

***THE NUTS AND BOLTS OF PRACTICING CRIMINAL LAW  
A DEFENSE PERSPECTIVE***

**COURT HOUSE TOUR  
SAN ANTONIO YOUNG LAWYER'S ASSOCIATION**

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**I.**  
**THE SKILLS NECESSARY TO BE AN  
EXCELLENT CRIMINAL DEFENSE LAWYER**

- A.    *Investigation and discovery***
- B.    *Pre-trial motions***
- C.    *Jury selection***
- D.    *Trial advocacy***
  - 1.    *Opening statement***
  - 2.    *Examination of witnesses***
  - 3.    *Making and responding to objections***
  - 4.    *Summation***
  - 5.    *Sentencing***
- E.    *The books***
- F.    *Plea bargaining***

**II.**  
**SOME VERY GENERAL ADVICE TO YOUNG LAWYERS ABOUT  
THE PRACTICE OF CRIMINAL LAW**

- A.    *Do more than the rules and cases require***

As you will see, the case law and the rules of professional conduct do not require much of lawyers representing persons accused of crime. Please understand that good lawyers will not be satisfied to perform merely at the level of minimal acceptability.

- 1.    *Constitutional Duties***
  - a.    *Federal and State***

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. Two lines of cases, though, are instructive.

*i. 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 federal district court appears to take a different view. See *Burdine v. Johnson*, 65 F. Supp. 2d 854, 864 (S. D. Tex. 1999).

*ii. 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.

**2. Ethical Duties**

***a. STATE BAR RULES art. XII, § 8, Canon 7 (Repealed)***

Canon 7 of the former Code of Professional Responsibility provided the following: "A lawyer should represent a client zealously within the bounds of the law." Although this was a nicely turned phrase, the former Code of Professional Responsibility was repealed by the Texas Supreme Court in 1983. Since January 1, 1990, Texas lawyers have been governed by the Texas Disciplinary Rules of Professional Conduct.

***b. TEX. DISCIPLINARY R. PROF. CONDUCT 1.01(b)***

The requirement of zealous representation does not expressly appear in the new rules themselves:

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.

TEX. DISCIPLINARY R. PROF. CONDUCT 101(b)(1989), *reprinted in* TEX. GOV'T CODE ANN. tit.2, subtit. G app. (Vernon 1998)(STATE BAR RULES art. X, § 9).

**c.      *Commentary***

Comment Seven to Rule 1.01 is somewhat more expansive:

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.

**B.      *Remember who you work for***

**1.      *TEX. DISCIPLINARY R. PROF. CONDUCT 1.02***

A lawyer in a criminal case shall abide by his or her client's decisions:

1.      "as to the plea to be entered;"
2.      "whether to waive jury trial; and,"
3.      "whether the client will testify."

TEX. DISCIPLINARY R. PROF. CONDUCT 1.02.

**C.      *Beware of the collateral consequences***

Never forget that decisions made in the courtroom always have consequences outside the courtroom, and indeed, that these collateral consequences are sometimes much more serious. The following is a decidedly non-exhaustive list of collateral consequences, intended to give you a flavor of what to expect:

**1.      *Immigration.*** You may feel that you have done your client a great service by plea bargaining his charge down to some seemingly minor theft offense. In fact, if your client is not a United States citizen, what you may have done is insure that he will be deported for life, regardless of his length of residence in this country, regardless of his family ties, and regardless

of any mitigating circumstances whatsoever. Federal immigration laws are both draconian and enormously complex. Thomas J. Esparza, Jr., an Austin lawyer, presented a useful paper at the State Bar's 1999 Advanced Criminal Law Course. Thomas J. Esparza, *Criminal Acts and the Consequences for Foreign Nationals*, 1999 Advanced Criminal Law Course (State Bar of Texas, July, 1999). Read this paper before going to court.

