

PARTY TALK

As a lawyer, you may receive occasional requests for informal advice, whether from friends, family members, neighbors, or new acquaintances. And the holiday season, with its requisite parties and get-togethers, provides even more opportunities for you to hear, “Well, you’re a lawyer ... maybe you know the answer?”

Of course, no lawyer’s expertise covers every area of law, so we have provided another installment of Party Talk for some of those friendly requests for advice you may encounter at the next round of social gatherings.

While you should be careful how you answer — make sure the people you are speaking with understand that you are not their lawyer and that your answer does not constitute formal advice — you may be able to impart some basic knowledge.

What questions are you asked in social situations? Send us your question and answer and we’ll post them to the Texas Bar blog at blog.texasbar.com. Email tbj@texasbar.com.



What is your liability if you give legal advice?

You're at a cocktail party, and word gets out you're a lawyer. Someone pulls you aside and explains a legal issue they're confronting. What do you do? Legally, the safest route is to say you don't feel like talking shop, and get back to your martini. Realistically, however, when you get a softball legal question that falls into an area of your practice, there are occasions when you'd feel dumb (or like a jerk) not to provide some answer to point someone in the right direction.

It is unlikely your happy-hour legal advice will result in a claim of malpractice, but do not rule it out. Forming an attorney-client relationship that becomes the backbone of a malpractice suit does not require a fee to be paid, a formal meeting, or a retention letter. You might be found to have "represented" a person who had reason to believe you were providing legal advice upon which they relied, even if it never crossed your mind that he or she was your client.

Alternatively, you could be found liable for failing to advise someone that you do not represent him or her. If you are going to play barstool lawyer, provide disclaimers to any advice you may give, and explain that: 1) any number of facts could impact his or her situation; 2) you are not his or her lawyer; 3) he or she should not rely upon your advice; and 4) he or she needs to consult a lawyer of his or her own.

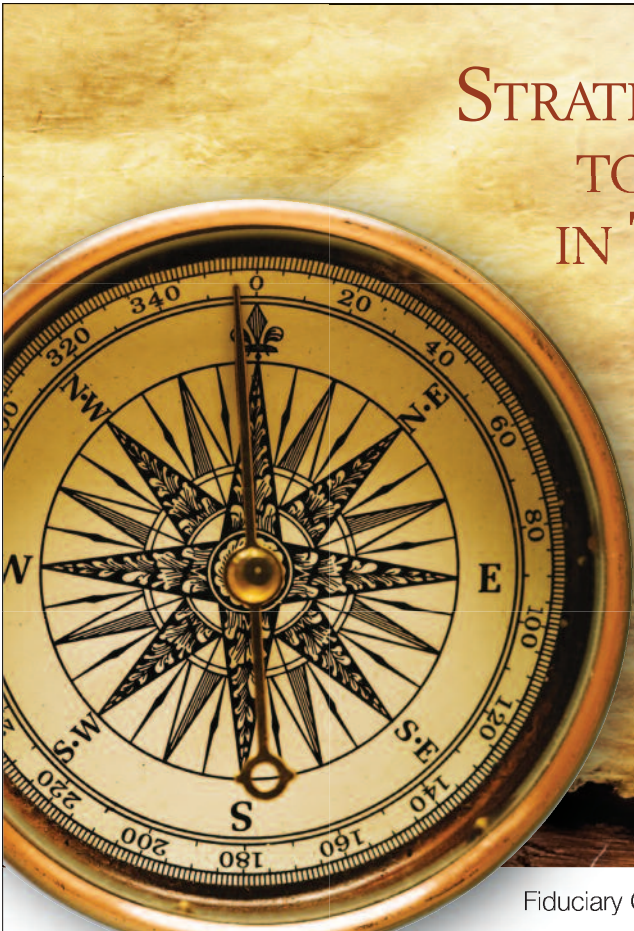
I have gone so far as to ask someone to sign a cocktail napkin acknowledging these things (in a situation that gave me more heartburn than the typical encounter). Small wonder I don't get many return invites to those happy hours.

