

**UPL: UNLICENSED, UNWANTED AND UNWELCOME**

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**REPRESENTING SMALL BUSINESS**  
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**CHAPTER 4**



## CURRICULUM VITAE

### J. RODNEY GILSTRAP

#### **Personal History:**

- A. Born: James Rodney Gilstrap, May 1, 1957, Pensacola, Florida
- B. Married to Sherry Sullivan Gilstrap, 1977 to present
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- E. Children:
  - 1. Lauren Gray Gilstrap, daughter, born November 25, 1983, Marshall, Texas
  - 2. Stephen Sullivan Gilstrap, son, born May 16, 1986, Marshall, Texas

#### **Education:**

- A. Primary and secondary education: Santa Rosa County, Florida Public School System/graduate: Gulf Breeze High School, 1975
- B. Undergraduate Education: Baylor University, B.A. magna cum laude, 1978
- C. Professional Education: Baylor University School of Law, Juris Doctor, 1981
- D. Academic organizations/Awards:
  - 1. Member - Phi Beta Kappa
  - 2. Member - Alpha Chi
  - 3. Associate Editor - Baylor Law Review  
[published article: Gilstrap, "Video Recorders: Copyright Infringement" 33 Baylor Law Review 695 (Summer 1981)]
  - 4. American Jurisprudence Award (Contracts), Baylor Law School, 1980
  - 5. Nathan Burkan Copyright Award, Baylor Law School, 1981
- E. Certified Mediator-Civil & Commercial-National Mediation Academy, Dallas, Texas; January 2002 to Present

#### **Employment History:**

- A. 1980 - 1981: Law Clerk with Naman, Howell, Smith, Lee & Muldrow of Waco, Texas
- B. 1981 - June, 1984: Associate/Attorney with Abney, Baldwin & Searcy, Inc. of Marshall, Texas
- C. 1984 - Present: Partner with Smith & Gilstrap of Marshall, Texas
- D. County Judge, Harrison County, Texas, 1989 through 2002

**Professional organizations:**

- A. American Bar Association
- B. State Bar of Texas
- C. Texas County Judges Association
- D. Northeast Texas Bar Association
- E. Harrison County Bar Association
- F. Supreme Court of Texas / State Bar of Texas - Committee on the Unauthorized Practice of Law (Member 1985 through 1995, Chairman 1998 through present)
- G. Admitted to practice law before:
  - 1. All courts of the State of Texas
  - 2. U.S. District Court for the Eastern District of Texas
  - 3. U.S. Court of Appeals, Fifth Circuit
  - 4. U.S. Supreme Court
- H. College of the State Bar of Texas

**Public/Community Service:**

- A. Marshall Rotary Club (Member 1983 through present; Director in 1986; Club President in 1989)
- B. Harrison County Historical Society (Board Member 1985 through 1992; President 1986 through 1988)
- C. Marshall Council of Campfire, Inc. (Board Member and Vice-President from 1985 through 1988)
- D. Harrison County United Way, (Board Member 1989 through 1992)
- E. Eagle Scout, with bronze palm, Gulf Coast Council, Boy Scouts of America
- F. Marshall Masonic Lodge, No. 22 AF & AM; Waco Scottish Rite Bodies 32<sup>o</sup>; Shriner - Sharon Temple, Tyler, Texas
- G. Trinity Episcopal Day School (Board Member 1989 through 1991; President of School Board, 1991)
- H. Marshall/Harrison County Board of Health (Member 1989 through 2002)
- I. Member Board of Trustees - the Davidson Foundation (1992 through present)

**Awards/Honors/Publications:**

- A. Road Hand Award from Texas Department of Transportation, 1997
- B. Commencement Speaker-Texas State Technical College, Marshall, 2002
- C. Author (with Leland de la Garza): "*UPL: Unlicensed, Unwanted and Unwelcome*" The Texas Bar Journal, Vol.67, Number 9 (October 2004) Pages 798-801

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## UPL: UNLICENSED, UNWANTED AND UNWELCOME

It has become a maxim of the legal profession that where the law ends tyranny begins.<sup>1</sup> Unfortunately, in Texas today, where the authorized practice of law ends, the unauthorized practice of law (UPL) begins, and brings with it abuse of those individual rights each lawyer is sworn to uphold. To protect the public, our profession not only supervises and disciplines its own, but attempts to stop UPL through the volunteer efforts of those lawyers and lay people who serve on the Texas Unauthorized Practice of Law Committee (UPLC).

