PACKIN' HEAT AND RUNNIN' GUNS: TRANSPORTING AND TRANSFERRING FIREARMS

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State Bar of Texas
WHAT EVERY TEXAS LAWYER NEEDS TO KNOW ABOUT FIREARMS LAW
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CHAPTER 8

Biographical Summary - Sean P. Healy

- Attorney, Healy Law Offices, P.C.; Practice includes civil litigation, business law, nonprofit organizations, domestic matters, and firearms law
- Civil, Family Law, and Child Protective case Mediator; Certified Arbitrator
- Member of the College of the State Bar of Texas; Honorary society of lawyers who are among the best trained attorneys in Texas
- NRA Training Counselor, Chief Range Safety Officer, and Certified Firearms Instructor, certified in all civilian disciplines
- Private Pilot
- Life Member of National Rifle Association and Second Amendment Foundation
- NRA-ILA Election Volunteer Coordinator (EVC) for Texas Congressional Districts 1 and 4
- Have been an active volunteer and officer with American Mensa; the Texas Jaycees; Azleway Boys' Ranch and Charter School, the John Ben Shepperd Public Leadership Institute; Toastmasters; and a number of local, state, and national political organizations
- 4-H Shooting Sports: Certified Instructor for Pistol; completed 2003 National 4-H Shooting Sports Workshop, May, 2003; authorized to train instructors in the Pistol discipline; served as a match director in several areas during the 2003 and 2004 Texas 4-H Shooting Sports Games
- Member of East Texas Friends of NRA Committee since 1993; member of North Texas State Fund Committee since 1998
- Speech and Powerpoint presentation at 2004 Texas State Rifle Association annual meeting, "State and Federal Gun Laws" (with Gene Hamm)

Continuing Legal Education Speeches and Papers:

- "Dodging the Bullet: Simple Steps to Avoid Grievances and Malpractice Claims in Gun-Related Cases," CLE seminar to Navarro Co. Bar Association, January 22, 2004
- "High Crimes and Misdemeanors: Major and Minor Screwups in the Law Office," CLE seminar to Smith County Bar Association, November 20, 2003
- "Packin' Heat and Runnin' Guns: Transporting and Transferring Firearms," presentation and paper for State Bar of Texas CLE seminar, "Lawyers, Guns & Money: What Every Texas Lawyer Needs to Know about Firearms Law," October 24, 2003
- "Dodging the Bullet: Simple Steps to Avoid Grievances and Malpractice Claims in Gun-Related Cases," CLE seminar to Smith County Bar Association, Family Law Section, June 19, 2003
- "Nuts and Bolts of Family Law," CLE seminar to Smith County Bar Association, April 6, 2001
- "Lawyers, Guns & Money," CLE presentation to Smith County Bar Association, March 9, 2001
- "Gun Laws for the General Practitioner," CLE seminar for the Rockwall Bar Association, October 11, 2000
- "Family Law 2000 Update: Guns and Family Law," CLE seminar to the Gregg County Bar Association, October 10, 2000
- "Judges' Personal Safety Seminar, CLE presentation at the Northwest Texas Judicial Conference, April 5, 2000
- "Don't Shoot Yourself in the Foot: Gun Laws You Need to Know," CLE Paper presented to Smith County Bar Association, November 11, 1999
- Whirlwind Web Tour, to the Smith County Bar Association, August 14, 1998
- Ethical Use of the Internet, Whirlwind Web Tour, and New Technology for Lawyers, to the Smith County Bar Association, June 5, 1998

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes and Bills

Cases

Other

PACKIN' HEAT AND RUNNIN' GUNS: TRANSPORTING AND TRANSFERRING FIREARMS

INTRODUCTION

An innocent violation of the firearms laws can result in a felony conviction, a lengthy prison sentence, and a massive fine. This article will explore some of the state and federal laws governing transportation and transfer of firearms, discussing laws of states other than Texas only tangentially. The article will mention in passing some of the prohibitions on simple possession or use of firearms, but will not discuss them in any detail.

WARNINGS

The purpose of this paper and presentation is to explain to a group of attorneys some of the more significant laws governing a Texas resident who wishes either to transport a firearm, or to be a party to the transfer of a firearm. It is intended to be used solely by attorneys, as an initial guideline in preparing to advise their clients. It is not intended to be used by people who are not lawyers trying to determine what is legal and what is not.

The laws governing transportation and transfer of firearms change frequently as Congress and the Legislature amend the statutes. They also change unpredictably when various state and federal courts render their decisions. The information was current as of the date of the presentation. Since that time no effort has been made to update this paper unless the paper specifically says at the beginning that it has been revised or updated.

According to the NRA Compendium of State Firearms Law, there are approximately 20,000 gun laws in the United States. There are 94,333 words of federal statutes regulating guns, at least 92 decisions by the U.S. Supreme Court regarding guns, and many decisions more by the Courts of Appeal. David Kopel, Stephen Halbrook and Alan Korwin, Supreme Court Gun Cases 12, Bloomfield Press, 2004. Many of them might also affect the legality of transporting or transferring firearms. It is important to consider all those laws in determining whether a certain course of action is legal. This paper may not include all the information necessary to make such a determination.

The work involved in researching and preparing this paper and in giving the presentation was done in order to render a public service by helping educate lawyers in a very specialized area of the law. I am not getting paid for this work, and if a client's freedom depended on having a definite answer to one of the legal issues discussed in this paper, you can bet I would take the time to get a definite answer. For that reason I take no responsibility for a nonlawyer who reads this paper, thinks he knows the law, and finds out he was wrong. For that matter I take no responsibility for an attorney who reads this paper and then errs in advising a client.

I. UPDATE

This paper was first presented at "Lawyers, Guns & Money: What Every Texas Lawyer Needs to Know about Firearms Law," last year's version of this seminar, on October 24, 2003. The Texas Legislature has not been in session since then (except for special sessions not involving gun laws), so there are no new Texas statutes to discuss. There are some developments in case law, which will be presented in the appropriate sections. The most significant development is the expiration of the federal "Semiautomatic Assault Weapons Ban" on September 13, 2004.

A. So-Called "Assault Weapons" Ban

On September 13, 1994 President Clinton signed the 1994 federal Crime Bill into law. Among other things this law made it illegal to possess "semiautomatic assault weapons" and "large capacity ammunition feeding devices." That law was set to automatically expire on September 13, 2004. Several bills were introduced that would have renewed the ban, but they did not reach the floor. At least one of those bills (S.1431, introduced by Lautenberg, and its companion, H.R. 2038) was sold as a "reenactment," but included sweeping expansions that would have banned many more firearms including all semiautomatic shotguns, and all semiautomatic rifles with detachable magazines. Because Congress did not adopt any of the bills that would have renewed it, the ban expired by its own terms on September 13, 2004. Because the expiration of the ban is a significant change to the federal firearms laws, this paper will examine some aspects of the ban to highlight conduct which was previously illegal but which is now legal.

The term "assault weapon" actually refers to a fully automatic firearm, one that fires multiple bullets for one pull of the trigger. The Defense Intelligence Agency defines "assault rifles" as "short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachine gun and rifle cartridges." Defense Intelligence Agency, Small Arms Identification and Operation Guide - Eurasian Communist Countries 105 (Washington: Government Printing Office, 1988).

The "assault weapons ban" was codified at 18 U.S.C. § 922(v). Punishment ranged up to five years' imprisonment. The 1994 law created a new term, "semiautomatic assault weapon," made possession of such items illegal, and defined them to include:

a. Nineteen specific models, including the Colt AR-15, FN-FAL, M-10, Steyr AUG, AK-47, Uzi, and TEC-9;

b. Other semiautomatic rifles which could accept a detachable magazine and had at least two of the following: a folding or telescoping stock; a pistol grip that protrudes conspicuously beneath the action of the weapon; a bayonet mount; a flash suppressor or threaded barrel; and a grenade launcher;
c. Other semiautomatic pistols which could accept a detachable magazine and which had at least two of the following: an ammunition magazine that attaches to the pistol outside of the pistol grip; a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; a manufactured weight of 50 ounces or more when the pistol is unloaded; or a semiautomatic version of an automatic firearm; and
d. Any semiautomatic shotgun that has at least two of the following: a folding or telescoping stock; a pistol grip that protrudes conspicuously beneath the action of the weapon; a fixed magazine in excess of five rounds; and an ability to accept a detachable magazine.

The law grandfathered firearms manufactured before its effective date. The prohibition is located at 18 U.S.C. § 922(v), and the definitions at 18 U.S.C. § 921(a)(30) and (31).

Note that the law also prohibited "manufacturing" the so-called assault weapons. This term included adding any of the listed features to guns which would cause the final product to run afoul of the list of features. So a person who possessed a pre-ban Colt AR-15 could legally add a grenade launcher, folding stock, and flash suppressor. Someone who bought a post-ban gun which was functionally identical to the AR-15, such as the Colt Sporter, would commit a federal felony by adding any of those items to his gun. The definition also meant that it was impossible to determine whether a firearm was legal based on its features and appearance, without knowing when it was manufactured.

This law caused the prices of "pre-ban" firearms (manufactured before September 13, 1994 and therefore subject to the grandfather clause) to rise significantly, in the same manner that prices of fully automatic firearms rose, because of their limited supply.

In 1996 the House voted 239 to 173 to repeal the ban, but it died in the Senate.

Now that this law has been repealed, the previously inflated prices for "pre-ban" firearms should drop; manufacturers will likely begin making previously banned models; and the government will no longer seek to imprison and fine persons who possess these firearms.

The Federal Bureau of Alcohol, Tobacco, Firearms and Explosives is the agency in charge of enforcing the federal firearms laws, among other things.. This agency is still referred to as "ATF" or "BATF" despite the addition of "Explosives" to its title and list of responsibilities in 2003, pursuant to the Homeland Security Act of 2002, Subtitle B. ATF Press Release, November 27, 2002, available at http://www.atf.gov/press/fy03press/112702homelandatf.htm (last visited September 16, 2004). ATF has produced two publications which explain their interpretation of the effect of the sunsetting of the ban, "Changes in Federal Law As Of September 13, 2004 Relating to Semiautomatic Assault Weapons (SAWs) and Large Capacity Ammunition Feeding Devices (LCAFGs)," available at http://www.atf.gov/firearms/saw-factsheet.pdf (last visited September 21, 2004), and "Semiautomatic Assault Weapon (SAW) Ban, Questions and Answers," available at http://www.atf.gov/firearms/saw-faqs.pdf (last visited September 21, 2004).

B. "Large Capacity Ammunition Feeding Devices"

The Crime Bill also made it illegal to possess a "large capacity ammunition feeding device," defined as a magazine or similar device which holds more than ten rounds of ammunition. 18 U.S.C. § 922(w). Violations were punishable by imprisonment for up to five years. It excluded "attached tubular device[s] designed to accept, and capable of operating only with, .22 caliber rimfire ammunition." Magazines made on or before September 13, 1994, including those made outside the U.S., were not affected. Those made after that date were required to have a stamp showing the date of manufacture.

This law inflated the prices of "pre-ban" magazines which could hold more than ten rounds. It also resulted in the creation of new, smaller handguns, although the widespread adoption of concealed carry laws also contributed to this effect. Its repeal will allow citizens to have larger capacity magazines for self-defense, and will cause previously inflated prices for high-capacity magazines to drop. It will also open up a new range of sizes and designs, particularly for handguns, so we can expect manufacturers to respond.

C. What Hasn't Changed - Laws Banning Specific Guns

Don't think that just because a specific gun was banned by the expired law, it is legal to possess. Many of the guns which were banned by 18 U.S.C. § 922(v) were already banned by other laws.

Political figures and the general public do not seem to understand exactly what the ban did, and what the effect of its expiration will be. Presidential candidate John Kerry said on the day the ban expired, "Police officers, police officers, begging the president all across our country, 'keep this ban in place so we don't have to walk into a drug bust staring down the barrel of a

military machine gun, of an Uzi or an A.K.-47.'" He also said, "And so tomorrow, for the first time in 10 years, when a killer walks into a gun shop, when a terrorist goes to a gun show somewhere in America, when they want to purchase an AK-47 or some other military assault weapon, they're going to hear one word: Sure." Sen. John Kerry, News Hour with Jim Lehrer, transcribed and quoted in "Campaign Snapshots," available at http://www.pbs.org/newshour/bb/politics/july-dec04/snapshot_9-13.html, last visited September 16, 2004).

The original AK-47's and Uzis were fully automatic, and are therefore effectively banned by the National Firearms Act. Manufacturers have made semiautomatic versions of various machine guns, but semiautomatic models of the AK-47 and Uzi were banned from importation in 1989 because ATF deemed them not to be "generally recognized as particularly suitable for or readily adaptable to sporting purposes." 18 U.S.C. § 925(d)(3). In 1993, "assault pistols" like the Uzi Pistol were banned under the same law.

Since 1934 the National Firearms Act (NFA) has generally made it illegal for private citizens to possess machine guns, "destructive devices" such as grenades and bazookas, short-barreled rifles and shotguns, silencers, brass knuckles, switchblade knives, or zip guns. 18 U.S.C. § 922(o); 26 U.S.C. § 5861(d) and (f). These are commonly referred to as "NFA weapons." Violations carry a penalty of up to ten years' imprisonment. As noted above, these are commonly referred to as "NFA weapons" although the statute uses the term "firearm" to refer to NFA weapons within that chapter.