— Geoff Gannaway, Houston

I own a ranch, but I don't own the minerals. An oil company told me it is going to drill a well and cut a road right through my pasture. Can they do that?

Yes, they can. The mineral estate (which includes the oil and gas underneath the surface) is the dominant estate. That means the mineral estate owner, or, in this case, his or her leasee, has the right to use as much of the surface as may be reasonably necessary to develop the minerals by drilling its well. This includes selecting its drilling location in your pasture, cutting a road through the pasture, and even using your caliche to build its road and drill site. Subject to some narrow exceptions, the oil company even has the right to interfere with your use of the ranch. But, if you interfere with the oil company's operations, you could be liable for damages.

— Aaron Dorfner, Midland



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How does a U.S. citizen or permanent resident bring a family member to the United States?

You will first need to file a petition for alien relative, which proves that you are eligible to “petition” for a family member and states the type of relationship (e.g., parent, spouse, child, or sibling). After the approval of this petition, your family member will be notified by the National Visa Center when visa numbers are available (which range from zero to eight years) and about what documents to prepare. Then, your family member needs to attend an interview, upon the approval of which he or she will receive an immigrant visa, valid for six months, to enter the United States.

— Kellie Pai, Houston

My child posted inappropriate photos to his Facebook page. School administrators are threatening to suspend him. Can they do that?

It depends. In more than one federal case, courts have tried to balance a student’s First Amendment rights with school administrators’ mission of maintaining order and discipline in the school.

While at least one appellate court sided with the educators in the matter of a social networking page that was promoting unlawful behavior, most have upheld a student’s freedom of speech, even though it might be considered inappropriate and/or critical of, or even derogatory toward, teachers.

While school administrators’ efforts at suppressing student expression have been upheld where the students’ activities were materially and substantially disrupting the work and discipline of the school, the potential for disruption is usually harder to show when the expression in question happens off-campus. And if the student’s social networking profile is privacy-restricted (as opposed to publicly viewable), the school’s legal justification is even weaker. But there are circumstances where photos or statements appearing in cyberspace could pose a legitimate concern for school officials; for example, threats of violence made on a Facebook page would certainly be viewed as relevant to school safety.

— John Browning, Dallas

My office doesn’t give me religious holidays off. Can I take them anyway?

Title VII of the Civil Rights Act of 1964 requires employers to make “reasonable accommodations” for employees’ religious practices, but they don’t have to make accommodations that are expensive or highly disruptive. A reasonable accommodation for holidays might be flexible scheduling or the option to take unpaid leave.

Talk to your boss. Before an employer has to do anything, you have to alert him or her to the need for accommodation. If you can’t come to an agreement, it would be smarter to file a claim with the Equal Employment Opportunity Commission than to take off without permission.

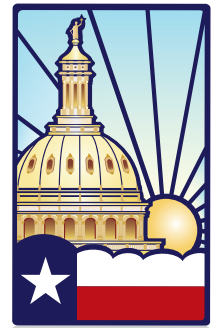
— Brian McGiverin, Austin

You’re a lobbyist? How do you live with yourself? Do you know Mr. X? He works at the Capitol. You know, my friends tell me I would be a great lobbyist. How do I become one?

Yes, I sleep well. No, I don’t know everyone who works at the Capitol, but I would like to meet him or her. Really? Here’s how ...

The truth is, there is no magic formula to become a lobbyist. The most common way is to have experience in the public sector, either in a legislative office or an agency. The easiest is to share consanguinity with an elected official. You do not need to be a lawyer or have a special degree. The only mandates call for yearly registration with the Texas Ethics Commission and subsequent financial reporting. There is no prototypical lobbyist. Anyone can be one. Don’t believe me? Google Bill “Sputnik” Strain — arguably one of the greatest lobbyists in Texas history.

