory Clinic with the Sabre Legal Team in Southlake and Passport to Freedom charity partners, Mosaic Family Services and GRACE (Grapevine Relief and Community Exchange). The inaugural Sabre *pro bono* legal clinic kicked off in January 2015 at GRACE in Grapevine, Texas and it turned out to be a huge success. The legal team members were able to volunteer and assist victims of human

trafficking with domestic violence and immigration legal issues. It proved to be a very rewarding experience. The second *pro bono* legal intake clinic took place in July 2015 and it was more successful than the first with a 37% increase in client intake. I am happy to announce that we conducted our third *pro bono* legal clinic on January 21, 2016 and it turned out to be a successful event.

Awareness

As a result of effective *pro bono* service with the Passport to Freedom sector, I along with Tyra Jordan (Sabre Corporate Social Responsibility Manager) was able to represent Sabre during a Human Trafficking Prevention Business Partnership Press Conference at Children At Risk in Houston, Texas. There Children At Risk CEO Dr. Sanborn, Representative Senfonia Thompson and Senator Joan Huffman (authors of the human trafficking bill that

was passed in the Texas 84th Legislature),

Chelsie Kramer who represented the Texas Association of Business, and a representative from the Office of the Texas Secretary of State collaborated and brought awareness to the issue of human trafficking and agreed to take a stand to combat human trafficking.

I also serve as a volunteer with the National Center for Missing Children and will continue to partner with them to bring awareness and educate communities about child sex trafficking and cyber-bullying in an effort to put an end to this issue which affects families throughout the United States and the rest of world. It is my hope that you will consider volunteering your time to learn more about issues that affect families and figure out a way to help and serve those families.

Another organization that you might consider learning more about is CASA (Court Appointed Special Advocate).⁴ I

know several paralegals who are CASA volunteers and they truly enjoy serving in this capacity. They are the voices of children who otherwise wouldn't have an opportunity to be heard. I truly believe that greatness is achieved through service. If you ever thought about how you can be great and Win *big* in your career and in life, consider collaborating with your company or another organization to bring awareness and advocacy to issues that affect human rights and families.

Toya Walker is a paralegal at Sabre GBL, Inc. in Southlake.

¹ See <http://www.acf.hhs.gov/programs/ind Trafficking/resource/about-human-trafficking>

² See <http://lawstreetmedia.com/issues/law-and-politics/humantrafficking-alive-united-states/>

³ See <http://gov.texas.gov/news/proclamation/21832>

⁴ See <http://www.casaforchildren.org/site/c.mtJSJ7MPISE/b.5301295/k.BE9A/Home.htm>

Standing Committees of the PD

Annual Meeting Committee — responsible for planning the Annual Meeting of the general membership of the Paralegal Division.

Continuing Education Committee — responsible for planning and presenting at least three hours of continuing legal education in each district per year and/or soliciting substantive legal topic speakers for webinars offered by the Paralegal Division. This committee shall also implement and manage an online continuing legal education program. The committee shall implement and monitor compliance with the six-hour mandatory continuing legal education requirement for membership in the Paralegal Division.

Elections Committee — responsible for enforcing election guidelines.

Membership Committee — responsible for determining criteria and qualification for membership and promoting growth within the Division.

Professional Development Committee — responsible for enhancing the professional development of paralegals, for monitoring articles, state and national legislation and court cases affecting the paralegal profession and for disseminating to the general membership of the Division any national articles, legislative action or court cases which it deems appropriate.

Professional Ethics Committee — responsible for interpreting the Division's Code of Ethics and Professional Responsibility, serving as a Grievance Committee, making recommendations to the Board of Directors with respect to disciplinary procedures, and disseminating to the general membership of the Division articles on ethics issues of paralegals.

Public Relations Committee — responsible for studying and developing various means to better inform the legal profession and the general public about the paralegal profession and the Paralegal Division, and for nurturing positive relationships with local and national associations of paralegals and other associations throughout the country.

Publications Committee — responsible for publishing the Texas Paralegal Journal, the Division's official publication, reviewing and submitting various articles for publication in the Texas Bar Journal, and recommending to the Board any other publications which will be beneficial to members of the Division.

Which one interests YOU? Join today!