In February 1994, revolving cylinder shotguns (Street Sweeper and Striker-12) were banned under the National Firearms Act. These guns were also banned by the expired 18 U.S.C. § 922(v), but remain illegal by virtue of the NFA.

You may have noticed that the main gun control law is in Title 18 (Crimes and Criminal Procedure), but the National Firearms Act is in Title 26 (Internal Revenue Code). The reason is that Congress used its power to tax as the justification for regulating these weapons. Congress' power to regulate "commerce . . . among the several states" is the justification for most other federal firearms laws. U.S. Const. Art. I § 8 (Commerce Clause); See 18 U.S.C. § 922(g); U.S. v. Pierson, 139 F.3d 501 (5th Cir., 1998).

Federal law allows private citizens legally to possess NFA weapons if they are registered with the National Firearms Registration and Transfer Record, maintained by the Treasury Department. Only machine guns manufactured and placed into the Registry before May 19, 1986 can be possessed by private citizens; therefore possession of machine guns manufactured or imported after that date by private citizens is illegal. Some states impose an outright prohibition on possession of NFA weapons, but Texas allows it if such possession is in accordance with federal law. Penal Code § 46.05. There are about 190,000 registered machine guns in country, and about 15,500 in Texas. Alan Korwin, The Texas Gun Owner's Guide 93 - 94, Bloomfield Press, 2002. In order to take ownership or possession of an NFA weapon, one must apply for permission, undergo a background check, and pay a transfer tax which is generally $200.00.

The Unsoeld Amendment of 1990 [18 U.S.C. § 922(r)] banned using imported gun parts to assemble in the United States guns which would otherwise be illegal.

In 1986 federal law prohibited the manufacture or importation of "armor piercing ammunition." 18 U.S.C. § 922(a). The original law defined such ammunition as "a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium." The 1994 crime bill added "a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile." 18 U.S.C. § 921(a)(17)(B).

Texas Penal Code § 46.02(a) makes it generally illegal to carry a handgun, illegal knife, or club. Federal law also generally prohibits possession of certain types of weapons, including machine guns, "destructive devices," and other specific types of weapons. These laws often explicitly prohibit transportation of those weapons, but in any case it would be hard to transport one without possessing it. For that reason this paper will provide a brief introduction of these laws. A full discussion is well beyond its scope.

II. TRANSPORTING FIREARMS

Justice Oran M. Roberts, in Cockrum v. State, 24 Texas 394 (1859), said that "The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute." The attitudes of the courts have changed considerably since then. In the last sixty years or so, courts have generally refused to recognize a private constitutional right to keep and bear arms. See, e.g. United States v. Wright, 117 F.3d 1265 (11th Cir. 1997). This hostility to the Second Amendment may be changing. The Fifth Circuit recently did explicitly recognize an individual constitutional right to keep and bear arms in U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 122 (2002), although the Court then held constitutional the law making it illegal for persons who are subject to domestic restraining orders to possess firearms, 18 U.S.C. § 922(g)(8).

The Solicitor General, responsible for representing the government before the U.S. Supreme Court, publicly adopted the position that the Second Amendment recognizes an individual right. Opposition to Petition for Certiorari in United States v. Emerson, No. 01-8780, at 19 n. 3. Following the Emerson decision, Attorney General John Ashcroft took a similar position in a memorandum to all U.S. Attorneys stating his agreement

with the Emerson holding. Ashcroft memo to US Attorneys, November 9, 2001

In order to legally transport a firearm, a person must now comply with numerous state and federal statutes, in addition to a confusing collection of state and federal cases. The laws of various states differ significantly, and the laws for a person holding a CHL differ markedly from those governing other persons.

Many of the restrictions on transporting firearms are simple common sense, and therefore should raise a "red flag" in the mind of the average person. Most people would think twice before taking a gun into a bank, courthouse, airport, military base, or prison. These places often have prominent signs to guide the dull-witted.

Federal law imposes significant restrictions on interstate sales of firearms, but does not impose restrictions on interstate transportation of firearms, except for transportation via airlines or "common or contract carriers." In fact federal law provides a "safe harbor" allowing persons to transport firearms across state lines, provided that certain conditions are met.

A. Totin' in Texas

With a few exceptions, state law will determine the legality of transporting a firearm in Texas. Federal law, and to a lesser extent state law, will determine the legality of the person possessing the firearm in the first place.

There are two main sections of the Texas Penal Code that restrict the right to possess guns. Section 46.02, "Unlawful Carrying Weapons," generally makes it illegal to possess handguns and some other weapons, although there are some exceptions. Section 46.03, "Places Weapons Prohibited," prohibits possession of all firearms and certain other weapons, but only in specified locations.

1. How Do I Know What's Legal?

State law generally determines the legality of transporting firearms within Texas. Federal law does affect their interstate transportation, and for the most part determines the legality of possessing the firearm in the first place.

Some states allow regulation of firearms by cities and counties. This can make it difficult or impossible to know when it's legal to drag your gat along on the trip. Texas attempts to avoid some of this confusion by "preempting" any political subdivision or agency from making conduct covered by the Penal Code a criminal offense. Penal Code § 1.08. There is also a specific provision preempting political subdivisions from regulating the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, ammunition, or firearm supplies. Local Government Code § 229.001(a).

State law does allow a political subdivision to regulate carrying of handguns in parks, government meetings, political rallies, parades, and meetings, and athletic events, but only by persons without CHL. Local Government Code § 229.001(b)(6).

Penal Code § 30.05 (Criminal Trespass) and § 30.06 (Trespass by Holder of CHL) allow a property owner to deny entry on their property to a person carrying a weapon. In 2003 the Legislature passed Senate Bill 501, which amended Texas Penal Code §§ 30.05 and 30.06 to prevent political subdivisions from using that provision to deny entry to persons carrying under authority of a CHL. In other words, a Texas CHL now gives the holder the right to carry a handgun on governmental property except for meetings of governmental bodies, court premises, and other areas defined by state law. He does not have to worry about local ordinances or resolutions placing other locations off-limits.

Because of preemption and the revision to § 30.05, persons in Texas in most situations can familiarize themselves with state law and be reasonably assured of staying out of trouble.

2. Places All Shootin' Irons are Prohibited

Penal Code Section 46.03, "Places Weapons Prohibited," is generally based on the location of the person possessing a gun, without regard to the type of weapon. It prohibits the possession of any firearm and certain other weapons, but only in specified locations. These include the premises of schools, polling places, courts and their offices, and racetracks. Education Code § 37.125 also prohibits exhibiting, using, or threatening to exhibit or use a firearm and thereby interfering with the normal use of school premises or buses. Violation of § 46.03 is a third degree felony, punishable by two to ten years' confinement and/or a $10,000.00 fine. Possessing a valid CHL is not a defense to prosecution, so a CHL does not allow the holder to carry in those prohibited locations.

There are certain very specific affirmative defenses to prosecution under § 46.03 (such as being a peace officer, or a member of the armed forces in the actual discharge of one's duties) and there are additional places where weapons are prohibited. Presumably if you fit one of these categories you learned in your training when and where you may carry a firearm, so this article will not cover those defenses.

Penal Code § 46.11 enhances any offense to the next higher category if knowingly committed within 300 feet of the premises of a school or at certain school or athletic functions.

The laws governing possession and use of guns on government land differ significantly. For that reason hunters and shooters intending to pursue their activities on state or federal land will need to research the specific facility. The Parks and Wildlife Commission can regulate possession and use of firearms on certain state properties by virtue of Parks and Wildlife Code § 13.101 and § 102. Each of the river authorities has its own rules regarding firearms.

Parks and Wildlife Code § 62.081 states:

> "Except as provided in Section 62.082 of this code [dealing with rifle ranges and authorized hunting], no person may hunt with, possess, or shoot a firearm, bow, crossbow, slingshot, or any other weapon on or across the land of the Lower Colorado River Authority."

This apparently prohibits shooting or even possessing firearms on land of the LCRA, which administers some land near the river in the vicinity of Austin. There is an exception for certain supervised activities on shooting ranges.

Both the Texas State Rifle Association and Packing.org reported that LCRA issued a statement indicating that holders of CHL's would be allowed to carry their handguns on LCRA land. Texas State Rifle Association Website, "Licensed Concealed Carry on Lower Colorado River Authority Lands," available at http://www.tsra.com/CHL_LCRA.htm (last visited September 20, 2004), Packing.org, "Texas: Where Are LCRA Lands?" available at http://www.packing.org/talk/thread.jsp/30617/ (last visited September 20, 2004). The TSRA website offered the following quote:

> "Someone seeking to enter LCRA lands with a concealed handgun and a license under Subchapter H, Chapter 411, Government Code will not be denied entry, nor would they be prohibited from carrying their concealed handgun."

That statement could not be located on the LCRA website on September 20, 2004. This statement would appear to conflict with § 62.081. H.B. 2086 was introduced in the last session, would have amended § 62.082 to add an exception for CHL holders, but it did not pass. So if the LCRA made the statement described above, it was apparently in error, although the statement might provide a defense to someone who was arrested for violating § 62.081 while relying on the statement.

Federal land is subject to different guidelines. Guns are allowed in National Forests in Texas, although there are guidelines for their transportation and use. Hunting is also allowed there, with a license. Loaded guns are prohibited in National Parks, with some exceptions for hunting, with a possible $500.00 fine. Firearms may be legally carried in National Parks if unloaded and not readily available for use. 36 CFR 2.4.

Federal law prohibits anyone from bringing a firearm or other dangerous weapon into a "federal facility." 18 U.S.C. § 930. "Federal facility" means any building or part thereof owned or leased by the federal government, where federal employees are regularly present for the purpose of performing their official duties. This would appear to exclude parking lots and similar areas. "Dangerous weapon" includes pocket knives with blades 2.5 inches or longer. Penalties are higher for bringing weapons into court buildings, pri... or anywhere with criminal intent. In order for this section to apply, a sign must be posted conspicuously at each public entrance.

Carrying firearms or other dangerous or deadly weapons on "postal property" is prohibited by 39 CFR 232.1(l). This section applies whether the weapon is carried openly or concealed. The section doesn't state whether "carrying" includes transportation in an inaccessible part of the vehicle. The term "postal property" would appear to include the parking lot and premises; therefore this section is more restrictive than 18 U.S.C. § 930. Punishment ranges up to five years' confinement.

A person is only allowed to bring a firearm into a military base with the permission of the base commander. It makes no difference that the gun was in a vehicle. Vehicles on military bases are subject to search, and in the current climate searches are probably more frequent than normal. See Alan Korwin, The Texas Gun Owner's Guide 109, Bloomfield Press, 2002. Generally military bases will have signs prohibiting persons from bringing in firearms without permission. Persons living on base will either have to store them at the base armory or store them off-base, although some bases allow firearms to be stored in permanent housing. I have heard many people strongly recommend against storing guns in the base armory.

3. Packin' Heat in Texas With a CHL (Handguns)

Carrying a handgun in Texas with a concealed handgun license ("CHL") is a subject deserving of its own paper and presentation. Because other speakers will cover this subject thoroughly and ably, this paper will provide only basic information on this subject.

A holder of a CHL may carry a concealed handgun as authorized by that statute, but may also make use of the exemptions available to other citizens. See Government Code Chapter 411 and Penal Code § 46.15. In other words, the exemptions provided by § 46.15 and the common law do not exclude persons with CHL's from their provisions. So for instance a person with a CHL who fails to conceal his handgun may still be in compliance with the law if he is traveling directly from his residence to the shooting range.

Persons who hold a valid CHL are permitted to carry handguns in places where others would be prohibited from doing so. They are also subject to special restrictions, but these generally apply only in situations where a person without a CHL would be prohibited from possessing a handgun. For instance, under Penal Code § 46.035 it is an offense for a license holder to intentionally fail to conceal it. This only applies if the actor carries the handgun under the authority of his license, so the license holder may still rely on legal authority other than a CHL (for instance traveling or a sporting activity).

That same section also makes it an offense for a license holder to carry in a business that derives 51 percent or more of its income from the sale of alcohol for on-premises consumption; a person without a CHL carrying a gun into such a place would be committing a felony. License holders also violate this section if they carry at certain sporting events, into correctional facilities, in certain hospitals, at amusement parks, at governmental meetings, in churches, or while intoxicated. These offenses are Class A Misdemeanors (up to one year and a $4,000.00 fine), except for carrying in a correctional facility or bar, which are third degree felonies. The prohibitions against carrying in a hospital, amusement park, church, or meeting of a governmental entity do not apply if the license holder did not receive effective notice as required by Penal Code § 30.06; in other words, if a notice was not posted.

Penal Code § 30.06 creates a special category of trespass for license holders. A license holder violates this section when he carries a handgun under the authority of his license, without effective consent, and received notice that same was prohibited. It is also a violation to remain on the property after receiving such notice. There is a special sign that must be used in order to provide the written notice.

4. Packin' a Hogleg Without a License (Handguns)

Handguns are subject to special restrictions in Texas. In general, possession of a handgun is prohibited in Texas by Penal Code § 46.02. See Moosani v. State, 914 S.W.2d 569, 572 (Tex.Cr.App. 1995) (Baird, J., dissenting) ("If read alone, § 46.02(a) would prohibit one from ever possessing or carrying a weapon.") Section 46.02 is called "Unlawful Carrying Weapons," or UCW. It generally prohibits persons from possessing handguns, illegal knives, and clubs, regardless of location. It does not restrict carrying of long guns (rifles and shotguns). A violation is generally a Class B Misdemeanor, punishable by up to 180 days confinement and a $2,000.00 fine or both, but rises to a Third Degree Felony if committed on the premises of a place where alcohol is sold. When the concealed handgun law passed, this violation changed from a Class B misdemeanor to a Class A misdemeanor, increasing the maximum period of confinement from six months to one year, and the maximum fine from $2,000.00 to $4,000.00. At that time a number of Texas law enforcement agencies circulated a memo instructing their officers that with the new license available, they were to arrest any unlicensed person found in possession of a handgun.