**2. Probation or parole.** Similarly, pleading your client guilty or nolo contendere to a lesser offense may be a great resolution for some clients; if, however, that client is on probation or parole for another offense, a plea might cause his probation or parole to be revoked, and result in a trip to prison. Make sure of your client's status before you plead.

**3. Sex offender registration.** If your client (adult or juvenile) is convicted (including a deferred adjudication) of a variety of enumerated "sex offenses" he may have to register for the rest of his life as a sex offender. See TEX. CODE CRIM. PROC. ANN. arts. 62.01-62.12. For some people, registration is more to be avoided than trial and possible conviction. Effective September 1, 1999, "[b]efore accepting a plea of guilty or nolo contendere [for these sorts of offenses] the court shall ascertain whether *the attorney representing the defendant* has advised the defendant of registration requirements under Chapter 62." See TEX. CODE CRIM. PROC. ANN. art. 26.13(h)(emphasis supplied).

**4. Suspension of driver's licenses.** Conviction for certain offenses require the suspension of the defendant's driver's license. See TEX. TRANSP. CODE ANN. § 521.341(criminally negligent homicide in a motor vehicle; evading arrest; driving while intoxicated; intoxication assault with a motor vehicle; intoxication manslaughter; motor vehicle felonies; failure to stop and render aid resulting in injury or death; use of fictitious license); TEX. TRANSP. CODE ANN. § 521.372(drug offenses). How many people in San Antonio can easily manage without a driver's license?

**5. Professional licenses.** One convicted of certain crimes may be ineligible to be licensed to practice some professions. *E.g.*, RULES GOVERNING ADMISSION TO THE BAR, Rule III(d) (1992)(a period of ineligibility attaches to anyone convicted of a felony). Conviction of certain crimes can result in the suspension of some professional licenses. *E.g.*, TEX. R. DISCIPLINARY P. 8.04 (1992)(attorney convicted of "intentional crime" shall be suspended).

**6. Insurance premium surcharges.** Certain alcohol related driving offenses can cause an increase in your clients's insurance payments. See TEX. INS. CODE ANN. Art. 5.03-1.

**7. Guns.** Convictions for some crimes may make your client ineligible to possess a firearm. See 18 U.S.C. § 922; TEX. PENAL CODE ANN. § 46.04. Or to obtain a license to carry a concealed handgun. See TEX. GOV'T CODE ANN. § 411.172(a). Guns are *very* important to many people in South Texas, and your client deserves to know -- in advance -- whether what he does in court will take away his weapons of choice.

**8. Employment.** People are fired all the time, and others are not considered for hiring to begin with, because they have been convicted of crimes. The military will not take

people with certain criminal records.

**D. *Don't be bullied***

1. 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. Most prosecutors are fully cognizant of the awesome power they have, and take their responsibilities very seriously. Still, ours is an adversarial system, and prosecutors -- as do defense attorneys -- like to prevail, within the bounds of the law. Occasionally a prosecutor (and, occasionally, a defense lawyer) will try to bully a less experienced opponent. The tone of their voice may become inordinately hostile, the content of their speech may become insulting, or threatening. You may be accused of ignorance, incompetence, and -- the cruelest cut of all -- unethical behavior, if you fail to see the case their way. Maybe you really are ignorant, incompetent or unethical, but don't assume that you are just because your opponent says so. You have a license to practice law, just like your opponent, but only you represent your client. Seek advice from those whom you trust, figure out what is the right course of action for your client, and pursue it. Ignored the undeserved hostility.

2. One also sometimes hears of the bullying judge. Unquestionably, lawyers must show respect for all judges they appear before. A judge, though, is no more entitled to bully you than is you opponent, and when he or she tries you must remember it is your primary duty to represent your client. This may be one of the most challenging tasks you face as a new lawyer.

**E. *Don't be a bully***

1. The prosecutor is your opponent, not your enemy.
2. The courts's staff are people, too.
3. Come to the judge with the sword of righteousness, not the assassin's dagger.

