

**ETHICS:
PARALEGALS AND YOU**

Bruce D. Bain

Bain, Files, Jarrett,
Bain & Harrison, P.C.

109 West Ferguson

Tyler, Texas 75702

903-595-3573

Fax 903-597-7322

bbain@bain-files.com

www.bain-files.com

**STATE BAR OF TEXAS
MARRIAGE DISSOLUTION**

BOOT CAMP

May 9, 2007

El Paso, Texas

Panel II – 2.4

Bruce D. Bain

Bain, Files, Jarrett, Bain & Harrison, P.C.
109 W. Ferguson
Tyler, Texas 75702
(903) 595-3573
(903) 597-7322 fax
bbain@bain-files.com
www.bain-files.com

PERSONAL – *The important stuff first*

Married to Martha for 15 wonderful years and full time father of three boys as homework helper, diorama assistant, reader listener, video game time arbitrator with binding, unappealable authority, sport coach, etc., which results in my being only a part-time golfer and outdoorsman.

BOARD CERTIFIED IN FAMILY LAW- Texas Board of Legal Specialization

AREAS OF PRACTICE

Complex divorces and child custody cases. Protection of separate property and pursuit of reimbursement and/or economic contribution claims through tracing. Grandparent and third party conservatorship claims. Interstate custody conflicts and international compacts.

LECTURER & AUTHOR

Economic Contribution and Valuation – Texas College for Judicial Studies - 2007
Post Judgment Issues – SBOT Ultimate Trial Notebook: Family Law – 2006
Motions in Limine – SBOT Family Law Basic Training – 2005
New Grievance Procedures – Smith County Bar Assoc. - 2004
When Disaster Strikes – SBOT Advanced Family Law 2003
Recent Cases and Legislation - Smith County Bar Assoc., Family Law Section – 2002, 2003
Current Issues in Family Law – Tyler Area Association of Legal Professionals - 2003
Texas Private Schools: Family Law Issues and School Responsibility - 2002
Economic Contribution – Smith County Bar Assoc. - 2002
Economic Contribution – Texas Panhandle Family Law Assoc. - 2002
Modification of Custody – SBOT – Pro Bono Project - 2001
The New Discovery Rules – Smith County Bar Assoc. - 1998

PROFESSIONAL ASSOCIATIONS

Texas Academy Family Law Specialists
Texas Pattern Jury Charge – Family 2001- current
SBOT – Family Law Practice Manual Committee – 2006 - current
SBOT Grievance Committee – District 2A - 2003 – current (current Chairman)
Unauthorized Practice of Law Committee – Texas Supreme Court – 2001 - current
Smith County Bar Association – President 2005-2006; Vice President 2004-2005; Secretary 2002-2003; Director 2001-2002

EDUCATION & ACCOLADES

South Texas College of Law – J.D.; University of Mississippi – B.B.A.
Smith County Bar Association – Young Lawyer of the Year – 2004
BScene Magazine – Best Family Law Lawyer in East Texas - Fall, 2006

Table of Contents

I. INTRODUCTION	1
II. SHORT HAND GEMS	1
III. UNAUTHORIZED PRACTICE OF LAW	1
A. Authority of Attorney	1
B. Preparing and Signing Paperwork	2
1. Documents Generally Allowed to be Signed.....	2
2. Signing Pleadings or Discovery.....	2
3. Signing Certificate of Service.....	3
4. Signing Letters.....	3
C. Speaking with other Attorneys	3
D. Speaking with other Paralegals.....	4
IV. APPEARING IN COURT FOR THE ATTORNEY.....	4
A. Practical Considerations	4
B. Making Announcements.....	4
C. Presenting Orders.....	5
V. SPEAKING WITH CLIENTS	5
A. Initial Potential New Client Contact.....	5
B. Initial Meeting with Potential New Client.....	5
C. Regular Phone or E-mail Contact with Client	5
VI. PAYMENT BY A THIRD PARTY.....	6
VII. TAPING CONVERSATIONS.....	7
A. Old Rule – No Taping.....	7
B. New Rule – Taping Allowed	7
VIII.CONCLUSION.....	7

Appendix A: Code of Ethics and Professional Responsibility of the Paralegal Division of the State Bar of Texas

Appendix B: New Definition and New Paralegal Standards Adopted by the State Bar of Texas Board

Appendix C: Opinion 575, November 2006

Appendix D: Opinion 514 (Overruled by Opinion 575), February 1996

Appendix E: Opinion 392 (Overruled by Opinion 575), February 1978

ETHICS – PARALEGALS AND YOU

I. INTRODUCTION

We all know about the Canons of Ethics, but can you turn to your neighbor today and tell him or her with confidence why it is called a Canon or even what is a Canon? I couldn't before I began this paper.

The etymology of canon comes from the Greek word *kanon* which became used in Latin (then Old English, then Middle English, etc.) It originally was utilized as meaning 'an accepted principle or rule' or 'a criterion or standard' of judgment. Its current synonym is law. (That is a word I did know how to explain.) So, when we speak of Canons of Ethics, we are speaking of the standard by which we should be measured.