The Court of Criminal Appeals held almost ninety years ago that it is not an offense under the UCW statute to carry a pistol which is so out of repair or defectively manufactured that it could not be fired at all. Miles v. The State, 77 Tex. Crim. 597 (1915). The Amarillo Court of Appeals found that this rule has survived in to the modern era, albeit in a prosecution for possession of a short-barreled rifle. Campbell v. State, 633 S.W.2d 592 (Tex.App.-Amarillo 1982, pet ref'd). The Campbell Court did note that the prosecution need not introduce evidence that the gun may be fired unless the defense first raises the issue. The Court in Perez v. State, 87 S.W.3d 648 (Tex.App.-San Antonio [4th Dist.] 2002, no pet.) considered this same defense but affirmed the conviction because the evidence did not raise the issue. The Court of Appeals ruled the opposite in Lewis v. State, 852 S.W.2d 667 (Tex.App.-Hous. (14 Dist.) 1993, no pet.), a prosecution for possession of a prohibited weapon under § 46.06. The Court affirmed the conviction for possessing an inoperable sawed-off shotgun, relying on the plain language of the statute and on the harms which could occur as a result of a requirement that the firearm be operable. The Houston First Court of Appeals reached the same conclusion in Thomas v. State, 36 S.W.3d 709 (Tex.App.-Houston [1st Dist.] 2001, pet ref'd), which involved a pistol without grips or a trigger. These cases relied on Walker v. State, 543 S.W.2d 634 (Tex.Crim.App. 1976), in which the Court of Criminal Appeals held that a pistol without a firing pin or magazine is a "deadly weapon" for purposes of an aggravated robbery prosecution. Penal Code § 29.03(a)(2).

In Ex Parte Gonzalez, 04-03-00658-CR (Tex.App.-San Antonio [4th Dist.] 2004), the Court held that successive prosecutions for carrying two different weapons at the same time do not violate the double jeopardy clause. In Ex Parte Romero, 943 S.W.2d 79 (Tex.App.-San Antonio 1997, no pet.), the Court held that prosecutions for UCW under § 46.02 and entering a school premises with a firearm under § 46.03(a), arising out of the same incident, do not violate the double jeopardy clause.

There are a number of exceptions to the general handgun prohibition. Some of these exceptions are grounded solely in case law, including the exemptions for taking the gun home after purchase, moving to another residence, shopping for ammunition. Although many of the common law exceptions stem from very old cases, recent courts have recognized their continued vitality. Johnson v. State, 571 S.W.2d 170 (Tex.Cr.App. 1978); Inzer v. State, 601 S.W.2d 367 (Tex.Cr.App. 1980); Birch v. State, 948 S.W.2d 880 (Tex.App.-San Antonio 1997, no pet.).

Other exemptions have a basis in the statute, such as the exemption for possession on one's own premises, possession during sporting activities, and "traveling." Penal Code § 46.15(b). The statutory exemptions all involve some interpretation by virtue of over one hundred years of case law. Some of the common law exemptions may no longer be available.

These are now termed "exemptions" rather than "defenses to prosecution." They are also not "affirmative defenses." That means that the defendant has the burden to raise one of the exemptions, but once raised, the State must disprove it beyond a reasonable doubt. Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995); see also

Johnson v. State, 571 S.W.2d 170, 173 n. 4 (Tex.Crim.App. 1978).

The fact is that if you're caught with a gun in the wrong place, you will be arrested, charged, and have to pay an attorney to defend you. Many of the defendants in the reported cases were prosecuted because they left their heater in plain view. See, ex. Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995). Being the defendant in a reported case may make you famous, but it also means your attorney may move up a tax bracket or two.

a. Conventional Wisdom?

Conventional wisdom in Texas is that it is perfectly legal to carry a handgun if you "cross two county lines," if you are "carrying a large sum of money," or if you "stay overnight." Another example of Texas folk wisdom is that "if you have to shoot someone in self-defense outside your home, you should drag them inside the house before calling the law." And every Texan has heard of the affirmative defense referred to as, "He needed killin'." It would not be a good idea to rely on any of these tidbits.

b. Moosani

The most recent Court of Criminal Appeals case considering the exemptions is Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995). In this case the Court of Criminal Appeals reviewed a prosecution under § 46.02. The defendant was caught with a handgun commuting between his home and work. The evidence indicated that he carried it to and from work almost every workday. The defendant was convicted, and the Court of Appeals affirmed the conviction. The Court of Criminal Appeals affirmed the conviction, stating only, "We find that the Court of Appeals' reasoning is correct and adopt it as our own."

Moosani claimed that his possession of a handgun was legal because he was transporting it between his home and place of business. The evidence indicated that he did so almost every workday, and also showed that he frequently carried large sums of money. He did not have such a sum in his possession when he was arrested. He also presented evidence that there had been robberies and gang activity in the area. The Court did not accept the defense of necessity or the defenses allowing one to carry at his residence or place of business. The Court did comment in dicta that Moosani might have shown necessity had he been carrying a large sum of money at the time.

The Court of Appeals did actually set forth a standard for transporting a firearm between home and business. The Court imposed four requirements:

1. Such carrying must not be habitual;
2. The purpose must be legitimate (such as carrying a large sum of money);
3. The route must be "practical"' and
4. The journey must proceed without deviation or unnecessary delay.

Moosani at 738. The Court seemed to merge the common law exemptions for carrying a large sum of money and carrying a handgun at one's business premises into one exemption, at least under these facts. This opinion was adopted by the Court of Criminal Appeals sitting en banc, in Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995), so it appears that these common law defenses still exist.

Four justices in the Court of Criminal Appeals dissented from the holding. Justice Meyers argued in his dissent that the term "traveling" should have its ordinary meaning, without the judicially-created prohibition on doing so "habitually." Justice Baird argued for the same result in his dissent, concluding that "A person should not be denied a common law defense simply because the legitimate purpose for carrying the weapon is reoccurring."

Lawyers handling any UCW case must review Moosani.

c. Residence and Place of Business

One exception to the general prohibition allows a person to possess a handgun "on the person's own premises or premises under the person's control." Penal Code § 46.15(b)(2).This certainly includes one's residence, and also includes one's place of business if they are under the person's control. Apparently mere employees are not allowed to possess handguns on their employers' premises. Managers may or may not be allowed to do so, because they control the premises. Moosani v. State, 914 S.W.2d 569, 578 (Tex.Cr.App. 1995); J. Mansfield, dissenting. ("As night manager of the convenience store, he also has a right to possess a handgun there since he has the premises under his control.)

"Residence" includes a temporary residence, which is ill-defined, but it includes places such as hotel rooms. Campbell v. State, 28 Tex. App. 44 (1889). The 2003 Legislature expanded the definition of residence to include a recreational vehicle used for that purpose. H.B. 284; Texas Penal Code § 46.15(g). One has a right to carry a gun from a temporary home to a permanent home. Campbell v. State, 28 Tex. App. 44 [28 Tex.Crim. 44], 11 S.W. 832 (1889).

One is also allowed to take the weapon home after acquiring it, using the nearest practicable route. Kellum v. State 66 Tex. Crim. 505, 147 S.W. 870 (1912); Pressler v. State, 19 Tex. App. 52, 53 Am. Rep. 383 (1885). One is also permitted to transport a handgun while moving from one home to another. Johnson v. State, 571 S.W.2d 170, 173 (Tex.Crim.App. [Panel Op.] 1978); Christian v. State, 37 Tex. 475 (1873).

A person may also legally transport a handgun between one's home and place of business, if not done habitually and if done for a legitimate purpose. The Court

of Criminal Appeals explicitly referred to " . . . a right to carry a pistol from his place of business to his home, just as much so as if he had carried it from a repair shop or from a pawnbroker shop to his home, so long as he did not do it habitually." Smith v. State, 149 Tex. Crim. 7 (1945); see also Cortemeglia v. State, 505 S.W.2d 296 (Tex.Cr.App. 1974); Chambers v. State, 34 Tex. Crim. 293 (1895); Skeen v. State, 30 S.W. 218 (Tex.Cr.App. 1895); Smith v. State, 149 Tex. Crim. 7, 190 S.W.2d 830, 831 (1945).

The term "habitually" has no specific definition, so in order to understand its meaning one must review a number of cases. For instance, the Court has ruled that carrying the weapon for four days straight is "habitual". In Cortemeglia v. State, 505 S.W.2d 296 (Tex.Cr.App. 1974) the Court found carrying to be habitual when a store owner carried the pistol home every Friday night (along with a large sum of money) and then back to work the following week.

There is one case in which the Court of Criminal Appeals stated that an employer may authorize his employee to carry the employer's pistol from the employer's home to the business, or from one of his businesses to another. Cassi v. State, 86 Tex. Crim. 369 (1919).

d. "Traveling"

The most commonly invoked exception to the handgun prohibition is "traveling." The authority for this exemption comes from Penal Code § 46.15(b)(3) and from numerous cases. For more than one hundred years the Legislature has refused to define "traveling," and as a result the courts have had to grapple with the issue on a regular basis.

The most accurate definition of "traveling" one can distill from the case law is, "I know it when I see it." Whether a person is traveling is always a fact issue, decided on a case-by-case basis, considering all the circumstances surrounding the trip. Evers v. State, 576 S.W.2d 46 (Tex.Crim.App. [Panel Op.] 1978); Impson v. State, (Tex. Crim. App.) 19 S.W. 677 (1892); Matocha v. State, 890 S.W.2d 144 (Tex.App.-Texarkana 1994, pet. ref'd) (op. on reh'g); Ayesh v. State, 734 S.W.2d 106, 108 (Tex.App.--Austin 1987, no pet.). Major factors considered in the past include distance, whether county lines are crossed, and whether there was an overnight stay.

1) Distance and Mode of Travel

The distance of the trip has been a starting point for determining whether the traveling exemption applies. The courts have found the following journeys to be "traveling":

- 11 miles and two overnight stays. Irvine v. State, 18 Tex. App. 51 (1885)
- 16 - 17 miles, two to three days, to get pork, crossing a county line. Smith v. State, 42 Tex. 464 (1875)
- 25 miles, crossing a county line with an overnight stay. Price v. State, 34 Tex. Crim. App. 102, 29 S.W. 473 (1895)
- 25 - 30 miles, three days, crossing a county line. Eubanks v. State, (Tex. Crim. App.) 40 S.W. 973 (1897)
- 35 miles, through several counties, with an overnight stay. Bain v. State, 38 Tex.Crim. 635, 44 S.W. 518, 44 S.W. 518 (1898)
- More than 40 miles, with an overnight stay. George v. State, 90 Tex.Cr.R. 179, 234 S.W. 87, 89 (1923)
- 50 miles, with overnight stay. Grant v. State, 112 Tex.Crim. 20, 13 S.W.2d 889, 891 (App. 1928)
- About 60 miles, from the Indian Territory into another county. Impson v. State, (Tex. Crim. App.) 19 S.W. 677 (1892)
- From Mineola (Wood County) to Dallas, with an overnight stay. Williams v. State, 114 Tex.Crim. 177, 21 S.W.2d 672, 673 (App. 1929)
- An unknown distance, apparently with no overnight stay, crossing a county line twice. McDaniel v. State, (Tex. Crim. App.) 26 S.W. 724 (1894)
- 120 miles over a weekend. Allen v. State, 422 S.W.2d 738, 739 (Tex.Cr.App. 1967)
- 435 miles, apparently including overnight stays and crossing county lines. Rice v. State, 10 Tex. App. 288 (1881)

The courts have found the following not to constitute traveling:

- 15 miles, not crossing a county line, with no overnight stay. Sanchez v. State, 122 S.W.3d 347 (Tex.App.-Texarkana [6th Dist.] 2003)
- 15 miles, crossing a county line but with no overnight stay. Stanfield v. State, (Tex. Crim. App.) 34 S.W. 116 (1896)
- 18 miles, within one county, with an overnight stay. Darby v. State, 23 Tex. App. 407, 5 S.W. 90 (1887)
- 26 miles. Williams v. State, 74 Tex.Crim. 639, 169 S.W. 1154 (Tex.Cr.App. 1914)
- 35 miles, lasting one to one and half hours. Wortham v. State, 95 Tex.Crim. 135, 252 S.W. 1063 (App. 1923)
- 15 miles, into another county, with no overnight stay. Stanfield v. State, (Tex. Crim. App.) 34 S.W. 116 (1896)
- 30 or 35 miles. Hall v. State, 102 Tex.Crim. 329, 277 S.W. 129 (App. 1925)

- Less than two hours, with no overnight stay. Smith v. State, 630 S.W.2d 948 (Tex.Cr.App. 1982)
- Five hours. Vogt v. State, 159 Tex.Crim. 211, 258 S.W.2d 795 (App. 1953)

This is by no means a complete list, but it illustrates the inconsistent and unpredictable nature of the holdings.