— David Courreges, Austin



Can an airline prohibit me from boarding an airplane if I am wearing a provocative outfit?

Technically, yes. An airline’s “contract of carriage” typically allows it to refuse to board a passenger if the passenger’s appearance could offend reasonable sensibilities of other passengers to the point of causing an onboard disturbance. But such instances are rare. Today’s airlines operate in a complex environment, but safety is most important. Perceptions about clothing are necessarily framed by one’s subjective point of view rather than objective standards, so different people will respond or react differently. Whether an outfit is provocative, offensive, or just plain unsuitable enough to lead to an onboard disturbance is hard to predict. Although it would take an extreme situation for an airline to refuse to board you, it’s always best to wear something on board an airplane that won’t require airline personnel to make a judgment.

— Kelli Jones, Houston

I really enjoy making cupcakes for my friends and coworkers. I've been doing brisk business and filling more orders. At what point should I become incorporated or a company?

As with so many legal questions, it depends. It is a cost-benefit analysis. The benefit potentially could be substantial. By incorporating, you can protect your personal assets from claims made against the business — for example, if someone claims a cupcake made him or her sick, or that you failed to fill an important order.



Generally, the more assets you have to protect, and the more likely it is that your customers will make a claim against the business, the more important it will be to incorporate. The costs can vary greatly. The initial monetary cost, particularly for a one-person corporation or limited liability company, is relatively low; having an attorney help you form one should cost somewhere around \$1,000 (including filing fees). There may be additional tax costs, but these can be lessened by using an LLC or an S corporation. Finally, there are ongoing administrative burdens associated with a corporation or LLC, such as filing separate tax returns, keeping separate accounting records, making sure to sign checks and contracts in the name of the business, and having corporate meetings.

If the benefits outweigh the costs, or if it is close, you should consider incorporating.

— Manuel Escobar, Austin

My ex has stopped paying child support. Can I prevent my ex from visiting our child?

No. The nonpayment of child support is not a defense to violating a court order with regard to possession and access of a child. If there is a court order granting a conservator of a child the right to exercise possession and access with the child, a failure to deliver the child as ordered would constitute a violation of that court order that could result in the noncomplying conservator being held in contempt. Under the Texas Family Code Section 157.007, the only statutory defenses for failure to comply with an order for possession or access to a child are:

- 1) The involuntary inability to comply with the order; and
- 2) The voluntary relinquishment of actual possession and control of the child by the conservator who has the right to possession under the order.

If a conservator of a child wants to modify the possession schedule of a child with another conservator, they have the right to file a motion to modify with the court and seek a modification. However, until the prior order is modified by the court, it is still a valid and enforceable order.

— Kristy Sims Piazza, Plano

I own a hotel. A well-known website that publishes reviews of hotels and restaurants recently published a review of my business that is false, contains curse words, and is affecting the number of customers who want to stay at my hotel. Is there anything I can do to get the reviewer and the website to remove the post?

Under the Communications Decency Act, owners of an “interactive computer service” (ICS) (e.g., Yelp!) who publish information provided by others are not liable for defamatory statements made about another unless the owner actively engages in the gathering of information from the reviewer that leads to the defamatory statement. Therefore, you are unlikely to get legal redress from the ICS owner.

Focus instead on the reviewer. In contrast to an ICS owner, any person who makes a defamatory statement about another on an ICS site can be held personally liable for his or her statements. Remember, you can respond to the review on most ICS sites. If that doesn't work, send a demand letter to the reviewer asking them to remove the defamatory post and seek appropriate legal action.

— Kendall Kelly Hayden, Dallas



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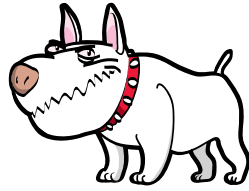
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My neighbor's dog viciously attacked my cat in my backyard. Can I have the dog put down?