The Paralegal Division of the State Bar of Texas and the Texas Code of Judicial Conduct continue to utilize Canons as the title for their guiding principles. But the State Bar of Texas no longer does – it now refers to our guiding standards as good old, normal rules. It is a distinction without a difference. Generally speaking, Canon is used with a more general and encompassing perspective – there are 10 Canons for Paralegals and only 8 Canons for Texas Judges. Whereas lawyers have (or some would argue need) 53 rules to keep them in line (discreet subparts not counted of course.)

I would like to thank Lisa Hoppes for the honor and opportunity afforded me to prepare and present this paper.

II. SHORT HAND GEMS

Rely on an experienced paralegal.

Find a mentor.

Trust your instincts (a/k/a - what would your parents' say you should do in this situation.)

Properly maintain the notary book.

Maintain and keep accurate records of drafts or instructions.

Provide the Texas Lawyer's Creed to each client.

III. UNAUTHORIZED PRACTICE OF LAW

As you proceed through this paper, you will notice that most actions that are prohibited or frowned upon entail the presentation of a final product to third parties – be it to the client, to

opposing counsel or opposing party, or to the court. The behind the scenes work such as drafting documents or the organization and interpretation of documents typically does not rise to the level of unauthorized practice of law. The unauthorized practice of law almost always entails the end product and how it is presented to the third parties. This is because an attorney is allowed to delegate quite a bit of his authority and responsibilities to competent assistants behind the scenes, as long as there is appropriate supervision and accountability. But remember that this delegation does not excuse the attorney from any of his direct responsibility nor liability.

The applicable rule is short and sweet but provides little insight into what it prohibits.

5.05 Unauthorized Practice of Law

A lawyer shall not:

...

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

TEX. DISCIPLINARY R. PROF. CONDUCT, reprinted in TEX. GOVT CODE ANN., tit. 2, subtit. G, appendix, State Bar Rules art X, § 9.

So, is the unauthorized practice of law a non-lawyer doing a lawyer's work? Or is it a non-lawyer holding themselves out as a lawyer? Or is it more appropriate to say that the unauthorized practice of law is a non-lawyer doing certain actions without the supervision or under the authority of a lawyer?

A. Authority of Attorney

The attorney is the captain of the ship, I mean law office. And as such the captain / attorney is in charge of the whole crew / office support staff. The attorney and paralegal ideally work as a team and should maximize their effectiveness by dividing the work. But the ultimate decision must rest with the attorney, both in the process and the final product. The attorney has the responsibility to supervise his staff and ensure they comply with all rules governing practicing law.

The attorney's responsibilities are enumerated with the Texas Disciplinary Rules of Professional Conduct., which include the following:

5.03 Responsibilities Regarding Nonlawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

Tex. Disciplinary R. Prof. Conduct, reprinted in TEX. GOVT CODE ANN., tit. 2, subtit. G, appendix, State Bar Rules art X , § 9.)

B. Preparing and Signing Paperwork

I could find no reported case where the reviewing court did not punish the attorney when his defense was the paralegal prepared or drafted the offending paperwork that was ultimately signed by an attorney. Each violation was credited against the attorney as being responsible for the paper's contents. As such, any document may be prepared or drafted by a paralegal as long as it is under the supervision and guidance of a supervising attorney. Which leads to the next question, what can be signed by a paralegal?

1. Documents Generally Allowed to be Signed

A paralegal may sign correspondence, including e-mail correspondence, so long as legal advice is not given and the paralegal's name, title, and either the firm name or the name of her supervising attorney is provided.

A paralegal may also sign correspondence from an attorney by permission so long as the

paralegal's title is clearly indicated and the letter does not contain legal advice or agreements. If the letter contains legal advice or agreements, the attorney should sign or have another attorney sign by permission.

Paralegals must always identify themselves by name and title on any business correspondence they send. This includes email, faxes (and fax cover sheets) as well as regular "paper" letters or documents. It matters not to whom the letter is addressed or by whom it was requested; if it is business correspondence or documentation on which the paralegal's name appears, the paralegal's title must also be included. This also applies to business cards and letterhead on which the paralegal's name appears.

2. Signing Pleadings or Discovery

An attorney only (or a party if not represented by an attorney) may sign a pleading. The only person who may "sign by permission" for a licensed attorney is another licensed attorney. *See* T.R.C.P. 57. This is because the signature of an attorney (or party) constitutes a certificate that the attorney or party has read the pleading, and that to the best of his or her knowledge, information and belief formed after reasonable inquiry that the instrument is not groundless and brought in bad faith or groundless and not brought for the purpose of harassment. *See* T.R.C.P. 13.

What about signature stamps? When may an attorney signature stamp be utilized? Recall that a stamp of the attorney's signature is the same as his or her signature, not just the attorney's name. Therefore, use of an attorney signature stamp is the equivalent of a paralegal signing the attorney's name "by permission." Therefore, using a stamp is allowed for letters that do not include legal advice or those that deal with administrative matters.

However, using an attorney stamp on pleadings, engagement letters, settlement offers and documents, correspondence that includes legal advice, and in particular court documents, is never appropriate. If you have any doubt as to the use of an attorney signature stamp, insist that the attorney sign the document. It is always safer, and never incorrect, to have an original attorney signature.