The Court in George v. State, 90 Tex.Cr.R. 179, 234 S.W. 87, 89 (1923) remarked that it was aware of no case finding the person who had been absent for less than a day to be a traveler, and also observing that the traveling exception has generally been applied to journeys in excess of forty miles. The Court in Vogt v. State, 159 Tex.Crim. 211, 258 S.W.2d 795 (1953) remarked that it was aware of no case finding the person who had been absent for less than a day to be a traveler.

In 1982 the Court considered the effect modern modes of travel have had on the law. In Smith v. State, 630 S.W.2d 948 (Tex.Crim.App. 1982), the Court apparently based its determination on duration rather than distance. The Court stated that it simply cannot understand how "a man who goes a distance which can be covered in two hours, in the broad daylight, along a road where he was probably never out of sight of a number of houses, [could be] held to be a traveler." The Court also observed that it had "found no case where a man is held a traveler whose absence was for less than a day." Apparently the Court had not read its opinion in McDaniel v. State, (Tex. Crim. App.) 26 S.W. 724 (1894), in which the defendant apparently made the trip in one day. Unfortunately the Court declined to lay down any specific rules to govern persons who intend to "travel."

The Texarkana Court of Appeals in Matocha v. State, 890 S.W.2d 144 (Tex.App.-Texarkana 1994, pet. ref'd) (op. on reh'g), apparently followed the lead of the Smith court when the issue came up again in 1994, stating that:

"To satisfy the traveler defense to charge of carrying handgun on or about defendant's person, defendant's journey is not measured by how far defendant may have come, but by the entire journey intended by defendant; there is no hard and fast rule for distance traveled or requirement of overnight stay."

In Sanchez v. State, 122 S.W.3d 347 (Tex.App.-Texarkana [6th Dist.] 2003) the Texarkana Court of Appeals went so far as to say that as a matter of law, a fifteen mile automobile does not qualify as "traveling." See also Perez v. State, 87 S.W.3d 648 (Tex.App.-San Antonio [4th Dist.] 2002, no pet.) (ten mile trip).

The Court of Criminal Appeals has rarely gone to the trouble of explicitly overruling prior cases. The Court almost always discussed distance, duration, crossing of county lines, and other factors, studiously avoiding setting down any standard, then made its analysis on a case-by-case basis.

The Court in Birch v. State, 948 S.W.2d (Tex.App.-San Antonio 1997, no pet.) ruled that the accused was entitled to a jury charge on traveling. He had driven approximately 55 miles, going through several counties, on Interstate 35. He stayed overnight, stopped for breakfast, then went to a job site instead of his home. He was on his way home when he was stopped.

2) Overnight Stay

Courts have also considered whether an overnight stay is involved, in determining whether a specific trip constitutes "traveling." Irvine v. State, 18 Tex. App. 51 (1885); Darby v. State, 23 Tex. App. 407, 5 S.W. 90 (1887).

In a number of cases courts have found the trip in question to be "traveling," in part because there was an overnight stay involved, or where the trip was obviously long enough to require an overnight stay. Williams v. State, 114 Tex.Crim. 177, 21 S.W.2d 672, 673 (App. 1929); Grant v. State, 112 Tex.Crim. 20, 13 S.W.2d 889, 891 (App. 1928); Smith v. State, 42 Tex. 464 (1875); Rice v. State, 10 Tex. App. 288 (1881); Irvine v. State, 18 Tex. App. 51 (1885); Impson v. State, (Tex. Crim. App.) 19 S.W. 677 (1892); McDaniel v. State, (Tex. Crim. App.) 26 S.W. 724 (1894); Price v. State, 34 Tex. Crim. App. 102, 29 S.W. 473 (1895); Eubanks v. State, (Tex. Crim. App.) 40 S.W. 973 (1897); and Bain v. State, 38 Tex.Crim. 635, 44 S.W. 518, 44 S.W. 518 (1898).

Other courts have refused to find that the excursion in question was "traveling," based at least in part on the fact that no overnight stay was involved. See Stanfield v. State, (Tex. Crim. App.) 34 S.W. 116 (1896); George v. State, 90 Tex.Cr.R. 179, 234 S.W. 87, 89 (1923). The George court remarked that it was aware of no case finding the person who had been absent for less than a day to be a traveler, as did the Court in Vogt v. State, 159 Tex.Crim. 211, 258 S.W.2d 795 (1953). The George Court also observed that the traveling exception has generally been applied to journeys in excess of forty miles.

Some courts have considered trips which involved or appeared to involve an overnight stay and found them not to qualify as "traveling." See Darby v. State, 23 Tex. App. 407, 5 S.W. 90 (1887).

In Smith v. State, 630 S.W.2d 948 (Tex.Cr.App. 1982) the Court provided some more current guidance, remarking:

> "We have examined all the authorities cited by appellant and many others, and have found no case holding in substance that a man who goes a distance which can be covered in two hours, in the broad daylight, along a road where he was probably never out of sight of a number of houses, is held to be a traveler. We have found no case where a man is held a traveler whose absence was for less than a day."

The Court also took the opportunity to blast the very idea of packing heat, saying:

> "A man going in an ox wagon 20 miles and having to camp out at night may have been held a traveler in times past, but it would certainly license pistol carrying with all its train of evils to hold in these days of swiftly moving automobiles which throng every road and carry their passengers the distance last mentioned, if desired, in a half hour, that persons are to be held travelers as a matter of law, on authority of such precedents."

The distance traveled in Smith was not stated, but apparently one must travel for more than two hours to claim traveler status.

Although a reading of the current cases would give the impression that an overnight stay is now a requirement for traveler status, there is authority to the contrary. Vogt v. State, 159 Tex.Crim. 211, 258 S.W.2d 795 (1953); Matocha v. State, 890 S.W.2d 144 (Tex.App.-Texarkana 1994, pet. ref'd) (op. on reh'g); Sanchez v. State, 122 S.W.3d 347 (Tex.App.-Texarkana [6th Dist.] 2003). The Sanchez Court said:

> "While the Texas Court of Criminal Appeals has noted the journey must generally be overnight, this Court noted in Matocha that Vogt did not restrict the defense to overnight stays. Under certain circumstances, such as traveling by a wagon or horse, Texas courts have held that distances as short as defendant's intended destination [fifteen miles] can be traveling." [citations omitted]

3) Crossing County Lines

In the past, all county courthouses in Texas had to be located so that each resident could travel to the county seat to vote, then return home in one day. See the Texas Association of Counties Website, "Some Facts about Texas Counties," available at http://www.county.org/counties/facts.asp (last visited September 21, 2004).)

Therefore in the past crossing a county line and staying overnight amounted to about the same thing. Until the advent of modern transportation Texas courts rarely had to consider trips of less than one day that crossed county lines.

In the following cases the actor crossed county lines, and the Court found the trip to be traveling:

- Smith v. State, 42 Tex. 464 (1875)
- Price v. State, 34 Tex. Crim. App. 102, 29 S.W. 473 (1895)
- Eubanks v. State, (Tex. Crim. App.) 40 S.W. 973 (1897)
- Bain v. State, 38 Tex.Crim. 635, 44 S.W. 44 S.W. 518 (1898)
- Impson v. State, (Tex. Crim. App.) 19 S.W. 677 (1892)
- Williams v. State, 114 Tex.Crim. 177, 21 S.W.2d 672, 673 (App. 1929)
- McDaniel v. State, (Tex. Crim. App.) 26 S.W. 724 (1894)
- Allen v. State, 422 S.W.2d 738, 739 (Tex.Cr.App. 1967)
- Rice v. State, 10 Tex. App. 288 (1881)

The following cases involved or appeared to involve a trip across county lines, but the courts found the trip not to constitute traveling:

- Stanfield v. State, (Tex. Crim. App.) 34 S.W. 116 (1896)
- Smith v. State, 630 S.W.2d 948 (Tex.Cr.App. 1982)
- Vogt v. State, 159 Tex.Crim. 211, 258 S.W.2d 795 (App. 1953)

This is by no means a complete list. Clearly, in the past crossing a county line has not automatically made one a traveler.

Where the distance is short and there is no real journey, one is not a traveler although he may be going from one county to another. See Birch v. State, 948 S.W.2d 880 (Tex.App.-San Antonio 1997, no pet.); Blackwell v. State, 34 Tex.Crim. 476, 31 S.W. 380, 380 (1895); see also Stanfield v. State, 34 S.W. 116, 116 (Tex.Crim.App. 1896).

As mentioned above, some people in Texas believe that traveling into a different county automatically makes one a traveler. Certainly traveling through multiple counties is a factor, but crossing a county line does not automatically confer traveler status. As the Court of Criminal Appeals in Smith v. State, 630 S.W.2d 948 (Tex.Cr.App. 1982) commented: "Some cases hold that going from one county to another would make one a traveler, but later cases demonstrate the fallacy of such holding."

4) Reason for Haulin' the Hogleg

Courts have often considered the purpose of the trip, or the activities involved in the trip, in determining whether one is a traveler. Persons who have traveler status, but then divert from the most direct route, have often been hauled before the courts. The courts have then had to determine whether the diversion resulted in a loss of traveler status.

It appears that you can divert from your trip to get something to eat, Price v. State, 34 Tex. Crim. App. 102, 29 S.W. 473 (1895), but for some reason getting a room is a no-no, resulting in the loss of "traveler" status. Ballard v. State, 74 Tex.Cr.R. 110, 167 S.W. 340 (1914); Stilly v. State, 27 Tex. App. 445, 11 S.W. 458, 11 Am.

St. Rep. 201, (1889). You may recall that the Court allowed a diversion to get some pork, in Smith v. State, 42 Tex. 464 (1875). However, if you stop for liquid refreshment, you may lose your status as a "traveler." The Court in Ratigan v. State, 33 Tex. Crim. App. 301 (1894), in upholding the conviction, remarked that "At the time he was disarmed appellant was in a saloon, drinking, cursing, threatening, and boisterous. He had freely visited saloons most of the day." The defendant's conviction in Gorge v. State, (Tex. Crim. App.) 22 S.W. 43 (1893) also was affirmed, the Court noting that he "visited every saloon in the town, bought whisky in all of them, went to other places, and carried the pistol all the time." It would appear from Ratigan that drinking and boisterous behavior would result in loss of the exemption, but the Court reached a different result in Cathey v. State, 23 Tex. App. 492, 493 (1887). In that case, witness Frank Dean testified:

> "I was in a wagon with Jeff Cathey, about seven miles from Belton, in Bell county, Texas. He stopped the wagon and commenced to hunt about in the end of the wagon for a bottle of whisky. Cathey couldn't find his whisky, and he reached down and picked up his pistol from the corner of the wagon body, and accused Ellis and myself of having his whisky, which we denied. He searched about his pockets for his whisky, held the pistol in his hand for awhile, and then put it down in the corner of the wagon body by his saddle bags. He found his whisky, took a drink and drove on."

The defense of traveling was not raised by name in this case, but this ruling makes it appear to be perfectly legal to question your fellow travelers at gunpoint in order to locate your whiskey.

Not surprisingly, criminal activities such as attempted burglary and fighting have also been ruled a deviation from one's travels, resulting in the loss of the exemption. Tadlock v. State, 124 Tex.Cr.R. 637, 64 S.W.2d 963, 964 (1933) (attempted burglary); Pecht v. State, 82 Tex.Cr.R. 136, 199 S.W. 290, 291 (1917) (fighting).

One very troubling ruling was handed down in Love v. State, 32 Tex. App. 85, 22 S.W. 140 (1893). The Court in that case held that Love, a postal worker, was justified in carrying a handgun, but only when he was actually inside the post office. The "postal worker exemption" now runs afoul of the federal laws cited herein.

The Court of Criminal Appeals may have rendered this entire line of analysis moot, in a relatively recent case. The Court in Evers v. State, 576 S.W.2d 46 (Tex.Crim.App. [Panel Op.] 1978) stated that, "Under the travel exemption, the purpose of the travel is not relevant." The Texarkana Court of Appeals echoed this ruling in Matocha v. State, 890 S.W.2d 144 (Tex.App.-Texarkana 1994, pet. ref'd) (op. on r... supra. Therefore gamblers, drinkers, saloon patrons, and boisterous persons may once again take advantage of the traveling exemption. This may be helpful for persons who "head for the boats" in Shreveport, at least until they reach the Louisiana border. See also Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995).

Sometimes the courts give "partial credit" if you don't get the whole meaning of the statute right, but make a good faith effort that shows you understand at least part of the law. The Court apparently cut the defendant in Lann v. State, 25 Tex. App. 496 (1888) some slack, at least partially because he left his pistol with the barkeeper before going about his business. The defendant in Stayton v. State, (Tex. Crim. App.) 40 S.W. 299 (1897) made the most extraordinary efforts to comply with the statute than any other litigant in recorded Texas history. While traveling a long distance to find work picking cotton, Alley Stayton was forced to deviate from his trip on at least two occasions. Apparently he had familiarized himself with the law before his trip, because he took great pains not to strain the limits of the traveling exemption. On one of those occasions, Alley entrusted the gun to a shopkeeper until resuming his journey. On the other, he left his pistol **on the side of the road**, where it remained until he returned. When the case was appealed to the Court of Criminal Appeals, the justices could apparently do nothing but shake their heads in admiration, and reverse Alley's conviction.

The law is clear about one thing: if you are legally traveling or if you meet another exemption, you violate the law if you deviate from the most direct route. Henson v. State, 158 Tex.Crim. 5, 252 S.W.2d 711 (Tex.Cr.App. 1952). The Court in Payne v. State, 494 S.W.2d 898, 900 (Tex.Crim.App. 1973), held that the defendant was not entitled to a jury instruction on traveling because he had interrupted his travels and loitered in a lounge for two hours.

