Appellate Ethics

FOR THE 40TH ANNUAL ADVANCED CRIMINAL LAW COURSE

This paper was prepared by Stacey M. Goldstein, Assistant State Prosecuting Attorney, for Judge Michael Keasler's 2014 Presentation: Appellate Ethics: Avoiding the Dreaded "Personal & Confidential" Envelope from the State Bar.

The governing criteria under which our professional conduct and performance is judged is established by: (1) statute, (2) case law, (3) appellate court rules, like the Lawyers Creed and Standards for Appellate Conduct, promulgated by Texas' high courts, (4) Rules of Evidence, and (5) Disciplinary Rules of Professional Conduct. This paper provides an overview of ethical issues pertaining to criminal appellate practice within the framework of the Disciplinary Rules. Being familiar with these laws and rules is essential to avoid the dreaded "Personal & Confidential" envelope from the State Bar.[1]

Competence and Diligence

Rule 1.01(a) provides that an attorney should not agree to handle any matter beyond the attorney's level of competence. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.01(a). There are two exceptions: first, when an additional competent attorney assists in the matter with the client's consent, and, second, when otherwise-incompetent counsel's assistance is required due to an emergency and the assistance is limited to matters of urgency. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.01(a)(1)-(2). Counsel also has the duty not to neglect any matter or fail to complete all services owed to a client. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.01(b). Neglect means "inattentiveness involving a conscious disregard for the responsibilities owed." TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.01(c).

The Texas Supreme Court's Professional Ethics Committee resolved a potential conflict between Rule 1.01's competency requirement and Rule 6.01's directive that an attorney not avoid court-appointed representation. The committee determined that an attorney's inability to competently handle a matter serves as "good cause" to excuse an appointment. Opinion 477, Supreme Court of Texas Professional Ethics Committee (June 1991). The El Paso Court of Appeals later elaborated on the "good cause" element involved in the interaction between Rules 1.01 and 6.01:

> when an attorney obtains a representation by appointment, the attorney may not merely decline the representation as provided under the more general Rule 1.01(a), but must 'seek to avoid' the appointment only for good cause pursuant to Rule 6.01. We find the phrase 'seek to avoid appointment by a tribunal' implies a showing to the tribunal of good cause. In other words, the attorney may not simply decide that he or she is not competent to handle the appointed matter and decline or refuse the representation without the

[1] This paper does not include any discussion about *Brady* or the Michael Morton Act because other speakers will be covering those topics in-depth.

court's permission.

Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927, 933 (Tex. App.—El Paso 1999, pet. denied), cert. denied, 529 U.S. 1022 (2000). The court also observed that Rule 1.15(c), which requires counsel to continue representation despite having "good cause" when ordered to do so by a court, shields an attorney claiming incompetence from any perceived "ethical repercussions" because it requires counsel to "accede to the tribunal's ruling." *Id*. at 935.

With respect to criminal appellate law, an attorney's competence is usually assessed under the Sixth Amendment ineffective assistance of counsel standard. A convicted person is entitled to effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Ineffective assistance is shown when counsel's failure to raise an issue on appeal was objectively unreasonable and the issue would have prevailed. *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000) (finding the *Strickland* standard applicable to a claim that appellate counsel was ineffective for concluding that the client's appeal was frivolous).

The Court of Criminal Appeals has held that an attorney deemed incompetent due to suspension or disbarment is not necessarily constitutionally ineffective.[2] *Cantu v. State*, 930 S.W.2d 594, 602-03 (1996); *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). In such cases, the facts will be reviewed on an *ad hoc* basis, and courts will consider the following non-exclusive factors:

> (1) severity of the sanction (suspension versus disbarment; length of suspension), (2) the reasons for the discipline, (3) whether the discipline was based upon an isolated incident or a pattern of conduct[,] (4) similarities between the type of proceeding resulting in discipline and the type of proceeding in question, (5) similarities between kinds of conduct resulting in the attorney's discipline and any duties or responsibilities the attorney had in connection with the proceeding in question[,] (6) temporal proximity between the conduct for which the attorney was disciplined and the proceeding in question, and (7) the nature and extent of the attorney's

[2] Note that an attorney who continues to practice law after having been automatically suspended due to the failure to pay membership dues violates Rule 8.04(10), which prohibits practicing law when the right has been suspended or terminated. *Commission for Lawyer Discipline v. Sherman*, 945 S.W.2d 227, 229 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

professional experience and accomplishments.