The Texas Criminal Court of Appeals has held that the use of a signature stamp on a notice of appeal was "ineffective to show personal

authorization" and did not "comply with the legislatively mandated guarantee that the only person permitted by statute to make an appeal on behalf of the State actually participated in the process." *See State of Texas v. Shelton*, 830 S.W.2d. 605 (Tex. Crim. App. 1992). *See also State of Texas v. Roberts*, 940 S.W. 2d 655 (Tex. Crim. App. 1996). The logical assumption from these cases is that it is never correct to use an attorney's signature stamp on a pleading, settlement agreement, or other official document, even if the attorney instructs you to do so.

But recall, we are talking about using the stamp for the original documents. We are not talking about using a stamp indicating the original was signed by the attorney or using an electronic signature, such as is used in the federal courts. Those are considered the same as original signatures or merely copies of the original.

3. Signing Certificate of Service

Similarly, only an attorney may sign a certificate of service because it is prima facie evidence of the fact of service. *See* T.R.C.P. 21a. The only person who may "sign by permission" for a licensed attorney is another licensed attorney.

4. Signing Letters

A paralegal supervised by an attorney can sign letters on the law firm letterhead if the signature block contains the paralegal's name and title and does not contain any legal advice. *See* Texas Ethics Opinion 381. But the paralegal cannot sign an agreement with opposing counsel or a letter that contains legal advice.

A potential problem that sometimes occurs is the use of letterhead for personal correspondence by the paralegal. All employees of law firms receive requests to help with this friend's minor legal problem or that family member's creditor snafu. The only time letterhead should be used is for firm business – never for personal use by a paralegal. It is improper for a paralegal to utilize firm letterhead for personal correspondence – with or without identification of their position as a paralegal. Use of the firm's letterhead allows the perception by a third party that the firm is representing an individual and the paralegal is using her position for discussion. This discussion will almost certainly involve negotiating, positions of the parties or offers to compromise – the sine qua non of legal advice. All which is

again the definition of the unauthorized practice of law.

C. **Speaking with other Attorneys**

It is both the attorney's and paralegal's responsibility to ensure that the paralegal is not believed to be an attorney by the opposing attorney or by opposing parties.

During the paralegal's conversation with other counsel, there will obviously be times that simple agreements will need to be reached. That is acceptable, but only in certain instances. If the supervising attorney asks the paralegal to contact opposing counsel for scheduling purposes, agreements may be made as to dates and locations. If the supervising attorney asks that the paralegal contact opposing counsel to obtain an extension of time in which to object and respond to discovery requests, the paralegal may obtain that agreement on the attorney's behalf. Keep in mind that any agreements between attorneys or parties touching on a pending suit must be in writing and filed with the court in order to be enforced. Thus, the Rule 11 letter will bear the signature block of, and be signed by, the supervising attorney and not by the paralegal, even "with permission." *See* T.R.C.P. 11.

Responsibilities that require the competent professional judgment of the lawyer cannot be delegated. Permitting a non-lawyer employee to prepare and sign correspondence that threatens legal action or provides legal advice or both creates the appearance that the lawyer is not exercising his legal knowledge and professional judgment in the matter.

And negotiating settlement agreements is problematic also. Tex. Disciplinary R. Prof. Conduct 1.01 requires that a lawyer provide "competent and diligent representation" to a client. According to Texas Ethics Opinion 396 "the offers and counter-offers that constitute realistic bargaining for settlement, the judgment of the defendant's attorney as to when and how much should be offered, and of the Plaintiff's attorney as to the adequacy of the offer, is itself a measure of competence. The client is entitled to this full measure of competence from their attorney in the bargaining process, and to the benefit of his attorney's analysis and recommendation concerning all offers of settlement. After the full disclosure and recommendation from the attorney, the burden of decision then shifts to the client." Therefore, it

would seem that paralegals are precluded from negotiating settlement agreements.

D. Speaking with other Paralegals

The legal community is close knit. Small towns are cozy and areas of practice are becoming tighter. With this polarization of practices, the same law firms, lawyers and paralegals are coming up against each other more and more. And with frequency comes comfort, and with comfort comes a relaxed atmosphere and with a more relaxed atmosphere, comes the increased likelihood of mistakes. Mistakes that could not only cost a paralegal her job, but the supervising attorney's license as well.

Regardless of familiarity or length of friendship, always treat an opposing paralegal as if they were the opposing lawyer. Remember to maintain the business attitude while you are working. Show the opposing paralegal respect and always remember that his or her interests, on behalf of his or her client, are by almost all definitions, opposite your and your client's interest. As such, if you would not make a statement to the other side or the opposing attorney, then you should not make that statement to the other paralegal. Keep your business life separate from your personal life, even if is during the regular Tuesday lunch or Friday evening cocktails with your long time friend who is also the opposing paralegal.

IV. APPEARING IN COURT FOR THE ATTORNEY

Probably the single biggest public status of an attorney is the ability to represent a client in the courtroom. A non-lawyer cannot represent a family member, cannot represent a business partner, nor can he even represent his own company. And likewise, a paralegal cannot represent or appear on behalf of a client in the courtroom.

Nonetheless, the practicalities of any litigation practice result in conflicting schedules, delayed hearings and last minute continuances or changes. These are sometimes able to be handled by a paralegal in a more cost efficient manner as long as all involved continue to ensure that there is no unauthorized practice of law.

