grand juror," and that "adjudication by a trial judge of a contempt committed in [a judge's] presence in open court cannot be likened to the proceedings here." *Id.,* at 137. The judge's prior relationship with the defen­ dant, as well as the information acquired from the prior proceeding, was of critical import....

Again, the Court considered the specific circum­ stances presented by the case .... The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

*Ill.*

Based on the principles described in these cases we turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitu­ tionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected . That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* ... when a mayor-judge

(or the city) benefitted financially from a defendant's conviction, as well as the conflict identified in *Murchison* ... when a judge was the object of a defendant's contempt .

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order .... We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias....

... [A] judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare de­ cisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and

common sense; and fairness and disinterest and neu­ trality are among the factors at work. To bring coher­ ence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel a real possibility of undermining neutrality, the judge may think it necessary to consider with­ drawing from the case.

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.... [T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias.... In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." ...

We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case.... We conclude that there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case had a signifi­ cant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campa ign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin . . ..

Massey responds that Blankenship's support, while significant, did not cause Benjamin's victory. In the end the people of West Virginia elected him, and they did so based on many reasons other than Blankenship's efforts. Massey points out that every major state news­ paper, but one, endorsed Benjamin .... It also contends that then-Justice McGraw cost himself the election by giving a speech during the campaign, a speech the opposition seized upon for its own advantage .... Justice Benjamin raised similar arguments ....

Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's vic­ tory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ulti­ mately drives the electorate to choose a particular can­ didate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, no procedure for judicia l factfind ing exists and the sole trier of fact is the one accused of bias....

Blankenship's campaign contributions- in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election-had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's

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influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented ...."

The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judg­ ment that cost his biggest donor's company $50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal. ...

We find that Blankenship's significant and dispro­ portionate influence-coupled with the temporal rela­ tionship between the election and the pending case

-"offer a possible temptation to the average ... judge to . .. lead him not to hold the balance nice, clear and true." . .. On these extreme facts the probability of actual bias rises to an unconstitutional level.

*IV.*

Our decision today addresses an extraordinary situa­ tion where the Constitution requires recusal.... Massey and its ... [advocates] predict that various adverse consequences will follow from recognizing a constitu­ tional violation here-ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree . The facts now before us are extreme by any measure. The parties point to no other

instance involving judicial campaign contributions that presents a potential for bias comparable to the cir­ cumstances in this case.

It is true that extreme cases often test the bounds of established legal principles, and sometimes no adminis­ trable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated....

This Court's recusal cases are illustrative. In each case the Court dealt with extreme facts that created an unconstitutional probability of bias that " 'cannot be defined with precision.' "... Yet the Court articulated an objective standard to protect the parties' basic right to a fair trial in a fair tribunal. The Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitu­ tional level.... In this case we do nothing more than what the Court has done before....

"Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order...."

"The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rig­ orous standards for judicial disqualification than those we find mandated here today ...." Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.

Application of the constitutional standard implicated in this case will thus be confined to rare instances.

The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

**Case Questions**

1. The Supreme Court split 5-4 in deciding this case . What do you suppose were some of the concerns of the dissenting four justices?
2. What single fact was most important to you as you went about making up your own mind as to whether this case was correctly decided?
3. . Does this case have any possible ethical implications that might have relevance for appointed judges?

# Author's Comment

Interested readers can find Chief Justice Roberts's dissent online a t the textbook's website. Another interesting case is also available on the website. In 2005, the Florida Supreme Court disciplined two attorneys because their television advertisement featured a pit bull with a spiked collar and their firn1's telephone n umber: 1-800-PIT-BULL. This fonn of advertising, said the Florida Supreme Court, violated the Florida Rules of Professional Conduct. You can read an edited version of *The Florida Bar 11. J oh,, Robert Pape* on this textbook's website.

# Ethics and Professional Responsibility Codes for Paralegals

Lawyers, law firms, businesses, and gove111ments have increasingly been hiring people as legal assis­ tants or paralegals (hereafter called simply paralegals)

) do work previously performed by licensed a ttor­ neys. The primary reason for this trend is the finan­ cial savings realized by having legal work petfonned by nonlawyers.

