ETHICS
FOR THE CRIMINAL LAWYER

"Sexual Assault And Family Violence Cases"

SAN ANTONIO CRIMINAL DEFENSE LAWYERS ASSOCIATION

Cadena-Reeves Justice Center
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I.
THE SCOPE OF THIS PAPER

This paper presents selected rules of professional conduct that – in my admittedly subjective view – are particularly relevant to criminal lawyers. These rules can be found in their entirety in the Texas Government Code, Title II, Subtitle G, Appendix A, Article X, § 9. The paper also occasionally refers to case law which interprets the rules and related concepts, and to the commentary to the rules.

II.
COMPETENCE

A. The Rules

Preamble: Terminology

"Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

> (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
>
> (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

> (1) neglect a legal matter entrusted to the lawyer; or
>
> (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious

disregard for the responsibilities owed to a client or clients.

Rule 1.02. Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;

(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

* * * * *

Rule 1.15. Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

(2) the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or

(3) the lawyer is discharged, with or without good cause.

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services

that the lawyer reasonably believes may be criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

B. Commentary

Rule 1.01, n. 7

> Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be

> controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

See also STATE BAR RULES art. XII, § 8, Canon 7 (repealed)("A lawyer should represent a client zealously within the bounds of the law")

Rule 1.02, n. 2

> Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

C. Case Law

1. Doing more than required is not forbidden

Frankly, the case law and the rules of professional conduct do not *require* much of lawyers representing persons accused of crime. Real lawyers, though, will not be satisfied to perform merely at the level of minimal acceptability.

a. Constitutional duties

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution have been interpreted to require the *effective assistance of counsel*. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984)(emphasis supplied); *Hernandez v. State*, 988 S.W. 2d 770, 770 (Tex. Crim. App. 1999). There are scores and scores of Texas cases which interpret the constitutional duty render effective assistance of counsel and an even cursory coverage of these cases goes far beyond the scope of this paper. Four lines of cases, though, illustrate important points.

(1) Sleeping in the courtroom

Twice in recent years the Texas Court of Criminal Appeals has refused to grant relief to persons condemned to die merely because their lawyers slept through parts of their trials. *See McFarland v. State*, 928 S.W. 2d 482, 508 (Tex. Crim. App. 1996); *Ex*

parte Burdine, 901 S.W. 2d 456 (Tex. Crim. App. 1995)(Maloney, J., dissenting).

The Fifth Circuit, sitting *en banc*, had a different view. "The Supreme Court has long recognized that 'a trial is unfair if the accused is denied counsel at a critical stage of his trial.' *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). When a state court finds on the basis of credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial. In such circumstances, the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant." *Burdine v. Johnson*, 262 F. 3d 336, 338 (5th Cir. 2001). The court refused to hold that proof of sleeping would invariably compel the presumption of prejudice. "Our holding, that the repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice, is limited to the egregious facts found by the state habeas court in this case." *Id*. at 349.

Recently, the court of criminal appeals examined *McFarland* on habeas corpus. Although applicant's retained lawyer slept through critical stages of the trial, co-counsel "was an awake, active, and zealous advocate in the adversarial testing of the prosecution's case." *Ex parte McFarland*, 2005 WL 1162800 (Tex. Crim. App. 2005). In such a situation, the court will not presume prejudice under *Cronic*. *Ex parte McFarland*, 2005 WL 1162800 (Tex. Crim. App. 2005).

(2) The duty to investigate when not sleeping

Although *Burdine* and *McFarland* make it seem like the life of the criminal lawyer is pretty relaxed, some work is clearly mandated. In *Stearnes v. Clinton*, 780 S.W. 2d 216 (Tex. Crim. App. 1989), the trial court removed previously appointed defense counsel because they interviewed a witness for the prosecution, in violation of a rule of the Lubbock County District Attorney's Office. The court of criminal appeals granted the defendant's petition for mandamus, holding that the trial court had had no authority to remove counsel under the circumstances. *Id*. at 226. In the process, the court made it clear that the district attorney's rule requiring permission to interview "its" witnesses was unauthorized. Indeed, the court recognized that defense counsel have a duty to make an independent investigation of the facts, which includes the duty to "seek out and interview potential witnesses." *Id*. at 224.