A. Practical Considerations

Before even considering whether to have a paralegal appear on for their attorney, both the

paralegal and the attorney should know the judge and her propensities. If you do not do so, it may have two severe and equally unpleasant circumstances: (1) the judge may consider you and your client a no show and proceed without you, and/or (2) the judge may 'admonish' your paralegal who will be rightfully upset that you 'allowed' that to happen to her or did not warn her about it beforehand.

If in doubt about what a particular judge and her clerks allow in their courtroom, simply ask the clerks beforehand. The whole court staff want the hearings to go smoothly and quickly and this is done when all know the 'rules' and stick with the judges' idiosyncrasies.

The general rule is that paralegals should stand behind the bar in the courtroom. That is, after all, one thing that distinguishes lawyers – they have 'passed the bar.' And obviously, the dress should be appropriate courtroom attire. Don't forget to turn off the cell phone, not just turn the ringer off or to vibrate, before you enter the court room.

B. Making Announcements

If the supervising attorney is unable to make a hearing due to some conflict, it is generally the better course of conduct for the opposing counsel to make the announcement for the case. A brief discussion prior to the case being called will allow the professionals to coordinate the announcement. And don't forget, the paralegal should not be afraid to 'fill in the blanks' or clarify the agreement on behalf of the client. Otherwise, silence may be deemed as acquiescence.

But if the opposing counsel is not there, is unwilling to announce or has a concern about the supervising attorney's stated position, then the next best option is for the paralegal to have another attorney announce for their supervising attorney. Regardless of who announces, it is important for clarity of the record that the announcing paralegal or other attorney not identify themselves as 'representing the client' or appearing 'on behalf of' the client. This may lead to the misconception that the paralegal is an attorney or that the other attorney has an attorney/client relationship with the litigant. Instead, the attorney or paralegal should state that they are announcing on behalf of the absent attorney, state briefly why the attorney of records

is not present, and dictate whatever is needed to be communicated.

Additionally, if the paralegal is allowed to and makes an announcement, then the paralegal should state her name and position, that she is announcing on behalf of her supervising attorney who represents which party, and then announce whatever needs to be said.

C. Presenting Orders

Some courts regularly schedule hearings for entry of judgment – to keep the case from languishing in the final stages. If all parties or attorneys have signed the agreed order, presenting it to the court by the paralegal is allowed. It is viewed the same as if a courier who is delivering the order at specific place and time.

Ex parte communications do not include the presentment or delivery of proposed orders – be they drafts or executed originals.

V. SPEAKING WITH CLIENTS

Each attorney and paralegal team will have different styles and standard operating procedures on how to cover the daily calls. These operations will depend on type of practice, area of law and location of office. And all these variables also invite disaster because they deal with the interaction a law office has with outside entities. To prevent a problem from occurring, the attorney and paralegal must discuss at length and in great detail what can and cannot be said, what can and cannot be provided, and what does and does not leave the office and under whose signature.

A. Initial Potential New Client Contact

With the increasing use of the internet to find attorneys and the omni-present e-mail for all in the world, law offices are getting more and more initial contacts via the internet. It should be treated no differently than a regular phone call or a potential client who walks in off the street. They all present a potential trap for saying too much and providing legal advice by the paralegal.

A frequent question in potential new client (our office refers to them as PNCs) calls is ‘what does he charge?’ or ‘how much will this cost?’ Setting a fee is a direct obligation of the attorney and cannot be delegated. It is the lawyer’s stock in trade – being paid for his time and the decision

of the appropriate fee for the unique case. But it is allowable for the paralegal to indicate to the PNC that the attorney has authorized the paralegal to tell the caller that there is a minimum fee of ‘y’ dollars for that ‘x’ type of case. It is also advisable to immediately add that the initial fee can go up from the minimum retainer depending upon the facts of the case and complexity of the issues involved.

Be careful that both the attorney’s and paralegal’s contact with third parties has no appearance of barratry. A paralegal may not solicit legal business, either for herself or for an attorney. This is not to say that freelance paralegals cannot solicit attorney clients; the free lance paralegal just cannot solicit non-attorney clients for whom they provide direct legal services. *See* Tex. Disciplinary R. Prof. Conduct 7.03 and Canon 5. *See also* Texas Penal Code 38.12, Barratry and Solicitation of Professional Employment.

B. Initial Meeting with Potential New Client

The first meeting with a PNC should be more about information gathering than anything else. As such, the PNC should do most of the talking with the appropriate questions and requested clarifications from the attorney or paralegal. Each PNC meeting ultimately contains the question of “What do you think my chances are?” or “What do you think I should do?” The response is providing legal advice and should only come from an attorney.

That being said, it is appropriate for a paralegal, if meeting solo with the client, to respond that the attorney has authorized her to say this about a particular court and its proceedings, or to say that about a particular area of law and what the current trend is. But the paralegal cannot tell a PNC the course of recommended conduct.

C. Regular Phone or E-mail Contact with Client

The paralegal is the main gateway for continued communication with the client. As such their regular contact, via e-mail or phone, needs to be, not just regulated, but controlled by the supervising attorney. This control can be as simple as yelling through the door about the conversation to as complex as memorandums to the file about the topics. The lynch pin is control and supervision by the attorney of the paralegal,

so develop a system and whatever works best for your practice is what should be implemented.