The purpose of the trip is just one more factor which may influence the outcome of future cases.

5) "In a condition of hopeless confusion"

In order to provide the maximum assurance that one will not run afoul of these laws, one would need to research the Texas and federal statutes, and review more than a hundred years of case law. Unfortunately even such a comprehensive review will still leave a great deal of uncertainty.

Since at least 1875, the Courts have begged the Legislature to clarify the meaning of "traveling." As early as Smith v. State, 42 Tex. 464 (1875), the Court remarked on the vagueness of the term: "Without undertaking to define the rather indefinite expression 'persons traveling in the State,' we are of the opinion that the facts stated show that the defendant was traveling within the meaning and spirit of the law. " In Bain v. State, 38 Tex.Crim. 635, 44 S.W. 518, 44 S.W. 518

(1898), the Court said, "The fact is that it is difficult to tell, under the statute, who is a traveler . . . We would suggest, in this state of uncertainty, that the legislature define what is meant by a 'traveler.'" In George v. State, 90 Tex. Crim. 179 (1921), the Court said, "We are aware that the decisions of this State are in a condition of hopeless confusion as to when a man is or is not a traveller, the earlier cases tending in the direction of greater, and those of later years, of less latitude of construction." More recently, the Court in Smith v. State, 630 S.W.2d 948 (Tex.Crim.App. 1982) observed that:

> "The 'traveler' exception in the statute has been described as 'one of the most enigmatic provisions of the prior weapons offense.' [cite omitted] We agree with this statement . . . We are aware that the decisions of this state are in a condition of hopeless confusion as to when a man is or is not a traveler; the earlier cases tending in the direction of greater, and those of later years of less, latitude of construction."

In 1994 the Court in Ayesh v. State, 734 S.W.2d 106, 108 (Tex.App. — Austin 1987, no pet.) commented that: "'Traveling' under § 46.03(3) is not defined by statute and the precise meaning of the term has been the subject of much debate." In Birch v. State, 948 S.W.2d 880 (Tex.App.-San Antonio 1997, no pet.) the Court commented that, "The decisions have not been harmonious." Further, There is no bright line test for determining when one is "traveling" for the purpose of the statute and the standards that have evolved from the case law are not models of clarity."

The Austin Court of Appeals also found the exception confusing, noting that, "traveling under [the statute] is not defined by statute and the precise meaning of the term has been the subject of much debate." Ayesh v. State, 734 S.W.2d 106 (Tex.App.-Austin 1987). In 1994, the Texarkana Court more complained that, "The Legislature has never seen fit to give a specific definition to the term traveler." Matocha v. State, 890 S.W.2d 144 (Tex.App.-Texarkana 1994, pet. ref'd) (op. on reh'g); Sanchez v. State, 122 S.W.3d 347 (Tex.App.-Texarkana [6th Dist.] 2003).

In the century and a quarter that the traveling exemption has existed, the Legislature has provided absolutely no guidance as to its meaning. On the other hand, the Courts have dedicated a formidable amount of time and expertise to defining this one word, as noted above. Unfortunately, the end result is that even lawyers who specialize in this area cannot give their clients any specific guidance on how to meet the requirements for the exemption.

The term "habitually" seems to be equally confusing.

Because of the lack of a clear definition of the term from the Legislature, and the conflicting applications in the Courts, defendants may claim that the statute is unconstitutionally vague. In raising such a defense, would undoubtedly help to point out the numerous times the Court of Criminal Appeals has expressed its own confusion and frustration. Or better yet, let's rent a van and have the entire Court get in the van and carry handguns on the trip. If they can't figure a way to do so legally, then the statute is probably too vague for the average Joe Six Pack to understand.

One Court of Appeals has considered and denied an appeal based on a claim that the "traveling" exemption is unconstitutionally vague. In Soderman v. State, 915 S.W.2d 605 (Tex.App.-Hous. (14 Dist.) 1996, pet. ref'd, untimely filed), the Court held:

> "The exception for traveling is obviously not a bright-line test, and the standards that have evolved from case law are not a model of clarity. However, we believe that people of common intelligence can ordinarily make a reasonable assessment as to whether they are traveling, and, thus, that the exception for doing so is not so unclear as to be void."

In Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995), Justice Baird in his dissent argued that " . . . the plain language of § 46.02(b)(3) is ambiguous. Indeed, almost a century ago we noted the ambiguity and called for the Legislature to define traveling. (Citing Bain v. State, 38 Tex.Crim. 635, 44 S.W. 518 (App. 1898))." This would lend support to the vagueness defense.

This vagueness was probably a good thing for the lawyers, because it resulted in a lot of litigation. A century ago people must have really valued their right to keep and bear arms, because many of them were willing to take their cases all the way to the Court of Criminal Appeals over a $25.00 fine and no jail time. Apparently the trial judges did not want to encourage appeals of these cases, because the $25.00 fine appeared to be the standard punishment for this offense for many years. My last traffic ticket involved a fine of almost eight times that amount. If we can figure out why these people were willing to pay lawyers to appeal a $25.00 fine all the way to the court of last resort in Texas, we can make a lot of money on these cases.

e. "Sporting Activity" and Related Exemptions

Penal Code § 46.15(b)(4) makes the handgun ban inapplicable to a person who is "engaging in lawful hunting, fishing, or other sporting activity on the immediate premises where the activity is conducted, or is directly en route between the premises and the actor's residence, if the weapon is a type commonly used in the activity." The peculiar wording of the statute might result in some gross inequities. For instance, it appears that a person would not be permitted to take certain types of handguns on a deer hunting trip, because many handguns are of a type not commonly used in deer hunting. Taking a .22 caliber handgun deer hunting may be illegal,

because rimfire guns are illegal for deer hunting. See the Texas Parks and Wildlife website, "Means and Methods, available at http://www.tpwd.state.tx.us/publications/annual/hunt/means/ (Last visited September 21, 2004).

It also appears that a person who lawfully possesses a handgun at his place of business, and who wishes to leave for a lawful shooting activity, would have to first transport the gun to his residence in order to make the trip legal. Fortunately there do not appear to be any reported cases involving such abuses.

One can carry a pistol home from the place of purchase. Pressler v. State, 19 Tex. App. 52, 53 Am. Rep. 383 (1885); Waddell v. State, 37 Tex. 354 (1872). Apparently one is allowed to take a handgun in for repairs. Fitzgerald v. State, 52 Tex. Crim. 265, 106 S.W. 365 (1907); Mangum v. State, (Tex. Crim. App.) 90 S.W. 31 (1905); Impson v. State, (Tex. Crim. App.) 19 S.W. 677 (1892); Pressler v. State, 19 Tex. App. 52, 53 Am. Rep. 383 (1885). One court even allowed carrying of the weapon to different shops in order to locate the proper ammunition. Waddell v. State, 37 Tex. 354 (1872). One may also take a handgun from his residence to his place of business in order to clean it. Boissean v. State, 15 S.W. 118 (Tex.App. 1890). One may also return a borrowed weapon. Inzer v. State, 601 S.W.2d 367 (Tex.Cr.App. 1980). Due v. State, 123 Tex.Crim. 73, 57 S.W.2d 849, 850 (1933).

These exemptions may not find strong support in the statutes or recent case law, but they should still exist if there is even a shred of common sense in the office of the local Criminal District Attorney.

f. Necessity

This section will discuss several defenses to prosecution which are generally based on necessity. The cases often refer to these defenses without using the term "necessity," so researching this area will require additional diligence.

Penal Code § 9.22 recognizes the defense of "necessity" as a general defense excluding criminal responsibility under certain circumstances. The Penal Code also contains related sections allowing the use of force for self-defense (§ 9.31) or the defense of others (§ 9.32).

Penal Code§ 9.31(b)(5) prevents a person from claiming self-defense if he confronted the other person while in violation of the UCW statute (§ 46.02) or the statute establishing places where firearms are prohibited (§ 46.05).

Defendants in these cases have sometimes invoked a general need to defend themselves, or high crime rates in their area, to justify carrying a handgun. Texas courts have uniformly rejected these arguments. In Johnson v. State, 650 S.W.2d 414 (Tex.Cr.App. 1983) the Court refused to recognize being in a high crime area as being sufficient to support a defense of necessity, but specific situations such as observing a serious crime being committed could justify carrying a handgun outside one's own premises while responding. Roy v. State, 552 S.W.2d 827, 832 (Tex.Cr.Ap. 1977) held that necessity cannot be established by proof of generalized fear of crime or being in a high-crime area.

The defendant in Moosani v. State, 866 S.W.2d 736 (Tex.App.-Hous. (14 Dist.) 1993) also raised the necessity defense, claiming that he frequently carried large sums of money, but that defense failed because he did not have such a sum in his possession when he was arrested. He also claimed necessity based on the fact that he worked in a high crime area. The Court did not accept these defenses. The Court did comment in dicta that Moosani might have qualified for the exemption of necessity had he been carrying a large sum of money. In order to meet the standard expressed by that Court, This opinion was adopted by the Court of Criminal Appeals in Moosani v. State, 914 S.W.2d 569 (Tex.Cr.App. 1995).

Defendants have also pointed to specific threats to justify carrying handguns. At one time the law allowed carrying of a handgun for persons who are reacting to an attack or imminent danger. Coleman v. State, 28 Tex. App. 173, 174, 12 S.W. 590 (1889); Brownlee v. State, 35 Tex. Crim. 213, 214, 32 S.W. 1044 (1895). One Court more than a century ago recognized an exemption for persons in hot pursuit of thieves, albeit in dictum. Lyle v. State, 21 Tex. App. 153 (1886).

The Court of Criminal Appeals ruled years ago that a person may carry a handgun when one is in fear for his life. Ellias v. State, 65 Tex. App. 479, 144 S.W. 139 (1912). Evers v. State, 576 S.W.2d 46 (Tex.Crim.App. [Panel Op.] 1978) appeared to weaken or eliminate this exemption. That court observed that "There is no recognized exception permitting one to carry a handgun on the basis of self-protection." But in Armstrong v. State, 653 S.W.2d 810 (Tex.Cr.App. 1983) the Court found that the person accused of UCW was at least entitled to a jury instruction on the defense of necessity. The defendant in that case testified that a man had raped her two weeks before; that he had been released on bail and continued to stalk her; and that she felt she needed the handgun to avoid imminent harm. The Court concluded:

> "It should have been for the jury to determine whether to believe appellant's testimony, and, if the testimony was believed, whether the circumstances testified to meet the criteria of § 9.22. We decline to hold that, as a matter of law, specific threats by a specific person who has committed violent acts directed against the threatened person cannot raise the defense of necessity if the person so threatened is then charged with carrying a weapon which she believes to have been necessary, in the circumstances, to her defense."

At least one federal court of appeals has allowed a defendant in a felon-in-possession case to present a justification defense, based on a fear for his life. U.S. v. Gomez, 92 F.3d 770 (9th. Cir. 1996). In Gomez the basis for the defendant's fear was a series of death threats which were several days old. In another case the Court allowed a defendant who smuggled drugs into the country to present evidence of duress based on threats against his life and his family's lives. United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984).

In the past, persons have also been allowed to carry a handgun if they are transporting a "considerable sum of money and when not deviating from the nearest or most practical route." Boyett v. State 167 Tex. Crim. 195, 196, 319 S.W.2d 106, 107 (1958). The Court of Criminal Appeals on another occasion described this exemption as applying to persons who are on the legitimate business of protecting a large sum of money or carrying the pistol to his place of business along a practical route, such carrying being not habitual. Evers v. State 576 S.W.2d 46, 51 (Tex. Crim. App. 1978).

The Court of Criminal Appeals in several recent cases affirmed a person's "right to arm himself and seek an explanation" of his differences with another person. Banks v. State, 656 S.W.2d 446 (Tex.Cr.App. 1983); Gassett v. State, 587 S.W.2d 695 (Tex.Cr.App. 1979); Williams v. State, 580 S.W.2d 361 (Tex.Cr.App. 1979); Young v. State, 530 S.W.2d 120 (Tex.Cr.App. 1975). This right is also sometimes called the "right to carry (or bear) arms to the scene of the difficulty." It had its genesis in the early cases Cartwright v. State, 14 Tex. App. 486 [14 Tex.Crim. 486] (1883) and Shannon v. State, 35 Tex.Crim. R., 28 S.W. 687 (Tex.Cr.App. 1894).

In 1993 the Legislature amended Penal Code Section 9.31 to state that the use of force is not justified "if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was . . . carrying a weapon in violation of Section 46.02." In 1995 the Legislature further amended this same section to state that the use of force is not justified if the actor sought an explanation of differences while he was "possessing or transporting a weapon in violation of Section 46.05." These amendments certainly abolished this defense in those situations, but the fact that the Legislature did not abolish the defense altogether indicates that it is still valid. In any case these exceptions do not apply when possession of the handgun was legal, so this right should still exist in that context. So it appears that a CHL holder may still arm himself to seek an explanation, as may someone without a CHL if his possession of the handgun meets one of the exemptions of the common law or of § 46.15. It also appears that one may arm himself with a shotgun or rifle and seek an explanation, as long as the person avoids taking the gun into a place prohibited by § 46.05.