### I. THE SOURCE OF THE UPLC'S POWERS

The Texas Supreme Court regulates the practice of law in Texas. Independent of any statutory authority, the Supreme Court has the inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as a whole.<sup>2</sup> The Texas legislature has supplemented this authority with Chapter 81 of the State Bar Act.<sup>3</sup>

Chapter 81 of the State Bar Act authorizes the Supreme Court to appoint a nine-member committee, comprised of six lawyers and three lay persons, that is charged with eliminating UPL, including if necessary by filing suit.<sup>4</sup>

Texas has other statutes and rules, both civil and criminal, that prohibit UPL:

- \* Section 83.001 of the State Bar Act prohibits most non-lawyers from charging or receiving a fee for preparing real estate instruments;
- \* Section 38.122 of the Penal Code prohibits a person, with intent to obtain an economic benefit, from falsely holding himself out as a lawyer;
- \* Section 38.123 of the Penal Code prohibits a person, with an intent to obtain an economic benefit, from (a) contracting with persons to represent them in regard to causes of action for personal injuries or property damages, (b) advising persons as to their rights and advisability of making claims for personal injuries or property damages, or (c) advising persons as to whether to accept a settlement of claims for personal injuries or property damage;
- \* DR 5.05 prohibits a lawyer from aiding a non-lawyer in UPL and from committing UPL in another jurisdiction;
- \* DR 5.04(a) prohibits fee splitting between a lawyer and a non-lawyer; and

- \* DR 5.04(b) prohibits a lawyer from forming a partnership with a non-lawyer to practice law
- \* DR 8.04(a)(11) prohibits a lawyer from practicing law during an administrative suspension.

The purpose of UPL laws is to protect the public from persons who are inexperienced and unlearned in legal matters who attempt to practice law without first qualifying themselves through courses of study or who may be morally unfit to practice law.<sup>5</sup>

### II. THE HISTORY OF THE UPLC

The first UPL committee in Texas was created in 1932 by the Texas Bar Association (predecessor to the State Bar of Texas) and was called the Committee on the Lay and Corporate Encroachment of the Practice of Law. The first job of the committee was to draft a statute defining the practice of law and prohibiting UPL. The statute was drafted in 1933 and the committee was renamed the Committee on Unlawful Practice of Law.

The UPLC was created following the creation of the State Bar of Texas in 1939. The Texas Supreme Court initially adopted rules that authorized the UPLC to assist local grievance committees to investigate UPL, but did not authorize the UPLC to prosecute lawsuits. The UPLC's role was largely advisory. The investigation and prosecution of UPL was left to the local grievance committees.

In 1952, the Texas Supreme Court adopted rules establishing the UPLC as a permanent entity and giving the UPLC investigative and prosecutorial powers, as well as the duty to inform the State Bar and others about UPL. From 1952 to 1979, the UPLC's members were appointed by the State Bar. In 1979, the UPL statute was amended to require that members of the UPLC be appointed by the Supreme Court.<sup>6</sup>

### III. DUTIES OF THE UPLC

Section 81.104 of the State Bar Act states that the UPLC shall:

- (1) keep the Supreme Court and the State Bar informed with respect to:
  - (A) the unauthorized practice of law by lay persons and lay agencies and the participation of attorneys in that unauthorized practice of law; and
  - (B) methods for the prevention of the unauthorized practice of law; and

- (2) seek the elimination of the unauthorized practice of law by appropriate actions and methods, including the filing of suits in the name of the committee.<sup>7</sup>

In order to accomplish these duties, the UPLC meets quarterly to discuss committee business, to hear reports from its subcommittees, and to act on requests from the subcommittees for authority to file law suits to enjoin or motions for contempt to punish UPL violations. The UPLC's expenses are reimbursed by the State Bar.<sup>8</sup> The UPLC, its members, investigators and complaining witnesses enjoy absolute immunity.<sup>9</sup>

The UPL statutes do not give the UPLC any adjudicative powers. The UPLC utilizes the courts to determine what is UPL and to eliminate UPL. The UPLC is prohibited by the Supreme Court from giving advisory opinions and acts only upon submitted complaints.<sup>10</sup> Complaints may be submitted electronically via the UPLC's website, [www.txuplc.org](http://www.txuplc.org), or in writing to any state committee member or the chair of any local subcommittee. Contact information for each is posted on the website.