Regardless of the formality, the paralegal should ensure the attorney is informed of all significant contacts with the client as well as refer all inquiries for advice. The attorney does not have to speak with the client, but the paralegal should always indicate to the client that that particular question seeks legal advice and the client either speaks directly to the attorney or the paralegal request for clarification. And follow up calls should include a reference that the paralegal did speak with the attorney and he said ‘x’ or that it needs to be handled in this fashion.

Recall that law is rarely emergencies that require immediate action. All calls and e-mails do not have to be taken and responded to immediately. But don’t forget that lack of communication with the client is the biggest source of filed grievances. If the client calls or e-mails, the better course of conduct may be to quickly confirm with the client that you are aware of their question and you will get back to them by a date and time certain. This allows the team of attorney and paralegal to thoughtfully consider the query and provide an appropriate timely response.

VI. PAYMENT BY A THIRD PARTY

The paralegal’s paycheck is more than likely signed by their supervising attorney, just like his own paycheck. But this fact does not alter the higher duty lawyers and paralegals owe over their clients such as not suborning perjury or not reporting child abuse. Both the attorney’s and paralegal’s allegiance is not dependent solely on the person who pays the fees and expenses, but to the client

Even if a family member pays the retainer, the monthly bill or billed expenses, the attorney and paralegal are still required to treat that relative as a third party and not the client. It is immaterial that the payor is a parent, child or even spouse of the party. The firm has a singular client with a duty of loyalty to that singular client. And as such, no attorney client confidences may be revealed and instructions on how the case progresses and settled are the client’s decision, not the paying family member.

What happens most times and the better practice is if a family member does pay the bills, provide a letter to your client seeking written authorization be kept in the file that the client

gives the attorney and paralegal permission to speak with the family member about the case. And if necessary, are there any restrictions on the topics of discussion – such as drug use or infidelity or sexually transmitted diseases.

It is also a good idea to specifically inform in writing the paying third-party that he is not your client and your ‘marching orders’ will come only from the actual client regardless of who is paying the bill. Recall this letter may be discoverable, so keep it generic.

A practical consideration also is to have the guarantor sign either the original fee contract as guarantor or sign a separate document evidencing their agreement to pay the fees and expenses incurred on behalf the client. This agreement again is discoverable and should be specific enough for enforcement (in the unlikely event you sue for your fees) and may contain disclaimer language that you are only representing the client, and not them.

I typically include the following paragraph at the bottom of my fee agreement letter if the fees are being guaranteed by a third party.

BY SIGNING THIS LETTER AGREEMENT, I AGREE TO GUARANTEE THE PAYMENT OF THE FEES AND EXPENSES SET FORTH ABOVE AND WILL PAY THOSE FEES AND EXPENSES SHOULD MY DAUGHTER, PAULA PETITIONER, FAIL TO DO SO.

Mr. Daddy Warbucks

Date: _____

Most consider payment by third parties to be the payment of the attorney fees. But also consider that payment by a third party may be from an attorney for a referral. This is only accomplished under very specific requirements and only between attorneys. Under no circumstances may a paralegal, or anyone who is not a licensed attorney, accept a referral fee from an attorney. Receipt of and making these payments are considered a felony. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 7.03 and 38.12, Barratry and Solicitation of Professional Employment, Texas Penal Code.

VII. TAPING CONVERSATIONS

We often times hear about once upon a time when the practice of law was more civil, genteel almost. A time when a handshake agreement was binding and an attorney's word was like gold. Then came along _____ (fill in the blank with your own perceived scourge) and things changed for the worse. No longer can verbal agreements be trusted nor opposing counsel's memory be relied upon. As such, it did not take long for tape recordings by lawyers to come into question.

A. Old Rule – No Taping

The 'old rule' in Texas was that taping by an attorney was only allowed if the attorney informed all those involved prior to the taping. This extra step was in place, not for compliance of any federal or state law, but due to the perception of the higher ethical position within the legal field. Texas Attorney General Ethics Opinion 392 in 1978 and Opinion 514 in 1996 confirmed this analysis. See attached Appendices D & E.

These opinions decided that because attorneys are held to a higher standard, "[t]he secret recording of conversations offends the sense of honor and fair play of most people." Opinion 392. This opinion relied upon the old Canons of Ethics which then became our Texas Disciplinary Rules. The no taping edict was affirmed in Opinion 514 as late as 1996. But the times, they are a changing.

As you look at the 'new' rule, recall the 1978 opinion mentions 'recording a conversation' and the 1996 opinion is about "recording a telephone conversation." Is it a distinction with any difference between a telephone call and a in person exchange?

B. New Rule – Taping Allowed

As recently as November, 2006 (after only 10 years of *stare decisis*) the Attorney General has reached a new conclusion regarding the viability for an attorney to record his phone conversations.

"The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client

information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person."

See appendix C; Texas Attorney General Ethics Opinion 575 (November 2006.)

A question may still arise as to what is considered a 'serious criminal violation' within number 3 above. And the way the privacy laws are progressing and being enacted these days to counteract identity theft, I am thinking that there will be only serious criminal violations when it comes to recording telephone calls.

Generally, you need to ensure four things:

- * you are recording to help you help your client.;

- * you protect the recording as confidential information if it contains such confidential information;

- * you are not violating a serious criminal law of another jurisdiction where the recording may be occurring; and

- * you have not told the participants that you are not recording.