Paralegals today perform a wide variety of tasks, depen ding on their training, education, and experience. Beca use they are not licensed a ttor­ neys, they cannot represent clients in court, give legal advice, or sign pleadings. Subject to these limitations, the scope of a paralegal's duties is largely a matter of wha t the supervising attorney is willing to permit. Often this includes interview­ ing clients, conducting research, preparing drafts of documents, u ndertaking investigations, preparing affidavits, and collecting and organizing materials for hearings.

Legally, a supervising attorney is responsible for providing oversight and regulating his or her para­ legal's work and conduct. There have been propo­ sals that paralegals be subject to ru l es of professional responsibility established by each state's supreme court. This was proposed in New Jersey, but

rejected by that sta te's supreme court.22 Several states have esta blished paralegal divisions within the state bar. One state that u ndertook this step in 1995 is New Mexico.

All three of the national paralegal associa tions­ the National Federation of Paralegal Associa­ tions, the America n Alliance of Paralegals , Inc., and the National Association of Legal Assista nts­ have recognized the need to provide pa ralegals with ethical guideli nes, and each has promulga ted a code of ethics to which its members subscri be. State and local pa ralegal organ izations also promote ethical conduct within their memberships.

The New Mexico Supreme Court has been a leader in enhancing ethical conduct and profes­ sional responsibility on the part of paralegals. The court, through its "Rules Governing Paralegal Ser­ vi ces," has helped to cla1ify the bou ndaries of the paralegal's role within that state. (Readers ca n see the complete text of the rules a nd commentary on the textbook's website.) The court also has recog­ nized the importance of establishing general ethical guidelines for paralegals in its "Canons of Ethics" (see Figure 2.3) .

Many states have defined what it means to be a paralegal and require people holding themsel ves out to be paralegals to have satisfied minimum standards with respect to educa tion , certification , and / or experience . These laws usually prohibit paralegals from advertising or offering their services to consumers a nd require that all paralegal work be petformed at the direction and u nder the super­ vision of a licensed attorney of that state. Such laws are intended to prevent paralegals from engag­ ing in the unautho1ized pract i ce of law. Some states, notably Californ ia, require paralegals to com­ plete mandatory continuing legal education courses periodically.

The Ametican Bar Association also has a Stand­ ing Committee on Paralegals and has published "ABA Guidelines for the Approval of Paralegal Education Programs" and "ABA Model Guideli nes for the Utilization of Paralegal Services."

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It is the responsibility of every member of the Paralegal Division of the State Bar of New Mexico (hereinafter referred to as "Paralegal") to adhere strictly to the accepted standards of legal ethics . The Canons of Ethics set forth hereafter are adopted by the Paralegal Division of the State Bar of New Mexico as a general guide.

CANON 1. A Paralegal must not perform any of the duties that only attorneys may perform nor take any actions that attorneys may not take.

CANON 2. A Paralegal may perform any task which is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client, maintains a direct relationship with the client, and assumes professional responsibility for the work product.

CANON 3. A Paralegal must not: (a) engage in, encourage , or contribute to any act which could constitute the unauthorized practice of law; and (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency unless so authorized by that court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety .

CANON 4. A Paralegal must use discretion and professional judgment commensurate with knowledge and experience but must not render independent legal judgment in place of an attorney. The services of an attorney are essential in the public interest whenever such legal judgment is required.

CANON 5. A Paralegal must disclose his or her status as a Paralegal at the outset of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof , or a member of the general public. A Paralegal must act prudently in determining the extent to which a client may be assisted without the presence of an attorney .

CANON 6. A Paralegal must strive to maintain integrity and a high degree of competency through education and training wit,. respect to professional responsibility, local rules and practice, and through continuing education in substantive areas of law to better assist the legal profession in fulfilling its duty to provide legal service.

CANON 7. A Paralegal must protect the confidences of a client and must not violate any rule or statute now in effect or hereafter enacted controlling the doctrine of privileged communications between a client and an attorney.

CANON 8. A Paralegal must do all other things incidental, necessary, or expedient for the attainment of the ethics and responsibilities as defined by statute or rule of court.