#### IV. WHO CAN PRACTICE LAW?

The right to practice law in Texas is a privilege, not a personal right.<sup>11</sup> There is no constitutional guarantee that lay-persons may represent other people in litigation.<sup>12</sup>

Generally, in order to practice law in Texas, a person must be a member of the State Bar of Texas.<sup>13</sup> The Supreme Court has adopted rules giving attorneys licensed in other jurisdictions and law school students a limited license to practice law.<sup>14</sup>

There are many exceptions to this general rule. For example, natural persons have the right to represent themselves *pro se* in litigation without an attorney.<sup>15</sup> Corporations and partnerships generally may not appear in court through an officer, partner or agent who is not an attorney.<sup>16</sup> While corporations, partnerships and other entities normally cannot appear *pro se* like natural persons, there are exceptions for claims in small claims court and FED cases in justice court.<sup>17</sup> And, various administrative agencies have adopted rules permitting non-lawyers to assist persons in administrative proceedings.<sup>18</sup>

#### V. WHAT IS THE PRACTICE OF LAW?

There is no comprehensive definition of the practice of law.<sup>19</sup> Section 81.101(a) of the State Bar Act defines the practice of law as follows:

In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a

judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.<sup>20</sup>

While this definition has been criticized for being vague and incomplete,<sup>21</sup> it has survived constitutional challenges.<sup>22</sup>

For its part, the Texas Supreme Court has defined the practice of law as "drafting and interpreting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, departments of government or administrative agencies."<sup>23</sup> Consistent with Section 81.101(b) of the State Bar Act, the Texas Supreme Court has held that the definition of the practice of law is ultimately a legal question for the courts to decide.<sup>24</sup>

Texas courts have broadly defined the practice of law to include "all advice to clients, express or implied, and all action taken for them in matters connected with the law."<sup>25</sup> Compensation is not necessary for conduct to constitute the practice of law.<sup>26</sup>

#### VI. CONCLUSION

Unlicensed persons with little or no legal training are constantly developing new schemes for providing legal services to the public that often leave the rights of unsuspecting Texans damaged or compromised. UPL victims have no practical recourse when their child custody rights are lost, their legal status has been forfeited, or their defective pleadings are dismissed. To those who have experienced its effects, UPL is both unwanted and unwelcome.



<sup>1</sup> William Pitt, Earl of Chatham, “Speeches” (1770).

<sup>2</sup> See *In Re Nolo Press/Folk Law*, 991 S.W.2d 768, 769-70 (Tex. 1999). The Supreme Court’s inherent power is derived from Art. II, Sec. 1, of the Texas Constitution.

<sup>3</sup> Tex. Gov’t Code § 81.101 *et seq.* The original UPL statute was Tex. Penal Code Art. 430a (enacted in 1933 and repealed in 1949). The successor UPL statute was Tex. Civ. Stat. Ann. Art. 320a-1, Sec. 3 (enacted in 1939 and repealed in 1987). Section 81.101 *et seq.* represents the codification of former Art. 320a-1.

<sup>4</sup> Tex. Gov’t Code, § 81.103 and 81.104.

<sup>5</sup> See *Grievance Committee v. Coryell*, 190 S.W.2d 130, 131 (Tex. Civ. App. -- Austin 1945, writ ref’d w.o.m.); see also *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, 947-48 (Tex. 1944) (“the State has a vital interest in the regulation of the practice of law for the benefit and protection of the people as a whole ...”); *Palmer v. Unauthorized Practice Committee of the State Bar of Texas*, 438 S.W.2d 374, 377 (Tex.Civ.App. – Houston [14th Dist.] 1969, no writ) (“[UPL statute] was enacted in the interest of the public welfare and safety ...”).