Cantu, 930 S.W.2d at 602-03. However, the Court recognized that a case-by-case evaluation is not needed when the reason for the suspension or disbarment was so egregious that the attorney is deemed incompetent *per se* or the grounds demonstrates that counsel is incompetent only in a particular situation. *Id.* at 602.

Sub-standard filings and the failure to meet filing deadlines demonstrate incompetence and neglect. Even though a habeas applicant sentenced to death is not entitled to effective assistance of counsel under the Sixth Amendment, the applicant is entitled, under Texas Code of Criminal Procedure Article 11.071, to competent counsel. *Ex parte Graves*, 70 S.W.3d 103, 113-14 (Tex. Crim. App. 2002). Habeas attorneys should be mindful of Texas Code of Criminal Procedure Article 11.071's pleading requirements. *Ex parte Medina*, 361 S.W.3d 633, 647 (Tex. Crim. App. 2011) (Keasler, J., dissenting). Counsel should not file "bare-bones" grounds. *Id*. "Because the burden is on the applicant, the courts are not responsible for delving into the record, investigating the case, and then formulating a habeas applicant's claims." *Id*. The failure to satisfy the requirements, whether intentional or not, could result in a referral to the State Bar. *Id*. Referral is not the only sanction available. An attorney who files a deficient habeas application or fails to timely file a brief could also be held in contempt, removed from representation, and prevented from receiving future appointments. *Ex parte Kerr*, 64 S.W.3d 414, 421 (Tex. Crim. App. 2002); *Guillory v. State*, 557 S.W.2d 118, 120 (Tex. Crim. App. 1977).

Abiding by the Rules of Appellate Procedure governing form is also fundamental to render competent assistance because non-conforming documents may be stricken. TEX. R. APP. P. 9.4(j).

Communication

Rule 1.03 requires adequate communication between attorney and client. The client must be kept "reasonably informed," and counsel must promptly respond to a client's information request. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.03(a). Counsel is also required to explain a matter so that the client can make informed decisions about the representation. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.03(b).

Compliance is judged according to the quality of the information relayed, not the quantity. *James v. Commission for Lawyer Discipline*, 310 S.W.3d 598, 611 (Tex. App.—Dallas 2010, no pet.). One of most important duties frequently neglected by appellate counsel is the obligation to inform the defendant of the outcome of the appeal and the right to file a

pro se petition for discretionary review. *Ex parte Wilson*, 956 S.W.2d 25, 27 (Tex. Crim. App. 1997); *Ex parte Riley*, 193 S.W.3d 900, 901 (Tex. Crim. App. 2006). Even when an attorney files an *Anders* brief, *see Anders v. California*, 386 U.S. 738 (1967), counsel is obligated to inform the client of the right to file a *pro se* petition for discretionary review. *Ex parte Owens*, 206 S.W.3d 670, 674 (Tex. Crim. App. 2006). Counsel's failure to comply with the PDR notification requirement is evaluated under a modified *Strickland v. Washington*, 466 U.S. 668 (1984), standard. *Id*. It must be shown that the client was entitled to be in the appellate process and would have timely filed a petition. *Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005).

Confidential Information

Rule 1.05 governs attorney-client confidentiality.[3] As a general rule, it prohibits an attorney from revealing the confidential information of a current or past client. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.05(a)(1). This rule is circumscribed by the so-called crime-fraud exception: confidential information can be revealed when counsel is required to do so by Rule 3.03(a)(2), which mandates that an attorney disclose information to avoid assisting in a criminal or fraudulent act. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.05(f).

Relying, in part, on Rule 1.05, which embodies the fiduciary attorney-client relationship, the Court of Criminal Appeals held that a client's file belongs solely to the client. *In re McCann*, 422 S.W.3d 701, 708 n.14 (Tex. Crim. App. 2013); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(d) (an attorney may retain client papers if permitted by law and retention will not prejudice the client). As a result, the Court held that a lower court judge cannot order appellate counsel to transfer his client's file to the client's habeas counsel when the client objects. *In re McCann*, 422 S.W.3d at 710-11.