CANON 9. A Paralegal's conduct is governed by the codes of professional responsibility and rules of professional conduct of the State Bar of New Mexico and the New Mexico Supreme Court. A member of the Paralegal Division of the State Bar of New Mexico shall be governed by the Rules Governing Paralegal Services (Rules 20-101 et seq. NMRA , as the same may be amended).

F IG U R E 2.3 State Bar of New Mexico, Canon of Ethics for Paralegal Division

**C H A PT E R S U M M A R Y**

Ethical questions permea te our society a nd are reflected in the laws enacted by our legislative bod­ ies and the decisions of our judge s a nd executive branch officials. Ethics is the study of morality a nd is a branch of the larger fi eld of philosophy. Philo­ sophers disagree about ma ny things, including whether ethical judgment s abou t right and wrong

can be proven conclusively , whether "goodness or badn ess" is dependen t on aftermaths, and whether there is such a thing as an "unjust " law. Beca use people differ in their moral beliefs, we have seen a n ongoing eth i cal debate in this country as to where to dra w the line between the right of indi­ vidual choice a n d the 1ight of society to promote a

common mora li ty . This chapter discussed codes of ethics and rules of professional responsibility . Read­ ers also saw tha t establishing objective mies to gov­ ern complex ethical probl ems is often a difficult u ndertaking. We saw one contemporary example of this in conju nction with th e financing of judicial el ections in West Virginia. I t is ha rd to draft objective rules that tell a sitting judge who has ac­ cepted campaign contributions precisely when re­ cusa1 is req uired to ensure judi cia l impa rtia li ty and avoid the possibility of bias. Ju sti ce Kennedy ex­ plained tha t in some circu msta nces the li k elihood of bias is clear a n d a constitutional remedy is re-

quired. Kennedy a nd a majority of Supreme Court justices believed *Caperton v. M asse y* was su ch a case. But in providi ng a new Due Process Clause­

based remedy in *Caperton,* the Court essen tia lly opened Pandora 's Bo, . They made it likely that fu ture U.S. Supreme Court justices will fin d it difficult to draw clear-cut ethical li nes. Beca u se many states requ ire tha t judges be elected , jud i cia l candidates have difficult decisions to make as they att mpt to fu nd their campaigns without crea ting the appearance of being biased in favor of l a rge donors and with ou t compromising their impartial­ ity should they be elected to office.

# C HA PT E R Q UE S TI O NS

1. Mich ael a nd Patricia Sewak bought a house from Charl es a nd Hope Lockhart. Prior to the sal e, the Lockharts had employed a contractor for $12,000 to renovate their basement. Some­ how, the mai n structural support th a t held up the hou se was removed during the renova tions. Shortly after moving in , th e Sewaks noticed that the kitchen floor was not l evel , tha t doors were not in alignment, and tha t the first a nd second floors were sagging. They hired a consulta nt, who investigated and determin ed that the sup­ port column was missing a nd that a n illegal jack , fou nd in the back of a heater closet, was used to provide the needed structu ral support. The consulta nt predicted tha t th e absence of the structural col u mn would ultim ately result in the colJapse of the house. The Sewaks filed suit,



alleging fra u d a n d a violation of th e

Pennsylva n ia Unfair Trade Practices and Consum er Protection Law (UTPCPL). The Sewaks maintained that the Lock harts sh ould have inform ed them that the support col umn

had been removed. The t1i al evidence, accord­ ing to the appellate court, pern1itted th e ju ry to find that the Lockharts not only had knowledge of th e column's removal , but a lso took steps to conceal its replacement with the illegal jack , and tha t they had not obtained the proper building permits before u ndertaking the renovations .

Did the Lockharts act ethically in their deal i ngs with the Sewaks? Should the l a w impose a legal duty on the Sewaks to in vestigate a nd discover the a bsence of the structural support col u mn for themselves?