Recall that the 1996 and 2006 opinions both reference telephone conversations, but the 1978 opinion talks about conversations generally, not specific to the telephone. It is not axiomatic to think that face to face conversations are not also equally covered.

A practice pointer in dealing with a pro se litigant is if they desire to record the conversation, you should likewise record the conversation. This is to protect you individually, not your client. It is a good bet that the pro se litigant is pro se for a reason and his recording is not intended to that both parties are being treated fairly. Your own copy of the conversation is for your protection due to the wealth of technology available that allows the changing of digital recordings with ease.

VIII. CONCLUSION

A great part of the practice of law and working in the legal field is the variables we encounter everyday. We do not have an assembly line routine nor do have route memorization

requirements. But this variety can likewise be our downfall. The uniformity and standard operating procedures implemented as a team will make your office run smoother and provide better client services for the future variables.

Recall that the work we do is for our client's benefit and the client's goals are best accomplished through teamwork. Each team needs a leader, with ultimate responsibility and final authority, and that leader can only succeed with qualified support staff. The paralegals who know what they are allowed to do as well as prohibited from doing will provide quality work for the team. And the team will become more successful with proper delegation and known restrictions. And a more successful team is one for whom the team members will enjoy playing (that is, working.)

Appendix A**CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY
OF THE PARALEGAL DIVISION OF THE STATE BAR OF TEXAS****Preamble**

Fundamental to the success of any professional organization are the integrity of its members and a high standard of conduct. This Code of Ethics and Professional Responsibility is promulgated by the Paralegal Division of the State Bar of Texas and accepted by its members to accomplish these ends.

The paralegal profession is by nature closely related to the legal profession. Although the Code of Professional Responsibility of the State Bar of Texas does not directly govern paralegals except through a supervising attorney, it is incumbent upon the members of the Paralegal Division to know the provisions of the attorneys' code and avoid any action which might involve an attorney in a violation of that code or even the appearance of professional impropriety.

The canons set forth hereafter are intended as a general guide, and the enumeration of these canons does not exclude others of equal importance although not specifically mentioned.

Canon 1. A paralegal shall not engage in the practice of law as defined by statutes or court decisions, including but not limited to accepting cases or clients, setting fees, giving legal advice or appearing in a representative capacity in court or before an administrative or regulatory agency (unless otherwise authorized by statute, court or agency rules); the paralegal shall assist in preventing the unauthorized practice of law.

Canon 2. A paralegal shall not perform any of the duties that attorneys only may perform or do things which attorneys themselves may not do.

Canon 3. A paralegal shall exercise care in using independent professional judgment and in determining the extent to which a client may be assisted without the presence of any attorney, and shall not act in matters involving professional legal judgment.

Canon 4. A paralegal shall preserve and protect the confidences and secrets of a client.

Canon 5. A paralegal shall not solicit legal business on behalf of an attorney.

Canon 6. A paralegal shall not engage in performing paralegal functions other than under the direct supervision of an attorney, and shall not advertise or contract with members of the general public for the performance of paralegal functions.

Canon 7. A paralegal shall avoid, if at all possible, any interest or association which constitutes a conflict of interest pertaining to a client matter and shall inform the supervising attorney of the existence of any possible conflict.

Canon 8. A paralegal shall maintain a high standard of ethical conduct and shall contribute to the integrity of the paralegal profession.

Canon 9. A paralegal shall maintain a high degree of competency to better assist the legal profession in fulfilling its duty to provide quality legal services to the public.

Canon 10. A paralegal shall do all other things incidental, necessary or expedient to enhance professional responsibility and the participation of paralegal in the administration of justice and public service in cooperation with the legal profession.

Adopted March 27, 1982, Amended June 26, 2005 - Paralegal Division, State Bar of Texas

Appendix B

New Definition and New Paralegal Standards Adopted by the State Bar of Texas Board

In 2005, the State Bar of Texas Board of Directors, and the Paralegal Division of the State Bar of Texas, adopted a new definition for "Paralegal."

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 a person, an attorney would be required to perform the task.

On April 21, 2006, the State Bar of Texas Board of Directors approved amending this definition by including the following "STANDARDS," which are intended to assist the public in obtaining quality legal services, assist attorneys in their utilization of paralegals, and assist judges in determining whether paralegal work is a reimbursable cost when granting attorney fees:

A. Support for Education, Training, and Work Experience:

1. Attorneys are encouraged to promote:

- a. paralegal attendance at continuing legal education programs;
- b. paralegal board certification through the Texas Board of Legal Specialization (TBLS);
- c. certification through a national paralegal organization such as the National Association of Legal Assistants (NALA) or the National Federation of Paralegal Associations (NFPA); and
- d. membership in the Paralegal Division of the State Bar and/or local paralegal organizations.

2. In hiring paralegals and determining whether they possess the requisite education, attorneys are encouraged to consider the following:

- a. A specialty certification conferred by TBLS; or
- b. A CLA/CP certification conferred by NALA.; or
- c. A PACE certification conferred by NFPA; or
- d. A bachelor's or higher degree in any field together with a minimum of one (1) year of employment experience performing substantive legal work under the direct supervision of a duly licensed attorney AND completion of 15 hours of Continuing Legal Education within that year; or
- e. A certificate of completion from an ABA-approved program of education and training for paralegals; or
- f. A certificate of completion from a paralegal program administered by any college or university accredited or approved by the Texas Higher Education Coordinating Board or its equivalent in another state.