PD Partnering at TAPS with San Antonio Food Bank

During TAPS in September, and in line with President Erica Anderson's vision this year of "giving back," we will be partnering with the San Antonio Food Bank during the entire TAPS event to help fight hunger in Texas. This one food bank helps approximately 58,000 people each week with their hunger issues. We cannot wait to see how we can help them during TAPS in their fight—and coincidentally, September is National Hunger Awareness Month! So join us at TAPS and enjoy meeting these great folks and work on some projects that will help give back to those in need. The following is a recent article from SA Food Bank President, Eric Cooper, about just one opportunity he had with a student graduating from the fantastic culinary and warehouse training program that the SA Food Bank offers. Please enjoy reading about just one amazing experience, and we will see you at TAPS where you will hear about even more such experiences!!

From Where I Stand

One of the special gifts of our work is being a part of the regular graduation ceremonies for students in our culinary and warehouse training programs. The graduations are highlighted by a special address from a guest speaker, along with student testimonies. The student who shared his remarks at our recent culinary graduation nearly had me in tears as he shared his journey in and through the program. It was his mother, he said, who told him about the program. She had been at a community event catered by the Food Bank and while there she learned that the money the Food Bank makes on catering is used to provide scholarships to the homeless, disabled and long-term unemployed individuals who enter the culinary training program. He received a phone call that evening from his mother saying, "Enroll in that program." He did so immediately. In fact, he graduated top of his class. And as he was describing all that he learned, he said that one of the best lessons is that you never know, as

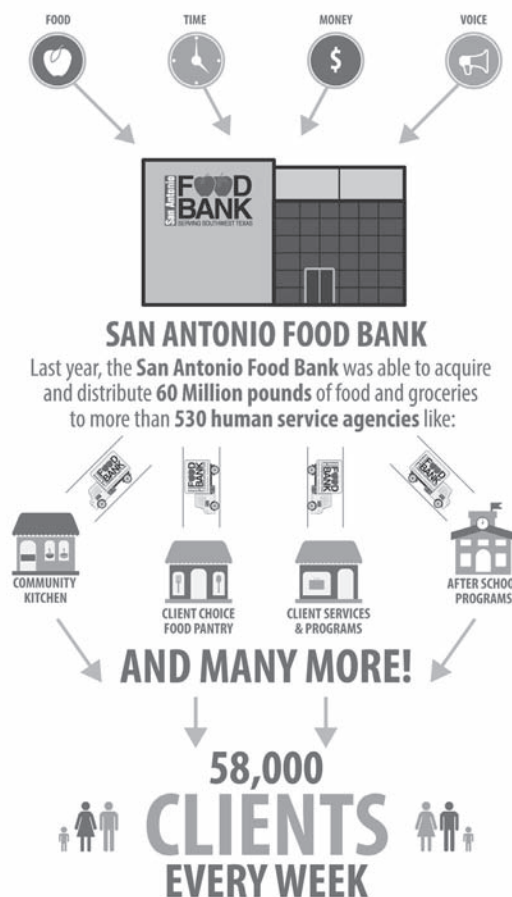
a chef, who will be eating your food—so make it the best every time. Surprisingly as he took his six-week kitchen training rotation at Haven for Hope, our downtown homeless campus, he ended up with an unexpected guest. Like his own story, his brother had fallen on difficult times. Now without any place to live, his brother turned to Haven for Hope for shelter and nourishment. Little did he know his first meal at the shelter would be prepared and served to him by his very own brother. It was a special moment. But the moment of the graduation was made even more

special seeing all three—mother, graduate, and younger brother—in attendance. We believe in helping individuals with self-sufficiency and independence. Our catering business and training programs are critical efforts in reaching this vision. Please support us by purchasing our catering, or be my guest at one of our upcoming graduations. Thank you for helping us set the table each week for 58,000 individuals in our community.

Sincerely, Eric S. Cooper President/CEO



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Scruples

Are Paralegals Ever Agents for Attorneys?

Ellen Lockwood, ACP, RP

A few months ago, an emeritus member of the Division who is now attending law school contacted me to discuss a statement her professor had made in her Professional Responsibility class. The professor gave the class a hypothetical situation wherein a paralegal interviewed a new client and completed the intake process, but calendared the statute of limitations deadline incorrectly based on an incorrect accident date provided by the client. The incorrect calendaring of the accident date caused the lawsuit to be filed too late. The question for the class was whether the attorney could be sued for malpractice. Of course, the answer was that the attorney certainly could be sued for malpractice, but the PD member questioned whether the attorney-client relationship ever existed. In the hypothetical situation, there was no mention of the attorney ever speaking with the client or accepting the case. The professor stated that the paralegal could accept the case because the paralegal *is acting as the agent of the attorney*. As an experienced paralegal, the PD member was confused about her professor's statement and hoped I could help her understand the basis for her professor's assertion.