It may seem shocking that a modern court would authorize a person to create such an explosive situation, in the light of the limitations on the right of self-def... See Penal Code § 9.31, which requires that the use of force must be "immediately necessary," that force cannot be used after the aggressor abandons the encounter, and that force is not justified in response to verbal provocation alone. See also § 9.32, which imposes a duty to retreat except when the other person is unlawfully entering the actor's home. The modern policy of the state seems to be strongly in favor of protecting human life. But the state's top criminal court has confirmed four different times in the last twenty-eight years that the right still exists. However, one appellate court concluded after Banks was decided that the Legislature abolished this right with the 1993 amendment. This conclusion appeared without explanation in dicta, in a footnote in an unpublished opinion. Castillo v. State, 1998 WL 720729, n. 1 (Tex.App.-Hous. (1 Dist.) 1998) (not designated for publication).

These cases arose in the context of murder prosecutions, where the accused claims self-defense and the state claims the accused provoked the conflict. They are not normally mentioned in the context of exemptions to the general handgun prohibition, and § 46.02 does not include a statutory exemption for persons exercising this right. The 1993 and 1995 amendments to § 9.31 appear to indicate that this right would not provide a defense to prosecution under § 46.02. But none of the cases except Banks even mentioned § 46.02. The only mention of that section in Banks was by the dissenting judge (joined by another judge). He mentioned § 46.02 in support of his argument that the Legislature abolished this right by adopting § 9.31 in 1973:

> "If this Court continues to allow this to be the law then we are advocating a violation of the law by allowing a person to carry prohibited weapons contrary to the provisions of § 46.02, V.T.C.A. Penal Code."

Banks at 449, Justice Walker, dissenting, joined by Justice Campbell.

The majority refused to accept Justice Walker's argument, and has not acted to abolish this right since then. Therefore it appears one still has the right to arm himself and seek an explanation.

The other exemptions may or may not still exist. It appears that we will have to wait until one of us advises his client that they are still valid then is hired to defend the client in the ensuing prosecution.

B. Strapped in Other States

Transporting or carrying a firearm in other states requires a familiarity with that state's specific laws. Travelers planning trips through several other states who do not wish to risk their freedom will review the gun laws of those other states. Holders of CHL's are not exempt from this requirement, because simple possession of a CHL recognized in that state does not give a person

permission to freely carry guns wherever and however he likes.

1. Carrying vs. Transporting

In Texas the laws generally do not distinguish between transporting a firearm and carrying it. Penal Code § 46.02, § 46.03. Some states do make such a distinction. "Transportation" generally means simply moving the firearm from one place to another, and may even include mailing or shipping it, when the actor is not present. "Carrying" generally means the gun is in the presence of the actor, usually within reach or otherwise accessible.

Under federal law a person is "carrying" a gun even if it is locked in the glove compartment or trunk. Muscarello v. United States, 524 U.S. 125 (1998). Federal law distinguishes between the two terms in at least one other important respect, by granting federal protection to persons transporting firearms, removing that protection if the gun is located where it is readily accessible. 18 U.S.C. § 926A.

In Christian v. State, 686 S.W.2d 930 (Tex.Cr.App. 1985), the accused was found sitting in a running car, with a pair of nun-chucks protruding from under the driver's seat. He was not the owner of the car. He claimed that he was not "carrying" the weapon, and argued that the State was required to show that he knew the weapon was contraband and that he exercised control over it, just as the law requires in drug cases. The Court declined to adopt that line of reasoning, but did conclude that "carrying" is different from "possessing" in that the former term requires some "conveyance or asportation." In other words, "carrying" would not include mere stationary possession. The Court observed that in 1970 the Legislature considered and rejected an amendment to the section that would have outlawed mere possession. The Court also observed that "on or about [the] person" extends to cover "at least the interior of an automobile."

In Courtney v. State, 424 S.W.2d 440 (Tex.Cr.App. 1968) the Court upheld the conviction of a man whose car's glove compartment contained a handgun, even though there were others in the car.

2. Firearms Owners' Protection Act

Federal law offers some protection to persons transporting firearms while traveling. The Firearm Owners' Protection Act of 1986 added 18 U.S.C. § 926A, "Interstate Transportation of Firearms," which states:

> "Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console."

This obviously does not allow carrying of guns on one's person, or where it is readily accessible in a vehicle, but it does provide some protection to interstate travelers.

Litigants appear to have rarely raised this section. In Muscarello v. United States, 524 U.S. 125 (1998), two defendant caught with a gun and drugs in the trunk and locked glove compartments, respectively, claimed that they were not "carrying" the guns and therefore should not receive the mandatory five-year prison term imposed by 18 U.S.C. § 924(c)(1). The Defendants did not invoke 18 U.S.C. § 926A to claim that their possession of firearms was legal, but rather they pointed to the use of the term "transport" in that section to argue that "carrying" required possession of the firearm on the person. The Court rejected this argument, but considered the meaning of the two terms at length, ultimately concluding that "carry" includes storage in the trunk or locked glove compartment, at least when the statute references carrying the firearm "during and in relation to" a crime.

The plaintiffs in Fresno R. and P. Club v. Van De Kamp, 746 F. Supp. 1415 (E.D.Cal. 1990) argued unsuccessfully that Congress intended 18 U.S.C. § 926A to preempt the conduct made illegal by California's Roberti-Roos Assault Weapons Control Act, California Penal Code sections 12275 to 12290 (banning so-called "assault weapons"). They apparently abandoned this argument during the appeal. Fresno Rifle and Pistol Club, v. Van De Kamp, 965 F.2d 723 (9th Cir. 1992).

The Plaintiffs in Coalition of N.J. Sportsmen v. Florio, 744 F. Supp. 602 (N.J. 1990) raised a similar argument, claiming that 18 U.S.C. § 926A preempted N.J.S.A. 2C:39-1 et seq., New Jersey's ban of "assault weapons" and large-capacity magazines. The Court rejected that argument, saying, "A straightforward reading of § 926A demonstrates that the statute prohibits only regulation of the interstate transport of firearms, and in no way restricts a state's power to regulate firearms within the state." The wording of § 926A (" . . .from any place . . . to any other place . . .") would seem to protect both interstate transportation and intrastate transportation, although the title of the section is "Interstate Transportation of Firearms." The Florio Court chose to interpret § 926A to protect only interstate transportation.

3. With a CHL

There are two different arrangements allowing Texas CHL holders to carry concealed handguns in certain other states.

Before considering the legality of carrying in other states by authority of a Texas CHL, one thing must be made clear. **The mere fact that it is legal to carry a handgun in another state does not guarantee that you will carry it in a legal manner and in locations where it is legal.** The laws of each state govern the actual carrying of the weapon. This means that travelers wishing to carry in other states by authority of their Texas CHL's must not only confirm that their licenses are effective in the destination state, but also investigate the specific requirements. By way of example, a nonresident traveling to Texas might not know that he is required to keep the handgun concealed, required to produce his CHL if stopped by law enforcement, and that he is prohibited from carrying into certain locations.

a. Reciprocity

The first arrangement allowing Texas CHL holders to carry in other states is called reciprocity, authorized by Government Code § 411.173(b). That section allows Texas to establish formal agreements with other states by which each state will honor CHL's of the other state. Verifying reciprocity is easy, because of the existence of the formal reciprocity agreements.

The Texas Department of Public Safety maintains information on Reciprocal License Agreements at http://www.txdps.state.tx.us/administration/crime_records/chl/reciprocity.htm (last visited September 21, 2004).

According to the site, as of September 15, 2004 Texas had established reciprocity with the following states:

> Mississippi, Utah, Idaho, North Carolina, Wyoming, Kentucky, Tennessee, Florida, Arizona, Louisiana, Oklahoma, and Arkansas.

b. Recognition

Some states recognize Texas CHL's even though there is no formal reciprocity agreement. Many web sites provide information regarding recognition, but in order to be certain whether another state recognizes Texas CHL's, one must either review that state's laws or contact the agency responsible for administering that program.

The NRA maintains a guide to CHL reciprocity and recognition, available at http://www.nraila.org/recmap/usrecmap.htm (last visited September 21, 2004).

There is another excellent source on reciprocity and other issues relating to carrying firearms at http://www.packing.org/.

This site employs volunteers in various states to provide the most up-do-date information.

The Citizens' Committee for the Right to Keep and Bear Arms posts a similar guide at http://www.ccrkba.org/reciprocity.html (last visited September 21, 2004).

The NRA website says the following states honor Texas CHL's, whether through reciprocity or recognition:

> Alaska, Arizona, Arkansas, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Missouri, Montana, North Carolina, Oklahoma, Tennessee, Utah, Virginia, Vermont, Wyoming.

The 2003 Texas Legislature adopted House Bill 3477, codified at Government Code § 411.173, requiring the Governor to issue a proclamation that Texas will recognize the CHL of any state where applicants have to pass the NICS. The NICS determines whether a person may legally possess a firearm under federal law, so most or all states which have CHL's should meet this requirement. The bill also requires TDPS to annually report to the governor which other states qualify. Texas has established reciprocity with four more states since passing this bill.

In 2003, the Missouri Legislature passed House Bill 349, establishing a concealed carry license in that state. When the previous version of this paper was presented, the bill had passed, the governor had vetoed it, and the Missouri Senate had overridden the veto, but a suit was pending to overturn the law. The Missouri Supreme Court rejected the challenge, Brooks v. State, 128 S.W.3d 844 (Mo.Banc 2004), and now CHL's are being issued in Missouri.

On August 20, 2003 the governor of Alaska signed House Bill 177 into law, which grants recognition to CHL's of all other states, as long as Alaska has not revoked or suspended the person's license or refused his application for one. Alaska House Bill 102, signed into law on June 11, 2003, allows anyone 21 years or older to carry a concealed handgun without a permit, if not otherwise prohibited from possessing firearms. Note that there are restrictions on the manner and location where firearms may be carried. Alaska retained its concealed carry law after adopting House Bill 102, mainly in order to allow its citizens to obtain a license which will be recognized in other states, and to buy guns without a background check.

The laws on reciprocity and recognition of CHL's change on a frequent basis, so make sure you use the most current information.

4. Carrying your Ventilator Without a CHL - State Laws

Carrying a firearm into other states can be hazardous to your freedom. As noted above, areas such as Chicago, New York City and Washington, D.C. either require registration or generally prohibit possession of firearms

altogether. Although the federal "Assault Weapons Ban" expired on September 13, 2004, many states have their own bans. If you plan to travel to one of those states with a firearm, you need to do your homework.

The portion of the Firearm Owners' Protection Act allowing interstate transportation of firearms provides some protection, but local law enforcement officials do not always know of this law or follow it. FOPA only helps if you keep the gun locked away where you can't find it, so it doesn't allow you to carry the gun or keep it accessible in your vehicle. Before taking a trip with your shootin' iron, you will need to research the laws of the specific states in which you intend to travel.

The fifty states have fifty different sets of laws which determine when persons in that state may carry firearms. A survey of the laws of all fifty states is well beyond the scope of this article, more appropriate for a book. Here are some resources:

NRA Compendium of State Firearms Laws http://www.nraila.org/media/misc/compendium.htm

NRA Guide to Interstate Transportation of Firearms http://www.nraila.org/GunLaws.asp?FormMode=Detail&ID=59

Alaska and Vermont allow any citizen to carry a concealed handgun, as long as that citizen can legally possess a firearm under federal law (18 U.S.C. § 922). State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); Alaska House Bill 102.

In some states "open carry" of a firearm is legal but carrying a concealed weapon is an offense. See Arizona Statutes, Title 13, Chapter 31, Section 13-3102(A). In Texas whether a firearm is concealed generally has no effect on the legality of transporting that firearm. In other words, concealing a firearm is not a separate offense under Texas law, and does not enhance the penalties for illegally possessing or transporting the firearm. Concealing a firearm also does not make transporting or possessing the firearm legal when it is otherwise prohibited, except for persons carrying under authority of a CHL, who are required to keep their handguns concealed. Penal Code § 46.035(a). Although concealment does not affect the legality of transporting a firearm, it may very well have the practical effect of preventing the actor from being prosecuted.

In some states transporting a firearm is illegal if that firearm is loaded. See OK Code § 21-1289.13. In Texas whether a firearm is loaded or not, and even whether it is operable or not, has no effect on the legality of transporting or possessing that firearm.

International travel is well beyond the scope of this paper, and travelers will have to research the law of the other country. Canada requires all firearms to be declared in writing, and generally require a permit to be obtained in advance. The gun laws of Canada and Mexico are very restrictive.

More detailed information is available in a book by Alan Korwin with Michael P. Anthony, entitled *Gun Laws of America*, published by Bloomfield Press, 2003. This is an excellent source for federal statutes, claiming to include "every federal gun law on the books." It includes virtually no case law. The statutory information is exceptionally thorough and detailed. For example, it notes that penalties for interfering with a federal poultry inspector are increased if a firearm is used. The book also includes the actual wording of each statute and the "Gist" of each law, written in plain English. Korwin teamed up with Georgene Lockwood to write *The Texas Gun Owner's Guide*, Bloomfield Press, 2002. By the same authors, this book includes much more than just statutes (although those are included verbatim). Topics include the CCL, laws on carrying (including "traveling"), and the use of deadly force in self-defense. There are few references to cases, but the explanations in the book include the substance of the common law on these subjects. The ATF website also has a great deal of information, including its Federal Firearms Regulations Reference Guide, available at http://www.atf.gov/pub/fire-explo_pub/2000_ref.htm (last visited September 21, 2004).