3. Although it is desirable that an employer hire a paralegal who has received legal instruction from a formal education program, the State Bar recognizes that some paralegals are nevertheless qualified if they received their training through previous work experience. In the event an applicant does not meet the educational criteria, it is suggested that only those applicants who have obtained a minimum of four (4) years previous work experience in performing substantive legal work, as that term is defined below, be considered a paralegal.

B. Delegation of Substantive Legal Work:

"Substantive legal work" includes, but is not limited to, the following: conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate closings, depositions, court or administrative hearings, and trials with an attorney.

"Substantive legal work" does not include clerical or administrative work. Accordingly, a court may refuse to provide recovery of paralegal time for such non-substantive work. *Gill Sav. Ass'n v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 705 (Tex. App. Dallas 1988, writ denied).

C. Consideration of Ethical Obligations (See Note* below):

1. Attorney. The employing attorney has the responsibility for ensuring that the conduct of the paralegal performing the services is compatible with the professional obligations of the attorney. It also remains the obligation of the employing or supervising attorney to fully inform a client as to whether a paralegal will work on the legal matter, what the paralegal's fee will be, and whether the client will be billed for any non-substantive work performed by the paralegal.

2. Paralegal. A paralegal is prohibited from engaging in the practice of law, providing legal advice, signing pleadings, negotiating settlement agreements, soliciting legal business on behalf of an attorney, setting a legal fee, accepting a case, or advertising or contracting with members of the general public for the performance of legal functions.

Appendix C

OPINION 575

November 2006

QUESTION PRESENTED

May a lawyer electronically record a telephone conversation between the lawyer and a client or third party without first informing the other party to the call that the conversation is being recorded?

STATEMENT OF FACTS

A lawyer electronically records telephone conversations with clients and third parties without the other party or parties to the conversation being made aware that the conversations are being recorded.

DISCUSSION

This Committee has considered the question of a lawyer's undisclosed recording of telephone conversations three times. In 1953, in Professional Ethics Committee Opinion 84 (November 1953) the Committee ruled that the undisclosed recording by a lawyer of his telephone conversations was not a violation of the Canons of Ethics. The question was considered again in Opinion 392 (February 1978), in which the Committee overruled Opinion 84 and ruled, under the then applicable Texas Code of Professional Responsibility, that a lawyer's undisclosed recording of his telephone conversations "offends the sense of honor and fair play of most people" and was generally not permitted under the disciplinary rules then applicable to Texas lawyers. When the question was again considered in Opinion 514 (February 1996), the Committee reaffirmed the conclusion of Opinion 392, citing [Rule 8.04\(a\)\(3\)](#) of the Texas Disciplinary Rules of Professional Conduct.

In the years since this Committee last considered the issue here presented, the issue has been the subject of rulings by a number of ethics committees, most notably by the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "ABA Committee") in Formal Opinion 01-422 (June 24, 2001). In that opinion, the ABA Committee withdrew Formal Opinion 337 (1974), which had held that a lawyer was not permitted to make undisclosed recordings of telephone conversations, and instead ruled that a lawyer may record his telephone conversations without disclosure to other parties to the calls provided that the recording is not in violation of applicable law and is not contrary to a representation by the lawyer that the conversation is not being recorded. The ABA Committee indicated that it was divided as to whether a lawyer was permitted to make an undisclosed recording of a telephone conversation with a client but indicated the Committee's view that such recordings were generally inadvisable.

It is recognized that there are legitimate reasons a lawyer would electronically record conversations with a client or third party. Among the legitimate reasons are to aid memory and keep an accurate record, to gather information from potential witnesses, and to protect the lawyer from false accusations.

No provision of the Texas Disciplinary Rules of Professional Conduct specifically prohibits a lawyer's unannounced recording of telephone conversations in which the lawyer participates. Moreover, applicable law does not generally prohibit such recordings in Texas by a participant to a telephone conversation, whether or not the participant recording the conversation is a lawyer. See section 16.02 et seq. of the Texas Penal Code and section 2511 of title 18 of the United States Code.

After reconsidering the issue, this Committee is of the opinion that the Texas Disciplinary Rules of Professional Conduct do not generally prohibit a lawyer from making undisclosed recordings of telephone

conversations in which the lawyer is a party, provided that certain requirements are complied with as discussed below.

Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct provides:

"(a) A lawyer shall not: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . ."

In view of the fact that persons in Texas are generally not prohibited from making undisclosed recordings of their telephone conversations and that many businesses routinely record telephone conversations on business premises with or without notice, the Committee does not believe that an undisclosed recording of a telephone conversation by a party to the conversation can be termed to involve "dishonesty, fraud, deceit or misrepresentation" within the meaning of Rule 8.04(a)(3). Hence, absent more, a Texas lawyer's undisclosed recording of his telephone conversation with another person should not be held to violate Rule 8.04(a)(3). Since, as already noted, an undisclosed recording of a telephone conversation by a party to the conversation is not a crime under Texas or Federal law, there appears to be no other provision of the Texas Disciplinary Rules of Professional Conduct that could be said to be violated by such an undisclosed recording. Accordingly, subject to the qualifications discussed in the next paragraph, the undisclosed recording of telephone conversations by a Texas lawyer should not be treated as a violation of the Texas Disciplinary Rules of Professional Conduct.