Agent: One who agrees and is authorized to act on behalf of another, a principal, to legally bind an individual in particular business transactions with third parties pursuant to an agency relationship

(*West's Encyclopedia of American Law*, edition 2. (2008).)

As the definition above states, an agent may make legal commitments and agreements for the principal. However, rules 5.03, 5.04, and 5.05 of the Texas Disciplinary Rules of Professional Conduct do not refer to non-attorney staff ever being agents for attorneys, although the rules do emphasize that attorneys have a duty to supervise non-attorney staff, including paralegals. Further, the State Bar's definition of a paralegal and the associated guidelines, as well as the PD ethics cannons, make it clear that paralegals may never serve as agents for attorneys in legal matters.

In the hypothetical situation presented to the law class, an attorney could be sued for malpractice if the paralegal incorrectly calendared a deadline, since attorneys must directly supervise paralegals. However, if the attorney had not yet met with the client and agreed to take the case, then there should have been some sort of form for the potential client to sign making clear that the intake interview did not establish an attorney-client relationship, and the attorney had not yet agreed to take the case. In that situation, while the attorney still might have been sued for malpractice, a potential defense would be that no attorney-client relationship existed. Of course, the date of the accident should have been verified by the paralegal by checking the police report or another source so the

deadline for filing could have been accurately entered into the calendaring system.

While many attorneys are under the mistaken impression that paralegals may sign pleadings and perform other actions that only an attorney may do, perhaps some of them, like this law professor, believe that paralegals may act as agents for attorneys. Unfortunately, it is unclear where they have obtained that false information.

One of our professional responsibilities as paralegals is to educate the public and attorneys regarding the limits of the duties we may perform. Apparently, this also includes correcting some attorneys' mistaken beliefs that paralegals may serve as agents for attorneys.



Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past

president of the Division. She is a frequent speaker on paralegal ethics and intellectual property and the lead author of the Division's Paralegal Ethics Handbook published by Thomson Reuters. You may follow her at www.twitter.com/paralegaethics and she may be contacted at ethics@txpd.org.



Paralegals Travel to Italy

by Erica Anderson, ACP, President



For those unable to travel to Italy with us this past April, I invite each of you to journey through this article and imagine yourself amongst new friends, lavish greenery, remarkable buildings, and foreign accents. Oh, and marble, lots of marble. Italy is home to cypress and olive trees, impressive duomos (cathedral churches), gelaterias, trattorias, and wineries sprinkled throughout the country, creating historic and vibrant sights to bewitch your eyes. This is just the beginning of what the travelers experienced in this year's tour of Italy.

Anticipation and First Impressions

Many awoke to put the finishing touches on packing for "the big trip." Small clusters of the twenty-four travelers departed





from their regions in Texas to form groups Houston, Dallas and Frankfurt, and at last meet in Florence, Italy. Arriving shortly before noon, ACIS Tour Manager, Chris Relton met the eager group at the airport. After settling into the hotel, many members explored the area around the hotel with Chris at the lead, and greeted by the Arno River and Ponte Vecchio. A quick look in Chiesa di Ognissanti, or Church of All Saints, and history of the Botticelli frescoes set the pace for the week. Upon a short rest, the weary entire group made their way towards their dinner destination, for a welcome feast at the Palazzo Borghese. Those making their way back to the hotel by foot ventured past Palazzo Vecchio, seeing statues and buildings lit up in hues of blue.

Exploring Florence

Winding their way through cobbled streets, the Florence guide, Carolina, highlighted many of Florence's skilled trades, such as leather, fabrics, and paper. Finding their eyes upon one dazzling display of architecture after another, the group viewed Palazzo Vecchio, Basilica di Santa Croce, Basilica de Santa Maria Novella, and the most impressive, the Cathedral di Santa Maria del Fiore. Walking to their next destination, the group toured the Galleria dell'Accademia, where striking sculptures and paintings abound. The famous David by Michaelangelo was on display for all to see. Left to find their way back to the hotel, the travelers enjoyed free time to wander throughout the streets and shops to find treasures along the way to the hotel.