**F. *Represent the poor as diligently as the rich***

Lawyers do not take vows of poverty and there is nothing wrong with being fairly compensated for your work. On the other hand, the criminal lawyer has no higher calling than to diligently represent his or her fair share of poor people. Luckily for you, the young lawyer will have ample opportunity to do so.

**1. *Court Appointments***

**a. *Felonies***

If you are interested in being appointed to represent persons accused of felonies, contact Gabriel Gonzales in the San Antonio Bar Association, 227-8822, to be placed on the “wheel” comprising lawyers eligible for such appointments. Also introduce yourself to the court coordinators in each of the District Courts, and let them know you are interested in being

appointed when attorneys are needed in appeals and motions to revoke probation.

***b. Misdemeanors***

There are two primary ways to be appointed to represent persons accused of misdemeanors.

i. County Courts at Law Numbers Two, Four and Nine rely on the centralized selection system maintained by the County Courts at Law Administration Office, located in suite 4071, Bexar County Justice Center. Interested lawyers must be in the Bexar County Attorney System Data Base and must register in the County Courts at Law Administration Office. Their names will be placed on an assignment roster in the mainframe computer, and they will be selected for appointments to these courts as needed, on a rotational basis.

ii. County Courts at Law Numbers One, Five, Six, Seven, Eight, Ten and Eleven are run by the Judges and Coordinators of those Courts. Lawyers interested in appointments there should speak to the Coordinators.

***c. Bonus***

Lawyers who have been in practice for at least one year may seek “bonus” appointments in felony cases, pursuant to the “San Antonio Plan.” In these cases, participating lawyers are paid additional money. Interested lawyers should contact fill out an application with Gabriel Gonzales, San Antonio Bar Association, 227-8822.

***d. Other Counties***

Surrounding counties are often happy for San Antonio lawyers to handle their court appointments. Contact the Court Coordinators there if you are interested.

***2. Experts and investigators***

Lawyers who represent paying clients often rely heavily on expert witnesses and investigators. Counsel for poor people are also entitled to assistance. Article 26.05 of the Texas Code of Criminal Procedure provides for reimbursement “for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony. . . .” *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), holds that an indigent defendant is entitled to an expert to “assist in evaluation, preparation, and presentation of the defense.” *See also DeFreece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993). Do not be shy about requesting the trial court to appoint experts and investigators you need to represent your client effectively.

***G. Get an honest accountant and follow his or her advice***

***H. Be brief***

I never got in trouble for something I did not say. Well, almost never.

***I. Take a vacation***

***J. Don't lie, cheat or steal***

***K. Don't lightly accuse your colleagues of lying, cheating or stealing***

***L. Resources***

***1. Other lawyers***

- a. Watch them in court.
- b. Ask them questions.
- c. Volunteer to help.

***2. Organizations***

- a. San Antonio Criminal Defense Lawyers Association  
Mark Stevens, President 2000-2001  
401 South Presa  
San Antonio, Texas 78205  
(210) 226-2566  
(210) 224-5722 (fax)
- b. Texas Criminal Defense Lawyers Association  
Robert Hinton, President 2000-2001  
600 West 13th Street  
Austin, Texas 78701  
(512) 478-2514  
(512) 469-9107 (fax)
- c. National Association of Criminal Defense Lawyers  
Edward Mallett  
1025 Connecticut Ave. NW, Suite 901  
Washington, DC 20036  
(202) 872-8600  
(202) 872-8690 (fax)

***3. Seminars***



**a. *Advanced Criminal Law Course.*** Every year in late July the State Bar puts on a four day seminar at which some of the best lawyers in the state write and speak on a variety of topics concerning state and federal criminal law, procedure and evidence. Next year's course will be held in Corpus Christi.

**b. *San Antonio Criminal Law Institute.*** This is the oldest, and one of the best, seminars in Texas on the subject of criminal law, held every spring in San Antonio. Contact the San Antonio Bar Association for details.