Wiggins v. Smith, 539 U.S. 510 (2003), is important because it highlights "counsel's duty to investigate." *Id*. at 522. There the petitioner complained that his trial counsel were ineffective because they failed to properly investigate and present mitigating

evidence of his unfortunate life history at the punishment phase of his capital trial. *Id*. at 514. The state court had denied habeas relief after finding that trial counsel had made a deliberate, tactical decision to forego a mitigation case in favor of convincing the jury that appellant was not directly responsible for the murder. *Id*. at 517-518. The Fourth Circuit Court of Appeals agreed that counsel had made a reasonable strategic decision to focus on petitioner's responsibility. *Id*. at 519. The Supreme Court reversed, finding that the state court's "application of *Strickland's* governing legal principles was objectively unreasonable." *Id*. at 528. The Court found counsel constitutionally deficient for failing to investigate petitioner's life history beyond consideration of a presentence investigation report and a report prepared by a municipal social services office. The respondent claimed that trial counsel had exercised reasonable professional judgment in choosing not to put on a mitigation case, and that for this reason, they had not performed deficiently. But the Supreme Court made it clear that its concern was not whether counsel should have presented a mitigation case. "Rather, we focus on whether the investigation supporting counsel's decision not to introduce evidence of Wiggins's background *was itself reasonable*. *Id*. at 523(emphasis in original); *See also Soffar v. Dretke*, 368 F. 3d 441, 478 (5th Cir. 2004)(counsel ineffective for not conducting an adequate pretrial investigation); *Lewis v. Dretke*, 355 F. 3d 364, 369 (5th Cir. 2003)(failure to investigate mitigating childhood abuse evidence); *Anderson v. Johnson*, 338 F. 3d 382, 394 (5th Cir. 2003)(failure to investigate and interview eyewitnesses).

(3) *The duty to convey a plea bargain*

Trial counsel was ineffective in not advising the defendant that the state had offered a plea bargain of 13 years, where defendant went to trial, was convicted, and was given a life sentence, and where defendant later testified that he would have accepted the plea bargain offered had he known about it. *Ex parte Wilson*, 724 S.W. 2d 72, 74 (Tex. Crim. App. 1987); *accord Ex parte Lemke*, 13 S.W. 3d 791, 796-97 (Tex. Crim. App. 2000).

(4) *The right to testify*

"[D]efense counsel shoulders the primary responsibility to inform the defendant of his right to testify, including the fact that the ultimate decision belongs to the defendant." *Johnson v. State*, No. 1623-03 (Tex. Crim. App. May 25, 2005).

III.
HONESTY AND INTEGRITY

A. The Rules

Rule 3.01: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Rule 3.03. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Rule 3.04. Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible

considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.05. Maintaining Impartiality of Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented

by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) "Matter" has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected.

Rule 3.06. Maintaining Integrity of Jury System

(a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror; or

(2) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected or any juror or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(e) All restrictions imposed by this Rule upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(f) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

(g) As used in this Rule, the terms "matter" and "pending" have the meanings specified in Rule 3.05(c).

Rule 4.02: Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Rule 4.04. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining

evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:

(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

(2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

Rule 5.04: Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order.

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.08. Prohibited Discriminatory Activities

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as "confidential information" under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

Rule 8.03. Reporting Professional Misconduct

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct

the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

(1) by Rule 1.05 or

(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

B. Commentary

Rule 3.01, n. 3

A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client's position ultimately may not prevail. In addition, this Rule does not prohibit the use of a general denial or other pleading to the extent authorized by applicable rules of practice or procedure. Likewise, a lawyer for a defendant in any criminal proceeding or for the respondent in a proceeding that could result in commitment may so defend the proceeding as to require that every element of the case be established.

Rule 3.03, n. 3

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Rule 3.03, n. 9

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering perjurious testimony or other false evidence, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

Rule 3.03, n. 10

The proper resolution of the lawyer's dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer's resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, the lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Rule 3.03, n. 11

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

Rule 3.03, n. 12

The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take reasonable remedial measure which may include revealing the client's

perjury. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence.

Rule 4.02, n. 2

Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government. Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a "second opinion" in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rule 7.02.

Rule 4.02, n. 3

Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

C. Case Law

1. Appointed counsel's duty on appeal

a. The Anders brief

What is appointed counsel's duty when he determines that the defendant's first appeal is frivolous? In *Anders v. California*, trial counsel concluded that his client's appeal was frivolous and he wrote a letter to the court in which he refused to

file a brief and advised that the defendant would file his own brief. The Supreme Court held that this procedure was inadequate. Counsel must be an active advocate, not merely an amicus curiae. 386 U.S. 738, 744 (1967).