Whether or not the dog can be put down, or euthanized, is likely to be determined by your city's ordinance. Some ordinances include the possibility of euthanasia for animal-on-animal attacks. Some do not. Make sure you know your local ordinances regarding animals. As for what you can do personally, state law says that, under certain circumstances, you can kill a dog that "is attacking" or "has recently attacked" a domestic animal on your property. However, it might not be a good idea to kill your neighbor's dog. There may have been extenuating circumstances.



— Yolanda Eisenstein, Dallas

I work at a publication and receive review copies of movies, CDs, and books. Once I am finished using them, can I give them away or sell them?

You can give them away or sell them if you are the bona fide "owner" of the copy, instead of the publication you work for, and if there is no restriction on distribution by the source of the copy. Review copies are often considered promotional copies and are sometimes labeled "Not for sale" or will be "loaned" for review only. The company sending the review copy may not want the copy distributed to the public, in which case distribution by the reviewer could be an infringement or impair relations with the source. The copyright law gives the copyright owner the exclusive right to distribute the copyrighted work to the public by sale or other transfer of ownership or rental, lease, or lending. However, once an authorized copy has been sold or ownership transferred, the new owner can dispose of that copy of the work by sale or gift (but not rental).

— Mike Tolleson, Austin

I hired a lawyer to represent me but he won't return my phone calls. What can I do?

If your attorney is not returning your calls, the best thing to do is to start documenting your efforts. Begin by sending your attorney a certified letter indicating your concerns. Make sure that you list your questions clearly and give the attorney a deadline to get back with you. Usually, this will be sufficient to get your attorney's attention.

However, if this does not work, you can contact the grievance information hotline at the State Bar of Texas. You will be greeted by a program associate who will listen to your concerns and give you options that are available through the State Bar's Client-Attorney Assistance Program, a statewide dispute reso-

lution program whose main objective is to assist the public in resolving concerns, disputes, or misunderstanding with Texas lawyers and to facilitate and improve communications between clients and their lawyers.

— Bennie Ramirez, Austin

My elderly mother, who suffers from dementia, has been declining in health for some time. Do I need to become her legal guardian?

Come on over, and let's have a burger and a drink. This doesn't happen in real life the same way it does in the movies. To avoid the guardianship, you need to find out if your mom has previously signed powers of attorney. If she did, you can probably avoid a guardianship because she named her agents while she was still OK.

If she doesn't have powers of attorney, and the doctor says she can't sign documents now, then you need to do the guardianship. Here's how it works ... [Two hours later] So, go find those documents and see what the doctor says.

Boy, you sure know how to have fun at a party!

— Terry W. Hammond, El Paso

I am a parent of a 2-year-old child. My husband and I often go out to eat with our son. One restaurant did not allow us to eat there because the business does not allow children. Can a restaurant prohibit kids or children from dining in their restaurant?

It surprises many people to know that restaurants can prohibit almost anyone from dining at their establishment. The few exceptions include those classes that are protected by the U.S. Constitution, including race, gender, sexual orientation, religion, national origin, disability, and veteran status. You might think that keeping children out could fall under the age exception, but it does not. The age exception applies only to the elderly. Therefore, a restaurant may prohibit children. Bars and nightclubs do this all the time, and restaurants are no different.



— Matthew Sanderson, Dallas

I want to print out a picture I found on the Internet to put on invitations. Do I need to pay to use the image?

The person who created the picture owns a copyright in it, and you need his or her permission before using it — even for an invitation. The best approach is to look for pictures in places that allow you to easily obtain a license to use them. You can



find royalty-free images and buy licenses on sites such as istockphoto.com or gettyimages.com. You can also search for images at flickr.com/creativecommons, which has millions of photos with a “Creative Commons” license, allowing you to use the images for noncommercial use. For information on the basics of copyrights, visit www.copyright.gov.