5. Airlines, Shipping, "Common Carriers"

A person transporting a firearm via an airline, bus, train, ship, or similar "common carrier" is subject to special requirements imposed by federal law. The carrier will often impose additional requirements. A person wishing to mail or ship a firearm or ammunition is also subject to special requirements.

Possessing a firearm in the secured area of an airport is prohibited, but having it in checked baggage is a defense. Penal Code § 46.03(a)(5). Bringing a firearm on an aircraft is generally prohibited by federal law, except in checked baggage when the carrier has been informed. 49 U.S.C. § 46505. The NRA has posted a very helpful guide to transporting firearms by air at http://www.nraila.org/CurrentLegislation/Read.aspx?ID=527 (last visited September 21, 2004).

Firearms in checked baggage must be unloaded, packed in a locked hard-sided container and declared to the airline at check-in. Only the passenger may have the key or combination to the container. Small arms ammunition must be placed in an appropriate container: "securely packed in fiber, wood, or metal boxes, or other packaging specifically designed to carry small amounts of ammunition. "

The Transportation Security Administration maintains a website, with guidelines for transporting firearms and ammunition available at http://www.tsa.gov/public/display?content=09000519800ac232 (last visited September 16, 2004). The TSA site erroneously states that a person transporting a firearm may declare the firearm to the carrier "orally or in writing;" 18 U.S.C. § 922(e) requires notice to be written. Under TSA regulations, ammunition may be packed in the same locked container as the unloaded firearm. Rules for international flights may differ. Some airlines may have separate requirements, or may impose

special fees; the NRA website identified above includes links to websites with the guidelines used by five of the major airlines.

Airlines used to require markings on the outside of baggage containing firearms ("Please Steal Me"), but for approximately ten years federal law has prohibited this practice. 18 U.S.C. §§ 922(a)(2)(A). The carrier may not mark the container to show that it holds a firearm, or require such a mark. 922(e).

Generally handguns are "nonmailable," although long guns are mailable. 18 U.S.C. § 1715; United States v. Powell, 423 U.S. 87 (1975). This prevents private citizens from mailing handguns to other private citizens, but this restriction does not prevent them from mailing shotguns or rifles to private citizens in the same state or to Federal Firearms Licensees (licensed dealers, referred to as "FFL's") in any state. A person may ship or mail a firearm directly to a dealer or manufacturer for a legitimate purpose, including sale, repair, or customizing. The Post Office has special requirements for mailing firearms. The container may not include any marking indicating that a firearm is enclosed. "Firearm" under postal regulations includes "any device (including a starter gun) that is designed, or may readily be converted, to expel a projectile by an explosion, a spring, or other mechanical action, or by air or gas pressure with sufficient force to be used as a weapon." U.S. Postal Service Publication 52, § 431.1. The shipper must complete PS Form 1508, Statement by Shipper of Firearms.

Anyone wishing to transport a firearm aboard a common or contract carrier in interstate or foreign commerce must deliver it unloaded to the pilot or other person in charge. 18 U.S.C. § 922(e); 18 U.S.C. § 2277. This requirement applies whether the person is shipping the firearm or carrying the firearm while traveling. The NRA web site indicates that bus companies usually refuse to transport firearms, but trains usually will transport unloaded, disassembled long guns in cases. See the NRA Guide To The Interstate Transportation Of Firearms, available at http://www.nraila.org/GunLaws/FederalGunLaws.aspx?ID=59 (last visited September 21, 2004).

Firearms or ammunition delivered to a common carrier must also be accompanied by a written notice to the carrier of the contents of the shipment.18 U.S.C. § 922(e). The carrier may not deliver shipped firearms without obtaining a written receipt. 18 U.S.C. § 922(f)(2).

III. TRANSFERRING FIREARMS

The definition of "transfer" differs depending on the statute, but generally includes not only retail sales and purchases, but also private sales, gifts, inheritances, acquisition by intestate succession, divorce settlements or awards, winning in drawings, loaning, renting, assigning, pledging, giving away, or otherwise disposing of the firearm.

There are several types of transfers that should a "red flag" because they involve additional legal complications. These include transfers to persons under 21; interstate or international transfers; and purchases of machine guns or other exotic firearms.

"Retail transfers" as used herein will refer to transfers between an FFL and a non-FFL. "Private transfer" will refer to transfers between two non-FFL's. Transfers between two FFL's would be considered wholesale transfers, but they are not covered in this paper.

The Brady Bill imposes certain requirements in order to complete a retail transfer, including filling out a federal form and completing a background check. 18 U.S.C. § 922(t). These requirements do not apply to private transfers. This means that it is now legal to privately transfer a firearm without undergoing a background check, completing any federal forms, or involving the federal government in any way.

Violation of the statutes governing firearms transfers can carry stiff penalties. Selling a single firearm to a felon or other "prohibited person" subjects the seller to a ten year prison term and a $250,000.00 fine. 18 U.S.C. § 922(d), 924(a)(2). Each gun illegally sold is a separate offense, so these penalties can add up.

It is illegal "for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State," but there is an exception for inheritance or receipt through intestate succession. 18 U.S.C. § 922(a)(3). Recent events show that even Presidential candidates are sometimes ignorant of gun control laws. Senator John Kerry demonstrated this on Labor Day, 2004 by accepting a shotgun as a gift from Cecil Roberts, President of the United Mine Workers, during a campaign stop in West Virginia. Sharon Theimer, "NRA Ads Focus on Kerry Gun Rights Record," Associated Press story carried by the Kansas City Star, available at http://www.kansascity.com/mld/kansascity/news/local/9610978.htm?1c (last visited September 16, 2004). This transfer might have been legal if accomplished through an FFL. 18 U.S.C. § 922(b)(3).

There are many nuances to these statutes. There are many, many cases interpreting them, and the definitions of key terms such as "firearm," "possess," and "felon," often differ under state and federal law. In many cases conduct which is perfectly legal according to state law is a felony under federal law. A full discussion of these laws is well beyond the scope of this article.

Firearms involved in violation of federal law may be forfeited under 18 U.S.C. § 924(d).

A. Private Transfers

Currently it is legal to make a private transfer of a firearm without completing any forms (ATF Form 4473) or involving any governmental agency (NICS). 18 U.S.C. § 922(a)(3) and (5), 922(b)(3). A private transfer as used herein means a transfer between two individuals who are not "engaged in the business of selling firearms." 18 U.S.C. § 921(a)(11).

Politicians have called this the "gun show loophole," and have made a number of proposals to close it. These include Senate Bill 22 which was proposed by Minority Leader Tom Daschle (D-SD) and cosponsored by Senators Clinton, Kennedy, Boxer, Lautenberg, and Schumer, among others. It is important to note that this supposed "loophole" is simply the fact that under current law you do not have to get the government's permission to privately transfer a firearm. This is the same "loophole" that allows a father to give his son a rifle for Christmas, or for a neighbor to sell you a shotgun. Most of the proposals to close this "loophole" would require the permission of the government for all transfers of any kind, regardless of whether they actually occurred at a gun show. This would mean that every purchase, gift, inheritance, trade, or other transfer of any kind would have to be done through an FFL, completion of ATF Form 4473, performance of a NICS check, and all the other formalities which now only apply to retail purchases. It would also inevitably make federal felons out of thousands of innocent persons unaware of the new requirement.

The law deeming firearms to be "nonmailable" and the Brady Law mean that mail order purchases are also illegal, but such a transaction may be completed by using FFL's to ship the gun and to complete the final transfer to the purchaser. 18 U.S.C. § 1715; 18 U.S.C. § 922(t).

It is highly advisable at least to complete a bill of sale for private transfers, in order to provide documentation in case of later problems. At a minimum the bill of sale should reference the date of the sale; the identities of the buyer and seller; the purchase price; and the make, model, and serial number of the gun.

B. Retail Transfers

Any person who is "engaged in the business of importing, manufacturing, or dealing in firearms,"as defined by 18 U.S.C. § 921(a)(11), is required to hold a federal firearms license ("FFL"). 18 U.S.C. § 922(a); 923(a); see also 18 U.S.C. § 921(a)(21).

FFL's are subject to significant recordkeeping requirements. From the buyer's standpoint one of the most significant is the requirement to keep the original Form 4473 for five years if the transfer is not completed, or for 20 years of it is completed. ATF can inspect those records at will in the course of an investigation and can inspect them once per year without cause. 18 U.S.C. §. 923(g)(1)(B). In some situations, when an FFL goes out of business without another business succeeding it, the forms are delivered to ATF. This system is decentralized in this manner in order to prevent the federal govern... from imposing a de facto gun registration scheme.

The Brady Bill governs transfers from FFL's to non-FFL's. 18 U.S.C. § 922(t). It includes some temporary provisions which have now expired (such as the five-day waiting period) and some permanent ones (such as the National Instant Check System, or NICS). The permanent provisions went into effect November 30, 1998, and govern all retail transfers after that date. Although the Brady Bill initially covered only handguns, it now applies to all firearms, including handguns, rifles, and shotguns.

Before completing a transfer covered by Brady, the purchaser must complete ATF Form 4473. A sample of this form is available at http://www.atf.gov/forms/4473/index.htm. It was revised on February 19, 2002 to require non-U.S. citizens to provide their INS-issued alien number or admission number, to enable NICS to determine if a buyer is a nonimmigrant alien. The Fifth Circuit has ruled that the form does not violate the Fifth Amendment privilege against compelled self-incrimination. United States v. Ortiz-Loya, 777 F.2d 973 (5th Cir. 1985). Making any false statement or furnishing false identification in acquiring any firearm or ammunition from a licensee is a federal felony. 18 U.S.C. § 922(a)(6). After the buyer completes the 4473, the FFL must verify the purchaser's identity using photo ID, then contact NICS for approval of the transfer. NICS will provide one of three responses: 1) "Proceed," meaning that the FFL may complete the transfer; 2)"Delayed," meaning that the FFL must delay the transfer until either receiving a final response from NICS or until three business days; or 3) "Denied," meaning that the FFL may not complete the transfer.

If NICS sends a final response ("Proceed" or "Denied"), then the FFL must comply with the directions. If the initial response from NICS is "Delayed," then the FFL must wait three business days pass for a final response. If no final response is forthcoming within that three-day period, the FFL may complete the transfer.

NICS is not a perfect system. The system generates many "false positives," where a transfer is denied based on mistaken identity or other incorrect information. The system will not provide a reason for a denial, but the transferee may contact the FBI or the state Point of Contact in writing to request the reason for the denial. The FBI allows the potential purchaser to appeal a denial.

If the transfer is approved, the FBI must destroy all records of the instant check. 18 U.S.C. § 922(t)(2)(C). The purpose of this requirement is to prevent the federal government from compiling a list of guns or gun owners, and therefore accomplishing gun registration through the NICS loophole. The D.C. Circuit has ruled that despite this requirement, the Attorney General may retain records of NICS checks for audit purposes, with appropriate safeguards. National Rifle Association v. Reno, 216 F.3d 122 (D.C. Cir. 2000).

Brady does not apply to loans or rentals for use on the FFL's premises, but does apply to redemption of a pawned firearm. Pawnbrokers are allowed to run a NICS check prior to accepting a firearm, to avoid problems returning the firearm. Brady does not require a NICS check for returns of repaired firearms or delivery of replacement firearms. See the ATF's "Brady Handgun Violence Prevention Act Questions and Answers," available at http://www.atf.gov/firearms/bradylaw/q_abrady.htm (last visited September 21, 2004).

The Brady Bill exempts transfers to persons holding CHL's from the requirement of running a NICS check, if the CHL meets certain requirements. In order to exempt the holder from the NICS check, the transfer must occur in the state issuing the CHL; the license must have been issued in the last five years; and the license must be available only after verification that the person may legally possess a handgun. ATF has published a list of states whose CHL's meet these requirements, and Texas is listed as one of those states. Texas Peace Officer Licenses do not meet these requirements and therefore do not exempt the holder from the requirement of a NICS check before acquiring a personal firearm. See ATF's Open Letter to All Texas Federal Firearms Licensees, available at http://www.atf.gov/firearms/bradylaw/states/texas.htm (last visited September 21, 2004).

18 U.S.C. § 922(c) allows an FFL to transfer a firearm to a person who does not personally appear at the FFL's place of business. The purchaser must provide a sworn statement with statutory language affirming that the transfer would be legal, and providing the address of the chief law enforcement officer where he lives. The FFL must send the statement via certified mail to the officer, and delay the transfer until seven days after the green card is returned. The author has never heard of an FFL using this procedure.

It is illegal under 18 U.S.C. § 922(a)(3) for an FFL to sell a handgun to a person who does not reside in the same state. A person may buy rifles and shotguns from FFL's outside their home states, but only if the buyer and seller meet face-to-face, and only if the purchase complies with both states' laws. 18 U.S.C. § 922(b)(3). Loans or rentals are permitted, but only for "temporary use for lawful sporting purposes." 18 U.S.C. § 922(a)(5)(b); 18 U.S.C. § 922(b)(3)(b). It's also illegal under 18 U.S.C. § 922(a)(3) to bring a gun in from another state, unless it was inherited. Texas law has a parallel provision at Penal Code § 46.07, but limits this procedure to contiguous states. Generally local FFL's will be happy to accomplish interstate transfers for a small fee, usually $10.00 - $35.00.

It is not clear whether it is a crime to sell to a legal recipient believing he was an illegal, out-of-state buyer. United States v. Plyman, 551 F.2d 965 (5th Cir. 1977) (not a crime); United States v. Colichhio, 470 F.2d 977 (4th Cir. 1972) (is a crime).