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id.

b. Anders in the Fourth Court

The Fourth Court of Appeals has established the following course of action where a court appointed attorney determines the appeal is frivolous under *Anders*:

(1) the attorney shall file a motion requesting permission to withdraw;

(2) accompanying that motion shall be an *Anders* brief and an exhibit showing that counsel sent appellant a copy of the motion and brief and informed him of his right to review the record and file a *pro se* brief;

(3) counsel must "explain 'the details of the procedure to be used in the particular court of conviction to gain access to the record.'"

(4) if the court of appeals determines that *Anders* has been complied with, it will grant the motion to withdraw;

(5) appellant will then have 30 days either to file a *pro se* brief or a motion for extension of time;

(6) After the *pro se* brief is filed, or the time lapses for its filing, the court of appeals will determine if there are arguable grounds for the appeal;

(7) If there are arguable points, the appeal will be abated and new counsel will be appointed to assist the appellant.

See Bruns v. State, 924S.W.2d 176, 177 n. 1 (Tex.App.– San Antonio 1996, no pet.); *see also Nichols v. State,* 954 S.W.2d 83, 86 (Tex.App.-San Antonio 1997, no pet.).

2. Retained counsel's duty on appeal

Anders does not apply to retained counsel. Like appointed counsel, retained counsel has a duty "to refuse to prosecute a frivolous appeal." *Nguyen v. State*, 11 S.W. 3d 376, 378 (Tex. App.–Houston [14th Dist.] 2000, no pet.). Retained counsel is not required to file an *Anders* brief, and, if he does, it will be stricken. Instead, he must file a motion to withdraw that will be evaluated according to the Rules of Appellate Procedure. This motion must be accompanied by a showing that it was served on appellant, and that appellant was advised of impending time deadlines. The appellate court must be provided a current address for the appellant. *Id*. at 379.

3. The limits of zealous advocacy

"Counsel's argument goes beyond the limits of zealous advocacy. He has misrepresented the facts, distorted the record, and falsely accused the trial court of highly unprofessional and unethical conduct. In our opinion, counsel's statements exceed the very broad scope of permissible argument set forth in rule 3.01 of the Texas Disciplinary Rules of Professional Conduct." *Bond v. State*, 2004 WL 2066525 *4 n.3 (Tex. App.–Houston [1st Dist.] 2004, no pet. h.).

4. Rule 3.03(a)(5) and perjury

What do you do when you *know* your client intends to commit perjury? First, do not be too quick to cry "perjury." How do you *know* the intended testimony is perjury? But if, somehow, you do, consider (at the risk of really confusing yourself) two cases -- *Nix v. Whiteside*, 475 U.S. 157 (1986) and *Maddox v. State*, 613 S.W. 2d. 275 (Tex. Crim. App. 1981).

In *Nix*, the Court rejected respondent's complaint that he had been denied the effective assistance of counsel when his trial lawyer dissuaded him from committing perjury. "[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury." *Nix v. Whiteside*, 475 U.S. at 173.

In *Maddox*, trial counsel apparently concluded, before calling the defendant, that he was going to perjure himself. Failing to persuade him not to testify, counsel moved to withdraw, and their motion was denied. Counsel then requested that the defendant represent himself while testifying, and this request was granted by the court. Defendant then testified in a narrative form, without participation of counsel. *Id.* at 277. Calling this "one of the hardest questions a criminal defense lawyer faces," the court of criminal appeals cited a number of secondary sources. *Id*. at 279-280. The court first recognized that "[e]xperienced and conscientious people can come to different conclusions about how to deal with the conflict." *Id*. at 280. Then, without answering the difficult question, the court held that the defendant was not denied the effective assistance of counsel, either by counsel's motion to withdraw, or by their permitting him to testify in narrative form. *Id*. at 284. Dissenting judges wrote to "make it clear that no panacea for the difficult problem of the perjurious client has been presented here." *Id*. at 287.

5. A permissible ex parte discussion under Rule 3.05(b)

In *Ake v. Oklahoma*, 470 U.S. 68 (1986), the Court held that an indigent defendant may make his threshold showing of the need for a court-appointed expert *ex parte*. Proceeding *ex parte* may be a very valuable right, necessary to avoid exposing your defensive theories prematurely. *See Williams v. State*, 958 S.W. 2d 186, 193-94 (Tex. Crim. App. 1997). The right to an *ex parte* hearing is waived absent a request to do so at trial. *Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999).