The Court of Criminal Appeals has addressed when, for purposes of Texas Rule of

[3] Rule 1.05(a) states: "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 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.

Evidence 503, the attorney-client privilege attaches. *Mixon v. State*, 224 S.W.3d 206, 208-12 (Tex. Crim. App. 2006). The Court held that it attaches when the client consults with an attorney with the view of employing counsel. *Id*. at 208. This is so even if the client ultimately does not employ counsel. *Id*. Therefore, any information relayed at this time is privileged and cannot be disclosed. *Id*. To hold otherwise, the Court stated, would result in a "chilling effect on defendants' willingness to be candid with the lawyer whose services they seek to obtain." *Id*. at 211. And counsel's best interests would not be served because counsel would have to agree to represent the defendant before getting all of the information needed to make that initial determination. *Id*. at 212.

The Professional Ethics Committee has also addressed the Rule's application in several opinions. First, in 1991, the Committee considered whether an attorney, appointed to represent an indigent defendant, can disclose the fact that his client was not actually indigent when counsel was appointed. Opinion 473, Supreme Court of Texas Professional Ethics Committee (June 1991). Citing the crime-fraud exception, the Committee answered in the affirmative. *Id*. Applying the same reasoning, the Committee also stated that counsel has a duty to disclose a subsequent change in the client's indigent status due to newly obtained employment that would enable the client to pay for counsel. *Id*.

In 2005, the Committee was asked to decide whether appointed counsel is permitted to provide a statement itemizing the work performed on behalf of the client—including the subject matter or records and documents reviewed and legal research conducted—to obtain payment from the court. Opinion 559, Supreme Court of Texas Professional Ethics Committee (July 2005). The Committee stated that, in the absence of the client's consent, such an itemized statement is prohibited. *Id*. But a general description of services and hours, e.g., the number of hours devoted to research, is allowed. *Id*. Regarding consent, the Committee stated that informed consent is required; therefore, counsel must advise the client that disclosure may adversely affect the client. *Id*. Consent given in advance of the itemized statement would not constitute informed consent because it would be premature. *Id*.

Finally, in 2006, the Committee considered whether counsel, without the client's consent, can deliver documents containing confidential information to an independent-contractor copy service. Opinion 572, Supreme Court of Texas Professional Ethics Committee (June 2006). In the Committee's view, when there is no prior objection by the client, it does not constitute "revealing" confidential information within the meaning of the Rule. *Id*. The Committee qualified this statement, however, stating that counsel must reasonably believe that the contractor will respect the confidential character of the items. *Id*.

Conflict of Interest[4]

Rule 1.06, which outlines the general rules about conflicts of interest, prohibits an attorney from representing a person if it involves "a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client" or counsel's firm. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.06(b)(1). Representation is also barred when it would be adversely limited by the attorney's responsibilities to another client or the firm's interest. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.06(b)(2). These rules are not absolute. If counsel believes the representation will not be materially affected and the client consents after a full disclosure of all relevant information, representation is permitted. TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.06(c)(1)-(2).

The Professional Ethics Committee has decided that an assistant district attorney's spouse may not represent defendants in the same county, even if the spouses do not appear against each other and the prosecutor spouse is not directly involved in defense-spouse's case. Opinion 539, Supreme Court of Texas Professional Ethics Committee (April 2002). The Committee reasoned that a conflict exists by virtue of their individual and reciprocal interest in professional success. *Id*. Therefore, defense counsel spouse would have to comply with the disclosure requirement with respect to defendants. *Id.* The DA's office would also have to disclose the information and could, perhaps, condition consent on an agreement that the prosecutor spouse will not participate in any manner. *Id*. If the State does not consent, the Committee concluded that the entire DA's office would be prohibited from representing the State. *Id*. However, the Committee noted that it was unable to find a law authorizing a particular person to consent on behalf of the State; therefore, it appears that the DA's office would be conflicted out anyway. *Id*.