<sup>6</sup> See *In Re Nolo Press/Folk Law*, 991 S.W.2d at 769-70.

<sup>7</sup> Tex. Gov’t Code § 81.104.

<sup>8</sup> Tex. Gov’t Code § 81.103(t).

<sup>9</sup> See *Crain v. Smith*, 22 S.W.3d 58 (Tex.App. – San Antonio 2000, no pet.); *Green v. State Bar of Texas*, 27 F.3d 1083 (5th Cir. 1994).

<sup>10</sup> Rules Governing UPL Committee, Section 7.

<sup>11</sup> See *State Bar v. Heard*, 603 S.W.2d 829, 834 (Tex. 1980).

<sup>12</sup> See *Thomas v. Estelle*, 603 F.2d 488, 489 (5th Cir. 1979); *Harkins v. Murphy & Bolanz*, 112 S.W. 136 (Tex.Civ.App. – 1908, writ dismissed).

<sup>13</sup> Tex. Gov’t Code § 81.102.

<sup>14</sup> Tex. Gov’t Code § 81.102; Rule XIX of the Rules Governing Admission to the Bar.

<sup>15</sup> See Tex.R.Civ.P. 7 (Texas state court); 28 U.S.C.A. § 1654, Fed.R.Civ.P. 4(a) and 11 (Federal court proceedings).

<sup>16</sup> See *Dell Development Corp. v. Best Industrial Uniform Supply Co., Inc.*, 743 S.W.2d 302 (Tex.App. – Houston [14th Dist.] 1987, writ denied); *Globe Leasing, Inc. v. Engine Supply and Machine Service*, 437 S.W.2d 43 (Tex.Civ.App. – Houston [1st Dist.] 1969, no writ).

<sup>17</sup> See Tex. Gov. Code § 28.003(d); Op. Tex. Att’y Gen. Nos. C-82 (1963), C-283 (1964) and H-538 (1975) (small claims court cases); Tex.R.Civ.P. 747a; Tex. Prop. Code § 24.011; Op. Tex. Att’y Gen. No. JM-451 (1988) (FED cases).

<sup>18</sup> See *e.g.*, Tex. Labor Code § 401.011(37) (Worker’s Compensation Comm.); 28 Tex. Admin. Code § 1.8 (Texas Dept. of Insurance).

<sup>19</sup> *Palmer*, 438 S.W.2d at 376 (“under our system of jurisprudence such practice must necessarily change with the ever changing business and social order”).

<sup>20</sup> Tex. Gov’t Code § 81.101.

<sup>21</sup> See Report of the UPL Task Force which can be viewed at [www.txuplc.org](http://www.txuplc.org).

<sup>22</sup> *Drew v. UPL*, 970 S.W.2d 152 (Tex. App. – Austin 1998, pet. denied); *Lynn v. Board of Law Examiners*, 1999 Tex.App. LEXIS 677 (Tex.App. – Dallas 1999, no pet., unpub. op.).

<sup>23</sup> Rule XIII(c)(1) of the Rules Governing Admission to the Bar.

<sup>24</sup> See *UPLC v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985), *cert. denied*, 474 U.S. 980, 106 S.Ct. 384, 88 L.Ed. 2d 337 (1985).

<sup>25</sup> *Crain v. UPLC*, 11 S.W.3d 328, 333 (Tex.App. – Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); *Davies v. Unauthorized Practice Committee*, 431 S.W.2d 590 (Tex.Civ.App. – Tyler 1968, writ ref’d n.r.e.); *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686, 689 (Tex.Civ.App. – Beaumont 1939, no writ).

<sup>26</sup> See *Magaha v. Holmes*, 886 S.W.2d 447, 448-49 (Tex.App. – Houston [1st Dist.] 1994, no writ).

J. Rodney Gilstrap, a principal of Smith & Gilstrap of Marshall, Texas, is the Chairman of the UPL Committee. Leland C. de la Garza, a shareholder of de la Garza & Wallace, P.C. of Dallas, Texas, is the Chairman of the Dallas Subcommittee of the UPLC.