6. Rule 5.08 and *Batson*

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court recognized that purposeful racial discrimination in jury selection violates a defendant's right to equal protection of the law. *Id*. at 86. This practice is also prohibited by article 35.261 of the Texas Code of Criminal Procedure.

7. The duty to cite adverse authority

Ibarra v. State, 782 S.W. 2d 234 (Tex. App.–Houston [14th Dist.] 1989, no pet.)(chastising counsel for not attempting to distinguish, or even mentioning adverse authority contained in one of his own earlier, published, cases)

8. Reporting unauthorized jury contacts

In *Mize v. State*, 754 S.W. 2d 732, 740 (Tex. App.–Corpus Christi 1988, pet. ref'd), the district attorney learned that someone had made threatening calls to a juror during the trial, but the prosecutor did not report it. The prosecutor's failure to alert the court to jury tampering violated the rules of professional responsibility, but it was not reversible error.

9. Second opinions are authorized, even if without consent

"Rule 4.02(d) permits an otherwise prohibited communication if it is initiated by the client." *In re Medrano*, 956 F. 2d 101, 103 (5th Cir. 1992).

10. Threatening criminal prosecution

A lawyer was properly disciplined for the following threats:

> Why don't you tell me what you are willing to pay me. I don't want to go to the District Attorney's office. I have sworn affidavits of the people you've been questioning and talking to. There is an antistalking law in Texas. I don't know how ugly you want to get with me, but you are going about this the wrong way, Mr. Del Castillo. If you want me to press criminal charges against you, I can do that right now.... I wish you would just sit down with me, agree to pay me something, and you can go your way and I'll go my way. But if you want to make trouble for me, I can assure you that you're violating the law, and you can be put in jail for what you are doing. I have sworn affidavits against you. *** Do you want me to file criminal charges against you? *** Fine. Then I suggest you get yourself a criminal defense lawyer if you want to stalk me.

Weiss v. Commission for Lawyer Discipline, 981 S.W.2d 8, 18 (Tex. App.–San Antonio 1998, rev. den.).

11. Do not split fees with your investigator

Sharing legal fees with an investigator/paralegal based on his involvement in a particular case is improper. *State Bar of Texas v. Faubion*, 821 S.W. 2d 203, 208 (Tex. App.–Houston [14th Dist.] 1991, writ denied).

IV.
CONFIDENTIALITY

A. The Rules

Rule 1.05. Confidentiality of Information

(a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

B. TEX. R. EVID. 503

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A "representative of the client" is:

(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or

(B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) Rules of Privilege.

(1) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) Special rule of privilege in criminal cases. In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's

representative by reason of the attorney-client relationship.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

C. EXPERTS

1. TEX. CODE CRIM. PROC. ANN. 39.14(b)

"On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to

present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins."

Rule 4.02(b)

In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.02(b), n. 3

"Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large."

V.
CONFLICTS

A. The Rules

Rule 1.06. Conflict of Interest: General Rule

* * * * *

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the

lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Rule 1.08. Conflict of Interest: Prohibited Transactions

* * * * *

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

* * * * *

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyer's independence of professional

judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

* * * * *

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

* * * * *

Rule 3.08. Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

B. Case Law

1. The Sixth Amendment guarantees representation free from conflicts of interest. *Wood v. Georgia,* 450 U.S. 261, 271 (1981); *See also Ex parte McCormick*, 645 S.W. 2d 801, 806 (Tex. Crim. App. 1983)(where same lawyer represented two defendants charged with capital murder, the convictions were reversed because that lawyer could not "simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty"); *but see Ex parte Prejean*, 625 S.W. 2d 731, 733 (Tex. Crim. App. 1981)(trial court erred in disqualifying counsel because of conflict of interest in capital case, because defendant may waive conflict).

2. In *Ramon v. State*, 159 S.W. 3d the prosecutor called herself to testify on a collateral matter before the jury. The court of criminal appeals "agree[d] that the prosecutor's behavior was improper." *Id*. at 931. The court did not reverse the conviction, though. "Given the strength of the evidence against appellant, the court's instruction to the jury to disregard the prosecutor's testimony, and the tangential nature of that testimony, we do not find an abuse of discretion in the trial court's failure to declare a mistrial." *Id*. at 932.