The Committee notes several qualifications to the conclusion reached above. First, in view of the rights of a client to the lawyer's protection of confidential client information as provided in Rule 1.05 and the client's rights against a lawyer's involvement in an impermissible conflict of interest contrary to Rule 1.06, a lawyer should make an undisclosed recording of telephone conversations involving a client only if there is a legitimate reason to make the recording in terms of protection of the legitimate interests of the client or of the lawyer. Second, a lawyer should not make a recording of a telephone conversation with a client unless the lawyer can and does take appropriate steps consistent with the requirements of [Rule 1.05](#) to safeguard confidential information that may be included in the recording of the telephone conversation. Third, in view of the requirement of Rule 8.04(a)(2) that a lawyer not be involved in the commission of a serious crime, a lawyer should not make an undisclosed recording of a telephone conversation if the telephone conversation proposed to be recorded by a lawyer is subject to other laws (for instance the laws of another state) that make such a recording a serious criminal offense. Finally, regardless of whether the client is involved in the telephone conversation or has consented to the recording, the lawyer may not under Rule 8.04(a)(3) make a recording of a telephone conversation if the making of such a recording would be contrary to a representation made by the lawyer to any person.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person. [Opinions 392](#) and [514](#) are overruled.

APPENDIX D

Opinion 514 (Overruled by Opinion 575)

February 1996

QUESTIONS PRESENTED

1. May a lawyer, in the course of his or her practice of law, ethically electronically record a telephone conversation to which the lawyer is a party, without first informing all other parties to the conversation?
2. May a lawyer ethically advise a client to tape record a telephone conversation to which the client is a party without first informing all other parties to the conversation?

DISCUSSION

The above questions are governed by Texas Disciplinary [Rules 8.04\(a\)\(3\)](#), Misconduct.

In February 1978, this committee addressed the issue of whether an attorney, in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. (See Ethics Opinion 392, Tex. B.J., July 1978, page 580.) The committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation with another party, without first informing that party that the conversation was being recorded.

The only exceptions considered at that time were "...extraordinary circumstances in which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of the attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements, " which exceptions were to be considered on a case-by-case basis.

The disciplinary rules upon which Opinion 392 is based have been incorporated into the new Texas Disciplinary Rules of Professional Conduct. See [DR 8.04\(a\)\(3\)](#), Misconduct (formerly DR 1-102(A)(4)). Therefore, this committee sees no reason to change its former opinion. Pursuant to [DR 8.04\(a\)\(3\)](#), attorneys may not electronically record a conversation with another party without first informing that party that the conversation is being recorded.

This brings the committee to the issue of whether an attorney can ethically advise a client to electronically record a telephone conversation to which the client is a party, without first informing all other parties involved. Both Texas and federal law permit a party to a conversation to tape record that conversation without first informing the other parties that the conversation is being recorded. (see 18 U.S.C.β 2511 (2)(d); Tex. Penal Code Ann. (Vernon 1986).) An attorney is required to provide his or her client with both an accurate statement of the law, and an honest opinion of the consequences likely to result from a particular course of conduct. (See Comment 7 to [DR 1.02](#).) Hence, an attorney may advise his or her client that both Texas and federal law permit the client to electronically record conversations without first informing the other parties involved, where the equities of the situation merit such advice.

An attorney, however, may not circumvent his or her ethical obligations by requesting that clients secretly record conversations to which the attorney is a party. Under these circumstances, the attorney would be ethically required to advise the other parties of the electronic recording, in advance. An attorney may not solicit the aid of his or her clients to undertake an action that the attorney is ethically prohibited from undertaking. (See [DR 8.04\(a\)\(1\)](#)(discussing violations of the disciplinary rules through the acts of others).)

APPENDIX E**OPINION 392** (Overruled by Opinion 575)**February 1978****ATTORNEY RECORDING CONVERSATION WITHOUT CONSENT OR KNOWLEDGE****CANON 1; EC 1-5; 9-6****EC DR 1-102 (A)(4); 7-102 (A)(8)****QUESTION**

May an attorney in the course of his practice of law electronically record a conversation without first informing all parties to the conversation?

OPINION

While the recording of a conversation either by telephone or in person is not a violation of law if done with the consent of one party to the conversation, even though done without knowledge or consent of the other party, 35 Tex. L.Rev. 440, 58 ALR 2d, 1026, 47 U.S.C. P605, Rathbun v. United States 355 U.S. 107, 110-111 (1957); nevertheless, attorneys are held to a higher standard by Canons 1 and 9. The secret recording of conversations offends the sense of honor and fair play of most people.

Normally, therefore, no attorney should electronically record a conversation with another party, without first informing that party that the conversation is being recorded. This particularly applies to conversations between attorneys when candor and confidentiality should be strictly observed.

There may be, however, extraordinary circumstances in which the state attorney general or local government or law enforcement attorneys or officers acting under the direction of the attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis. See ABA Formal Opinion 337; New York Formal Opinion 328.

Accordingly, former Texas Opinion 84 (November, 1953) is hereby overruled.