"Straw purchases" are prohibited by 18 U.S.C. § 922(a)(6). This section makes it illegal for a buyer to knowingly make any false statement intended or likely to deceive a gun dealer with respect to any fact material to the legality of the sale. In this situation that section makes it illegal for a buyer to misrepresent the identity of the true recipient of the firearm. See U.S. v. Jefferson, 334 F.3d 671 (7th Cir. 2003) (citing H.R. Rep. No. 99-495 at 17, reprinted in 1986 U.S.C.C.A.N. 1327, 1343). The back side of ATF Form 4473 warns against straw purchases.

In 1980, 1984, and 1988 ATF published written guidelines defining "Straw Man Transaction." These guidelines stated that it was legal for one person to purchase a gun for another "as long as the ultimate recipient is not prohibited from receiving or possessing a firearm." In 1995 ATF changed its position, defining "straw purchase" to include a sale in which the buyer and the ultimate recipient were both allowed to possess firearms. Dave Kopel and Paul H. Blackman, "Gray Gun Stories," available at http://www.nationalreview.com/script/printpage.asp?ref=/kopel/kopel060903.asp (last visited September 16, 2004).

Sales to an individual of multiple handguns within a five-day period require dealer notification to the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives. 18 U.S.C. § 923(g)(3)(A).

IV. RELATED ISSUES

Federal, state, and local governments regulate virtually every aspect of acquiring, owning, possessing, storing, transporting, carrying, using, and disposing of firearms. This paper makes no effort to cover any of those subjects in any detail, except transporting and transferring firearms. But some laws are so closely related to those two subjects that they must at least be mentioned in order to understand the laws of transporting and transferring guns. These include the legal definitions of "firearm" in various statutes, distinctions between carrying and transporting, the laws prohibiting certain persons from even possessing firearms, the restrictions on possession of certain types of guns, and restrictions on the use of guns.

A. How 'Bout Not Getting Busted in the First Place?

The best victory comes in the battle you never have to fight. This is especially true in the field of criminal defense, where there is generally no way to recover attorney's fees from the government.

A complete review of criminal law is well beyond the scope of this paper (and even farther beyond the competency of its author), but some observations relating to firearms can be made.

Depending on the precise application of all these laws, at any specific time and place, a gun may be "contraband" similar to drugs. But the person possessing

the gun may not believe he is doing anything wrong, or may not know it's illegal. In fact, most of the persons involved in the cases reported in this paper were law-abiding citizens who just happened to run afoul of these laws. In other cases the person's conduct may be entirely legal, but the officer confronting him may believe it is illegal or just not care. The fact is that allowing the government to know that you have a gun is a major risk. Yet people regularly make decisions that result in their prosecution.

Anyone who follows the case law on search and seizure has seen case after case involving "consent," "plain view," and confessions. These cases generally read as follows:

I. Facts. The Defendant was stopped on I-20. The officer asked him if he could search the car. The Defendant consented, and the officer found three hundred pounds of marijuana in the trunk. The Defendant was convicted and now appeals, claiming that the search was illegal.
II. Analysis. The Defendant consented to the search. Affirmed.

Consenting to a search, or leaving a gun in plain view, effectively waives one's rights under the Fourth Amendment. Admitting that one possesses a gun, if criminal charges result, is called a "confession," which saves the prosecutor a lot of trouble. Any criminal defense attorney can tell you that these things generally result in convictions. For that reason:

1. One should never consent to a search;
2. One should never leave a gun in plain view, not only to avoid legal trouble but also to prevent theft; and
3. One should never admit to possessing a firearm, unless doing so is necessary for safety or to comply with the law.

Christian v. State, 592 S.W.2d 625 (Tex.Cr.App. 1980) held that the mere presence of a shotgun, which is a legal weapon, does not provide probable cause to justify a search under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

A recent Fifth Circuit case may be of some help. In Estep v. Dallas County, Tex., 310 F.3d 353 (5th Cir. 2002) a peace officer searched a person's car mainly because it had an NRA sticker. The Court found that such a sticker does not provide probable cause for a search, commenting: "Indeed, if the presence of an NRA sticker and camoflauge gear in a vehicle could be used by an officer to conclude he was in danger, half the pickups in the state of Texas would be subject to a vehicle search."

Florida v. J. L., 529 U.S. 266 (2000) is another case which provides some protection for persons carrying firearms. In that case the Court unanimously held that: "An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk [Terry search] of that person." The holding was partially based on the fact that the source's knowledge that the person possessed a firearm does not necessarily mean the source knew the person had done anything illegal.

State v. Kurth, 981 S.W.2d 410 (Tex.App.-San Antonio 1998) is not so helpful. In this case an attorney was caught with a gun in his briefcase when entering the courthouse. He had placed the briefcase on an X-ray machine. On appeal, he challenged the search. The Court held that such courthouse checkpoints are legal, and that the attorney consented to the search by placing his briefcase on the machine. See also Gibson v. State, 921 S.W.2d 747 (Tex.App.-El Paso 1996, writ denied).

Surprising an officer with a gun can be hazardous to your health. Texas requires a CHL holder to produce his license along with his driver's license, but only if he is armed. Government Code § 411.205. Since an officer in the course of a stop will generally call in to check the records, he will learn that you hold a CHL, and he will have a pretty good idea that you're armed. Denying the fact that you are armed or refusing to answer may just arouse the officer's suspicion. Section 411.207 allows any peace officer to disarm a license holder if he reasonably believes it is necessary for the protection of any person. In order to comply with this law you will have to produce the handgun if the officer requests that you do so. Although there may be a few other situations where you may want to admit to possessing a gun or actually produce it, in general you should avoid doing so if at all possible.

B. "Prohibited Persons"

It is a federal felony to transfer a firearm to a person who is prohibited from possessing one, punishable by up to ten years imprisonment. 18 U.S.C. § 922(d).

State and federal laws prohibit possession of firearms or ammunition by certain classes of persons. Many of these prohibitions are simple common sense, such as that which makes it illegal for a felon to possess a gun. The main federal law listing persons who are prohibited from possessing firearms is 18 U.S.C. § 922(g). This section prohibits possession of firearms or ammunition by convicted felons; drug addicts; persons adjudicated as mental defectives or who have been committed to a mental institution; illegal aliens or holders of nonimmigrant visas; persons with dishonorable discharges; persons who have renounced their citizenship; persons subject to certain court orders prohibiting them from assaulting or threatening their spouses; persons who have been convicted of a domestic violence; and persons who are charged with felonies. Violation of § 922(g) is a federal felony, and depending

on the application of the federal sentencing guidelines may subject the violator to a fine of up to $250,000.00 and imprisonment for up to ten years.

Section 922(g)(9) is called the Lautenberg Amendment. It prohibits persons who have been convicted of "misdemeanor crimes of domestic violence" from ever possessing firearms or ammunition. Section 922(g)(8) prohibits possession of firearms by persons who are subject to certain routine orders of domestic relations courts. Approximately eight years after these laws became effective, there are still many attorneys who either fail to advise their clients of these laws, or who advise them to do things that will likely cause them to run afoul of them. Many judges are also unaware of these two sections. As a result, people regularly plead guilty to misdemeanor crimes of domestic violence, not knowing the plea will result in a permanent ban from possessing firearms or ammunition. People also routinely agree to enter injunctions in their domestic relations cases without knowing that the order will have the unstated effect of prohibiting them prohibited from possessing firearms. Two warnings are attached as Appendix A and B, designed for use by courts and attorneys whose clients face these possible disqualifications. In addition to protecting the client, this could protect the attorney from malpractice liability for failing to properly advise a client and thereby subjecting him to a ten-year prison term and $250,000.00 fine.

Texas law includes similar, but not identical provisions disqualifying certain persons from possessing firearms, including Penal Code § 46.04 (prohibiting possession of firearms by felons within five years after release, but allowing them to do so at their residence after that period) and 46.04(b) (prohibiting possession by persons convicted of Class A misdemeanor assault against a member of the family or household).

There are also age restrictions on possessing firearms. 18 U.S.C. § 922(x) prohibits persons under 18 from possessing handguns or ammunition, with certain exceptions. 18 U.S.C. § 922(b)(1) prohibits FFL's from selling firearms or ammo to anyone under 18, or handguns or handgun ammo to anyone under 21.

C. Definitions of "Firearm"

The definition of "firearm" under Texas law includes any device designed "to expel a projectile through a barrel by using the energy generated by an explosion or burning substance . . ." The definition excludes antiques or curios manufactured before 1899, and replicas of those antiques which do not use rimfire or center fire ammunition. Penal Code § 46.01(3). It does not include airguns or BB guns, which may be regulated by local ordinance.

The definition of "firearm" under the main federal gun control law includes any weapon which will "expel a projectile by the action of an explosive . . ." It excludes "antique firearms," which include firearms manufactured before 1898, and replicas of those antiques which are not designed to use rimfire or centerfire ammunition. Guns manufactured before that date which use rimfire or centerfire ammunition are also considered antiques if their ammunition is "no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade." 18 U.S.C. § 921(a)(3). In other words, many black powder guns and a few cartridge guns are not considered "firearms" under state or federal law.

The National Firearms Act defines "firearm" to include machine guns, destructive devices, and certain other restricted weapons. 26 U.S.C. § 5845(a). That section limits the applicability of that definition to that chapter, so there should be no confusion with the other definitions of "firearm."

So there are a few categories of guns that are defined as "firearms" under one set of laws but not the other.

In Sims v. State, 546 S.W.2d 296 (Tex.Cr.App. 1977) the Defendant appealed based on the distinction between a pistol (the term used in the charging instrument) and a handgun (used in the statute). The Court refused to reverse based on that distinction.

D. Restrictions on Use

Of course there are numerous restrictions in the use of firearms. Placing a person in imminent danger of serious bodily injury is considered deadly conduct (Penal Code §22.05), which is generally a Class A Misdemeanor. If committed by firing a gun toward a person, building, or vehicle, it becomes a Third Degree Felony. Penal Code § 22.05(e).

Discharging a firearm in a "public place" other than a public road or a sport shooting range is considered disorderly conduct, a Class C misdemeanor. Penal Code 42.01(a)(9). Displaying a firearm or other deadly weapon in a public place in a manner calculated to alarm is also disorderly conduct, as is discharging a firearm on or across a public road. Penal Code 42.01(a)(10) and (11).

Firing a gun inside a municipality having a population of 100,000 or more is prohibited under Penal Code § 42.12. Local Government Code §225.001 allows smaller municipalities to pass ordinances prohibiting the same conduct. Local Government Code § 235.022 allows the commissioners court of a county to prohibit or otherwise regulate shooting on lots that are 10 acres or smaller in the unincorporated area of the county in a subdivision, but only in counties of more than a million persons. Violation of such a prohibition is a Class C misdemeanor. Section 235.023 makes it clear that commissioners courts cannot regulate transfer, ownership, possession, or transportation of firearms and cannot require the registration of firearms.

WARNING:

YOU WILL BE **PROHIBITED FROM POSSESSING ANY FIREARMS FOR LIFE**, IF YOU ARE CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE.

Please consult with your attorney and/or review the law if it affects you!

18 U.S.C. § 922(g)(9) states:

> It shall be **unlawful** for any person . . . who has been **convicted** in any court of a **misdemeanor crime of domestic violence**, **to** ship or transport in interstate or foreign commerce, or **possess** in or affecting commerce, **any firearm or ammunition**; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(33)(A) defines "misdemeanor crime of family violence" as a crime which:

> "has, as an element, the **use or attempted use of physical force**, or the **threatened use of a deadly weapon**, committed **by a current or former spouse, parent, or guardian** of the victim, by a person with whom the victim **shares a child** in common, by a person who is **cohabiting** with or has cohabited with the victim as a spouse, parent, or guardian, or by a **person similarly situated** to a spouse, parent, or guardian of the victim.

VIOLATION OF 18 U.S.C. § 922(g)(9) IS A **FEDERAL FELONY** WHICH CAN SUBJECT YOU TO **IMPRISONMENT AND A FINE!**

I acknowledge that I have been advised of this law.

_____ _____

Signature Date

WARNING:

YOU MAY BE **PROHIBITED FROM POSSESSING ANY FIREARMS**, IF THIS COURT ISSUES AN ORDER WHICH RESTRAINS YOU FROM HARASSING YOUR SPOUSE OR OTHER INTIMATE PARTNER.

This includes **restraining orders**, **protective orders**, **temporary injunctions**, **permanent injunctions**, and any other orders meeting the definition. Please consult with your attorney and/or review the law if it affects you!

18 U.S.C. § 922(g)(8) states in part:

"It shall be **unlawful** for any person . . . who is subject to a **court order** that -

(A) was issued after a **hearing** of which such person received **actual notice**, and at which such person had an **opportunity to participate**;

(B) **restrains such person from harassing**, stalking, or threatening an **intimate partner** of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a **finding** that such person represents a **credible threat to the physical safety** of such intimate partner or child; or

(ii) by its terms explicitly **prohibits the use**, attempted use, or threatened use **of physical force** against such intimate partner or child that would reasonably be expected to cause bodily injury

to ship or transport in interstate or foreign commerce, or **possess in or affecting commerce, any firearm or ammunition**; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

VIOLATION OF 18 U.S.C. § 922(g)(8) IS A **FEDERAL FELONY** WHICH CAN SUBJECT YOU TO **IMPRISONMENT AND A FINE!**

I acknowledge that I have been advised of this law.

_____ _____

Signature Date