**c. *Criminal Trial Advocacy Institute.*** This six day course is held yearly in Huntsville, on the campus of Sam Houston State University and uses Texas practitioners to teach criminal trial advocacy to students of all levels of experience. Contact the Texas Criminal Defense Lawyers Association for details.

**d. *Annual Rusty Duncan Advanced Criminal Law Seminar.*** This four day seminar is sponsored by the Texas Criminal Lawyers Association and is held each year in San Antonio, usually in June. It is similar to the Advanced Course put on by the State Bar, except that it covers only state law topics. In addition to the Duncan seminar, the Texas Criminal Defense Lawyers Association and its Criminal Defense Lawyers Project regularly sponsor useful seminars concerning both law and practical skills.

**e. *Monthly CLE programs from the San Antonio Criminal Defense Lawyers Association.*** Approximately monthly, the San Antonio Criminal Defense Lawyers Association sponsors an hour or so of CLE concerning a variety of criminal law and procedure topics. The Honorable Charles Baird will speak on October 19, 2000, at 12 noon on the Fifth Floor of the Bexar County Courthouse. Admission is free to members.

#### **4. *Books***

a. You just have to buy *current* versions of the Texas Penal Code, the Texas Code of Criminal Procedure, the Texas Rules of Evidence and the Texas Rules of Appellate Procedure, and, for juvenile cases, the Texas Family Code. The remaining books on this list are readily available in the community and can be borrowed or consulted when needed.

b. Course books published annually by the State Bar of Texas in connection with its Advanced Criminal Law Seminar.

c. 7, 7A, 8 MICHAEL J. MCCORMICK, THOMAS D. BLACKWELL & BETTY BLACKWELL, TEXAS CRIMINAL FORMS AND TRIAL MANUAL (Texas Practice 1995).

d. TEXAS CRIMINAL PRACTICE GUIDE (Matthew Bender 1999).

e. GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS (2d Ed. 1993).

- f. PAUL J. McCLUNG & W. SCOTT CARPENTER, TEXAS CRIMINAL JURY CHARGES (1999 ed.).
- g. 40, 41, 42, 43 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE (Texas Practice 1995).
- h. MICHAEL B. CHARLTON, TEXAS CRIMINAL LAW (Texas Practice 1994).
- i. PAT PRIEST, TEXAS COURTROOM CRIMINAL EVIDENCE (Lexis 1998).
- j. LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (Michie 1993).

Richard Anderson

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.

TX ST RPC Preamble

> 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.

## TX ST RPC Rule 1.01

### > 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.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) 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 substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

## TX ST RPC Rule 1.02

> 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 agreement for division of a fee between lawyers who are not in the same firm shall not be made unless:

(1) the division is:

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

(ii) made with a forwarding lawyer; or

(iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation;

(2) the client is advised of, and does not object to, the participation of all the lawyers involved; and

(3) the aggregate fee does not violate paragraph (a).

(g) Paragraph (f) of this Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

#### TX ST RPC Rule 1.04

#### > 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).

## TX ST RPC Rule 1.05

### > Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(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.

## TX ST RPC Rule 1.06

### > Rule 1.08. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(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.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(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.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client with out first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(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.

(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

#### TX ST RPC Rule 1.08

##### > Rule 1.09. Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client; or

(2) if the representation in reasonable probability will involve a violation of Rule 1.05.

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

#### TX ST RPC Rule 1.09

##### > 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.

## TX ST RPC Rule 1.15

### > 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.

### TX ST RPC Rule 3.03

#### > 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.

#### TX ST RPC Rule 3.04

#### > 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.

#### TX ST RPC Rule 3.05

#### > 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).

## TX ST RPC Rule 3.06

### > 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.

#### TX ST RPC Rule 3.07

#### > 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.

## TX ST RPC Rule 3.08

### > 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.

## TX ST RPC Rule 3.09

### > 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.

## TX ST RPC Rule 4.04

### > 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.

#### TX ST RPC Rule 5.08

#### > 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.

#### TX ST RPC Rule 6.01

#### > 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.

TX ST RPC Rule 8.03