3. Interestingly, the same prosecutor in *Ramon* called the defense lawyer as a witness in *Flores v. State*, 155 S.W. 3d 144 (Tex. Crim. App. 2004). This time, the court reversed:

> The adversary system of justice is predicated upon the proposition that justice will most surely prevail when adversaries are pitted one against the other. Under that system, it is the sworn duty of defense counsel to use all honorable and legal means to defend a client charged with a crime. It is inconceivable that a lawyer, seeking to convince a jury of the innocence of his client, or that the accused has not

> been proven guilty, can perform that high duty when he assumes the dual role of defense counsel and witness for the prosecution. Such a procedure sullies the entire legal profession. More particularly, it is manifestly unfair to the honorable trial counsel in this case, who was forced, against his will, to testify against the very client he was sworn to defend; his credibility as a lawyer immediately becomes suspect in the eyes of the jury. Above all, it was unfair to the defendant, who was convicted with the help of his own lawyer's testimony.
>
> Thus, in accordance with our holding today, the State may indeed call defense counsel to the stand, and the court may require the lawyer testify, but the State will do so at its own peril.

Id. at 151.

4. In *Powers v. State*, 2005 WL 1398110 (Tex. Crim. App. 2005), Williams was a police officer who investigated a DWI case in Tarrant County. By the time the case got to trial, Williams had become a Tarrant County prosecutor. He took no part in the case as a prosecutor, but was permitted to testify as a fact witness at trial. The court of appeals held that the trial court erred under Rule 3.08 when it permitted Williams to testify. The court of criminal appeals disagreed. Rule 3.08 does not apply because Williams did not serve as an "advocate" in the case. Because Williams did not serve as an advocate and a witness, he did not serve dual roles, and the trial court did not abuse its discretion when it admitted his testimony. *Id*. at *3.

5. The trial court did not err when it disqualified appellant's attorney under Rule 3.08. According to the state, the lawyer was a potential witness. When determining whether to disqualify a lawyer as a potential witness, the courts use Rule 3.08 as a guideline. "Counsel may be disqualified under the disciplinary rules when the opposing party can demonstrate actual prejudice resulting from opposing counsel's service in the dual role of advocate-witness." *Gonzalez v. State*, 117 S.W. 3d 831 (Tex. Crim. App. 2003).

VI.
PUBLICITY

A. The Rules

Rule 3.07. Trial Publicity

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;
>
> (3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
>
> (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation;

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

> (i) the identity, residence, occupation and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time and place of arrest; and
>
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

VII.
FEES

A. The Rules

Preamble: A Lawyer's Responsibilities

* * * * *

6. "A lawyer should render public interest legal service. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally. A lawyer may discharge this basic responsibility by providing public interest legal services without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, the administration of justice, and by financial support for organizations that provide legal services to persons of limited means."

Rule 6.01. Accepting Appointments by a Tribunal

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of law or rules of professional conduct;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Rule 1.04. Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted

before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, and

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a). other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph

(f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

B. Commentary

Rule 6.01, n. 1

A lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services. For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.01, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. Compare Rules 1.06(b), 1.15(a)(2), 1.15(b)(4). A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. Compare Rule 1.15(b)(6). However, a lawyer should not seek to decline an appointment because of such factors as a distaste for the subject matter or the proceeding, the identity or position of a person involved in the case, the lawyer's belief that a defendant in a criminal proceeding is guilty, or the lawyer's belief regarding the merits of a civil case.

Rule 6.01, n. 2

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from

assisting the client in violation of the Rules.

Rule 6.01, n. 4

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. Frequently, however, the needs of such a client for a lawyer's services are particularly pressing and, in some cases, the client may have a right to legal representation. At the same time, either financial considerations or the same qualities of the client or the client's cause that make a lawyer reluctant to accept employment may severely limit the client's ability to obtain counsel. As a consequence, the lawyer's freedom to reject clients is morally qualified. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Rule 6.01, n. 5

An individual lawyer may fulfill the ethical responsibility to provide public interest legal service by accepting a fair share of unpopular matters or indigent or unpopular clients. History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse. Likewise, a lawyer should not reject tendered employment because of the personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community.

VIII.
SPECIAL OBLIGATIONS OF PROSECUTORS

A. The Rules

Rule 3.09. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

B. The Constitutional Obligation To Disclose Exculpatory Evidence

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the Due Process Clause requires the state to disclose to the defense exculpatory evidence in its possession, irrespective of good or bad faith. *See also United States v. Bagley*, 473 U.S. 667, 676 (1985)(impeachment evidence also falls within the *Brady* rule).

C. The Texas Code Of Criminal Procedure

It is the primary duty of the prosecutor, "not to convict, but to see that justice is done. . . ." TEX. CODE CRIM. PROC. ANN. art. 2.01.