*Sewak 11. Lorkh,m, 699 A .2d* 755 *( 1997)*

1. Jonas Yod er a nd Wallace Miller, members of the Amish religion, withdrew their daughters, Frieda Yoder a nd Barba ra Mill er, from school after they h ad compl eted the eighth grade. This refusa l viola ted a Wisconsi n compulsory school a tten da nce law that required Frieda and Ba rba ra to be in sch ool u n til t h eir sixteenth birthd ays. Th e U.S. Supreme Court ruled that th e Amish pa rents had a constitutiona lly protected tight to control the rel igious educa tion of their child ren u nder the First a nd Fourteenth Amendments. The Court's majority concluded that to requ i re the children to a ttend pu blic high school wou ld u ndermine fu nda 111ental Amish values and reli ­ gious freedom s. F1ieda and Ba rba ra were not part ies to th e l a wsuit, a nd there is no record as to th eir positions on the issue in this case . Given the Supreme Court's holding i n *Wisco nsin v. Yoder,* what posture should the law take i11 a situation where Amish children desire to attend high school over the objections of their parents?

*Wisconsin v. Yoder, 406 U.S. 205 ( 1972)*

1. Raymond Dirks worked for a New York City broker-dealer firm. He specialized in analyzing insurance company investments. Dirks received a tip from Ronald Sec1ist, a fom1er officer of Equity Fu nding of America (an insurance company), that Equity Funding had fraudu­ lently oversta ted its assets. Dirks decided to investigate. Although neither Dirks nor his employer traded in Equity Funding shares, he told others in the securities industry about the tip, and soon thereafter Equity Funding's shares dropped precipitously in value. The Securities and Exchange Commission (SEC) investiga ted Dirk 's role in disclosing the exis­ tence of the fraud and charged him with being a "tippee" who had aided and abetted viola­ tions of the Secmities Act of 1933. This statute makes it illegal for persons with inside knowledge (nonpublic information) to take

u nfair adva ntage of a compa ny's shareholders by trading in the affected secmities before the news has become public . Can you make an argument supporting the conclusion tha t it was unethical for Dirks to share the information he obtained from Secrist with other people in the industry? Can you make an argument tha t Dirk 's conduct was not unethical?

*Dirks v. Semrities mid Exclta11ge Co111111issio11, 463 U.S. 646 ( 1983)*

1. Three sepa rate federal suits were brou ght by gay men a nd lesbians who had been discharged from their job s. One plaintiff, a schoolteacher, alleged that his firing was because he wore an earring to school. The second suit was brought by two l esbians who alleged that they were terminated from their jobs because of their sexual orientation . The third suit was filed by three homosexual plaintiffs who alleged that they were in one case denied employment and in two cases fired from employment beca use their employer had a corporate policy of not

employin g homosexuals. The U.S. District Court dismissed the complaints on the grou nds that Title VII does not protect employees from discharges based on effeminacy or homosexu ­ ality . The U.S. Court of App eals affim1ed the decision of the District Court. Does the fact tha t two federal courts ruled that the plaintiffs were not entitled to legal relief affect the ethical metits of their claims?

*De Sa11tis v. Pa cific Tel.* & *Tel.* Co., *J11 c., 608 F.2d 327 ( 1979)*

1. In many regions of the country, it is customa1y for schools to take a brea k for school vaca tions during Febru aty. Many families arrange their schedules so that families can take special ttips to remote destinations. The airlines are bene­ ficia1ies of this tradition , a nd flights to popular vacation spots are often totally booked. In 1999, airline pilots involved in collective bar­ gaining disputes with their employer engaged in a "sick-out " during the school vacation pe1iod. Analyze this scenario from the *egoist* perspective.
2. The Massach usetts Supreme Judicial Court has interpreted a statute to require injured skiers who wish to sue ski area operators to give the operators notice of the skier's claims within 90 days of the injury and comply with a one-year statute of limitations. Failure to give timely notice of the claims will preclude b1ingin g the suit at all . Both the court majotity and the dissenting ju stices attributed these unu sually short limitations to b1inging actions to a legis­ lative policy. Both concluded that the legisla­ ture evidently placed a high er value on the economic vitality of the Massachusetts ski indust1y than on the rights of injured skiers to seek recove1ies in tort and contract from ski

a rea operators. Analyze this case from a

*utilitarian* perspective.

*Atki 11s v. jil/lill )' Peak, illc. 514 N.E.2d 850 (1987)*

* 1. See *Macomber v. Dill111a11* in Chapter Vl.