Beyond Florence

Ambling by coach (bus), the group began each morning with Chris forging the way towards new destinations to areas surrounding Florence. First passing south through the Porta Romana, which translates to Gates of Rome, into the Chianti region. The first day delivered views of the countryside, including vineyards, terra cotta factories, and lush foliage. The travelers stopped in Greve, which greeted its guests a wine and cheese sampling at Macelleria Falorni in the odd-shaped piazza. Heading to Siena next, the group experienced a rewarding climb to lunch together. The afternoon was spent exploring Siena and its Piazza del Campo, which tells the tale of Siena's origin and the trade route that helped establish it as a banking



industry and the nine factions that come together to form the plaza.

A second day of exploration began with the journey to surrounding hill towns, formed during the fall of the Roman Empire and townspeople retreated to the hills to escape. First visiting the Contucci family in Montepulciano and partaking in

a wine, cheese, and salami tasting, the family proudly gave its historical background and the process in creating its product. Next stop—Monticchiello (Pieza) for lunch at a picturesque trattoria. The content travelers moved next to hear Gregorian chants at the Abbey of Santo Antimo just outside of Montalcino. The last stop of the day was the Fortezza di Montalcino for another round of samplings. The group left just as the sun set along the horizon, demonstrating

a beautiful collage of pinks, purples, and blue against the green countryside.

Traveling along the autostrade, the next destination on a new day was to the region Umbria to visit the lovely town of Assisi. The journey proved new sights and countrysides, with a sunlit view of Lago

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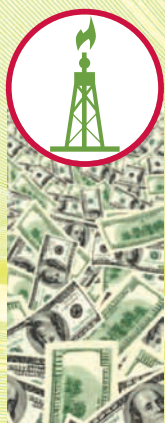


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Trasimeno. With near perfect weather, the medieval town of Assisi is something out of a storybook with steep streets, flowering gardens and a tranquility that is home to the massive Basilica, a two-tiered church with plenty of frescoes. The town's setting maintains the atmosphere established by St. Francis, who became known to begin the time period for sacrifice to the church and helping the poor in the community and the beginning of the Franciscan Order and feeling of peacefulness. First visiting the Basilica of St. Francis, the group ascended to a breathtaking view to dine together before viewing a few sights and stroll through town.

Heading west on the fourth day, the tour members first visited Pisa and then Lucca. Founded and used by the Romans as a port, Pisa is known for cabbage soup, seafood, Galileo, and of course, architecture that has gone horribly wrong. As the port of Pisa started silting up, it started to wane and a new port was established in Livorno, which is important to understand why the buildings lean. The duomo of Pisa was the first built with other cities and towns replicating with their own flair and regional influences as they established themselves. Part of the group climbed the Leaning Tower while others sat in the grass and stared at its marvel. Moving on to Lucca, the group explored the town on foot to find themselves in the Piazza Anfiteatro, an iconic image of the circular town square seen so often from aerial views. Seeing sights such as Chiesa di San Michele and Parrocchia Di San Frediano with mosaic and marble facades were breathtaking. A farewell dinner was enjoyed by all at La Buca di Sant'Antonio.



The last full day in Italy brought a free day for the adventure seekers, with an option to explore Venice or Florence on their own. Early risers boarded a train to reach Venice after a two hour journey. First venturing by vaporetto (water taxi) to Piazza San Marco, town on waterways was explored on their own. What an odd sight to not see cars or trucks and then think that everything must find its way among the 17 islands of Venice by water. Similar to Pisa, the buildings in Venice tilt one way or the other, again representing the shifting line where line meets ocean. Gathering at the train station in the late afternoon, everyone filed on board to rest their feet and minds and enjoy the ride back to Florence.

A Nostalgic Departure

As quickly as the travelers entered Florence, they left to return home or continue their travels. A huge thank you goes to Norma Hackler for coordinating this trip and to Chris Relton for joining



the group as Tour Manager. Old friends remembered, new friends discovered, and many new memories made throughout

this respite in Italy, with many vowing to see each other next year in Switzerland. Won't you join us?



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Paralegals Fly to: Lucerne, Switzerland—April 21–29, 2017



In 2017, the Paralegal Division is sponsoring a trip in conjunction with ACIS and traveling to LUCERNE, Switzerland. The detailed itinerary and pricing for the 2017 trip, can be found on the PD website home page at <http://txpd.org> under NEWS—PD 2017 Trip to Switzerland.

Friends and family are welcome to travel with the group.

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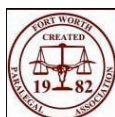
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