— John Sirman, Austin

POINT/COUNTERPOINT

My city institutes no-refusal weekends around holidays, where those stopped for suspicion of driving while drunk are required to take a blood test. What should I do if I am stopped for suspicion of driving while intoxicated?

A DEFENSE LAWYER’S TAKE:

First of all, the best advice I can give someone is not to drive if you have had too much to drink.

Prosecutors commonly try (improperly, in my opinion) to educate juries that “intoxicated” is a much lower impairment level than “drunk.” In Texas, intoxicated for purposes of DWI can be proved any one of three ways: 1) not having the normal use of mental faculties or 2) physical faculties by reason of the introduction of alcohol, a controlled substance, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or 3) having an alcohol concentration of 0.08 or more.

Most reasonable people would agree that it is very scary to think that they can have a margarita at dinner and then drive home and be at risk for having a needle stuck in their arm. In my opinion, if an officer merely smells alcohol on a driver’s breath, he or she has pretty much already made up his or her mind to arrest the driver, regardless of performance on any tests.

From a defense viewpoint, the less evidence there is against you, the more difficult it will be for a prosecutor to convict you. The following tips may help give you a stronger case to defend:

- 1) If you are being stopped, pull over right away.
- 2) You can refuse to submit to any of the roadside gymnastics (i.e., standardized field sobriety tests).
- 3) Don’t give a breath specimen. The Intoxilyzer 5000 isn’t even warrantied for breath testing by the manufacturer. Additionally, there have been numerous problems with the breath-testing program in Texas. Be aware, though, that a warrant may be obtained for a sample of your blood. Police agencies are becoming more and more aggressive with no-refusal weekends.
- 4) Be very polite and ask for a lawyer throughout the inves-

tigation (even though the right to counsel may not attach at the scene while under investigation).

Interestingly, one trial court recently threw out a breath test because it found that the officer psychologically coerced the subject to give a breath test by threatening to draw his blood if he refused to blow.

— Tyler Flood, Houston

A PROSECUTOR’S PERSPECTIVE:

Many no-refusal jurisdictions will still offer you the opportunity to take a breath test. If you’re given the opportunity, *take it!*

A breath test provides immediate results, so if you blow under 0.08 and your arresting officer does not suspect that you are intoxicated on some other substance, you will probably be released with no charge. That means no embarrassing jail call to your family, no posting a bond, and no court appearances as a criminal defendant. Also, remember that if you refuse to provide a breath sample after you have been arrested for a DWI offense, your license can be suspended *regardless* of the final disposition of any criminal charges. While blood tests will also provide definitive results, you and the prosecutors will get the benefit of that information only after the lab analyzes the blood at some later date.

The officer has the discretion to request only a blood sample. It is not your choice. Whether the officer is requesting blood or breath, you will first be asked voluntarily to provide the specimen. If you refuse to provide the requested sample (breath or blood), the officers will work with prosecutors to obtain a blood search warrant signed by a judge or magistrate. That search warrant requires a qualified technician (usually a registered nurse or phlebotomist) to obtain a blood sample. It is no longer a request but a command. Additionally, your refusal to provide a sample can be considered by a judge or jury as evidence of guilt.

My best advice: Make plans to get home safely *before* you start drinking. We all know drinking affects judgment (*see also* karaoke at office party and late night voice mails to exes). After a few hours of cocktails, rationalizations such as, “It’s only a few blocks,” “I’m only a little buzzed,” or “I can’t leave my car in the parking lot” start to sound like good reasons to attempt the drive. They’re not! Don’t risk your own safety or the safety of the other folks on the road.

Daily we see the consequences of impaired driving, and DWIs are nothing compared with the devastation of intoxication assaults and intoxication manslaughters. The officer that arrests you for DWI may have just saved your life or someone else’s life. Please take a cab or designate a driver. Have a great and safe holiday!

— Catherine Evans, Houston