# NO T E S

suggested that males are more oriented

* 1. . *See Atki 11s v. ]imin y Peak, In c., i11* Chapter V.
  2. You ca n find this case on the I nternet. The case citation is *F11r111an v. Geo,gia,* 408 U.S. 238 (1972) .
  3. Telling a lie about a mate1ial fact while u nder oath is a crime called pe1jury . Th eft by false pretense is another crime tha t is based on a

fraudulent, actual, factual misrepresentation. In contracts, fraud in the formation of a n agree­ ment can result in rescission a nd an award of damages to the injured party .

* 1. R. N. H ancock, *Twe11tieth Ce11t11ry Ethics*

(New York: Columbia University Press, 1974),

p. 2.

* 1. An example is the debate about whether the concept we call "good" is composed of parts or is essentially indefinable. G. E. Moore,

*Prin cipia Ethica* (Cambridge, England: Univer­ sity P1inting House, 1976) (1903).

'----/. J. Rachels, *The Ele111e11ts of Moral P/1ilo sophy,* 2d ed. (New York: McGraw-Hill, 1986), pp. 8-14.

8. Hancock, p . 12. 9. Ibid. , p. 12.

1. Rachels, pp. 12-24.
2. You *will* recall from Chapter I , for example, tha t utilita 1ians sought to produce the greatest good for the greatest nu mber of people. This kind of calculation can only be u nderta ken by examining aftermaths.
3. Carol Gilliga n and Jane Attanu cci maintain that all people think abou t the morality of their

rel ations with others from two perspectives. One perspective is ba sed on a concern for treating people fairly , which they call the

"ju sti ce perspective," and the other focuses on responding to persons who are in need, which they call the "care perspective. " The authors

towa rd concerns for ''.ju stice" and females toward "caring." See C. Gilligan et al., *Mapping t/1e Moral Domai11* (Cambridge, MA: Harvard University Graduate School of Education, 1988), Chapter IV.

1. I. Kant, *Gro1111rl1 tJork of the Metaph ysics* ef *Morals* ( 1785) , Chapter I. http:/[/www.](http://www/) gutenberg.org/etext/5682
2. *Ego is/11* (Benedict Spinoza, 1632-1677): "The virtues that ethics seeks to inculca te a re the qualities we require to have personally fulfilled lives ." These, he said, included "courage, tempera nce, harmoniou s, coopera tive a nd

stabl e relations with others."

1. Und er Article VI's Supremacy Clause, the federal Constitution is the ultim ate authority

as to matters a1ising under it, but the state con­ stitutions are the ultima te autho1ity as to matters that do not amou nt to federal questions .

1. *Bosto 11 Globe,* October 16, 1998, p . A17.
2. Note tha t these facts parallel the facts in the Unabomber case, a nd that Ted Kaczynski's brother did tell authorities of his suspicions,

he did receive a large cash reward , and he gave it all to cha1ity.

1. P. Devlin, "Morals and the Criminal Law," in

*The E1iforce111ent of Morals* (Oxford: Oxford University Press, 1965), pp. 9-10.

1. David Millon refers to this as a dispute between the "contracta 1ia ns" and the "comn1Lmitarians." See D. Millon, "Commu nitarians,

Contractarians, and the Crisis in Corpora te Law," 50 *Washingto11* & *Lee Law RetJiew* 1373 (1993) .

1. See J. N esteruk, "Law, Virtu e, and the Corporation," 33 *A 111erica11 B11si11ess Journa l* 473 (1996).
2. For a brief a nd critical hist01y of the devel­ opment of bar associa tions, see H. Abadinsky, L11111 *and ]11 stice* (Chicago: Nelson-Hall , 1991), p. 102.
3. The New Jersey Supreme Court in 1999 rejected its own Committee on Paralegal Education 's recommendation that the state supreme court adopt "a court directed

licensing system." The New Jersey high court indicated that it supported in principle "the creation of a Code of Conduct for Paralegals ," bu t thought tha t this should

be produced by "paralegals and attorneys and their respective associations ."

New Jersey Supren1e Court Press Release of May 24, 1999.