A spousal-based conflict of interest issue was addressed by the Tyler Court of Appeals in *Haley v. Boles*. 824 S.W.2d 796, 797-98 (Tex. App.—Tyler 1992, no pet.). There, the court held that a court-appointed defense attorney had a conflict of interest in defending his client because his law partner was married to the district attorney. *Id*. at 797. The court reasoned that the circumstances may suggest that the defendant's right to effective assistance of counsel will be compromised, that counsel's independence may be diminished, and that counsel may be affected by his partner's financial interest in his wife's success. *Id*. at 787-98.

[4] For an in-depth understanding of conflicts of interest, please see Wilkinson, Edward L., *Conflicts of Interest, Disqualification, Recusal & Withdrawal of Counsel, & the Advocate-Witness Rule,* Texas District and County Attorneys Association (2010).

Regarding public defenders offices, the Professional Ethics Committee has stated that, if a conflict of interest for one attorney exists under Rule 1.06(b)(2) in representing two clients, Clients A and B, the conflict is not resolved if Client B is transferred to a different attorney in the office. Opinion 539, Supreme Court of Texas Professional Ethics Committee (November 2007). All attorneys in the office are in the same "law firm" under Rule 1.06. *Id*. Representation of A can continue if counsel does not use information from B, which is not generally known, to B's disadvantage without B's consent after consultation under Rule 1.05(b)(3) (use of confidential information) and A's representation is not "adverse" to B under Rule 1.09(a). *Id*. If representation would be "adverse" to B, then A's representation may continue if B consents under Rule 1.09(a). *Id*.

Rule 1.09 specifically addresses a conflict of interest arising out of the representation of a former client. Counsel is prohibited from representing a current client in a matter adverse to a former client without consent if, *inter alia*, the representation will likely involve a violation of Texas Disciplinary Rule 1.05 or the matter is "substantially similar." TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.09(a).

The law applicable to disqualification of a prosecutor for this type of conflict of interest is not as exacting as Rule 1.09. The Court of Criminal Appeals has explained why: civil cases differ from criminal cases because, one, criminal cases are measured according to due process standards, and, two, the law mandates that district attorneys represent the State, except in cases where the prosecutor was employed adversely as provided in TEX. CODE CRIM. PROC. art. 2.01. *Landers v. State*, 256 S.W.3d 295, 305-06 (Tex. Crim. App. 2008); *see also Marshall v. Jerrico*, 466 U.S. 238, 249 (1980) (recognizing that the Due Process Clause imposes limits on the partisanship of prosecutors). The "hard and fast" rule under Article 2.01 is that a prosecutor is disqualified if the prosecutor previously represented the defendant in the same criminal matter currently being prosecuted. *Landers*, 256 S.W.3d at 304; *Ex parte Spain*, 589, S.W.2d 132, 134 (Tex. Crim. App. 1979); *see also* TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.10(e)(1) (a public officer is prohibited from participating "in a matter involving a private client when the lawyer had represented that client in the same matter while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead").

In all other cases, due process requires a showing of actual prejudice. *Landers*, 256 S.W.3d at 304. Actual prejudice can be shown if the prosecutor represented the defendant in a substantially related matter and obtained confidential information that was used to the defendant's disadvantage. *Id*. at 305. A substantially related matter in this context means that "the same or inextricably related facts, circumstances or legal questions are at issue in

both proceedings, not whether both charges are for the same criminal offense, or both offenses involve guns, drugs, or other specific facts." *Id*. at 307. *But see In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998) (matters are substantially related when a genuine threat exists that counsel may divulge confidential information obtained in the other matter because the facts and issues are so similar). Confidential information includes privileged and unprivileged information learned during the course of the prosecutor's former representation but excludes "generally known" information. *Id*. at 307-08.

The Court of Criminal Appeals' understanding of "generally known" information appears to be more expansive than that of the Professional Ethics Committee. The Court explained that information is "generally known" if it is a matter of public record or is generally known to other people. *Id*. at 308. Conversely, the Committee has observed that information that is a matter of public record may not be "generally known." Opinion 595, Supreme Court of Texas Professional Ethics Committee (February 2010). "Information that 'has become generally known' is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found." *Id*.

When a prosecutor voluntarily recuses himself or herself, the prosecutor is deemed to be disqualified under the statute governing appointment for attorneys *pro tem*. *Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008).

Client Property

Rule 1.14 directs the safekeeping of client property and provides that counsel shall keep client property separate from the counsel's property in an account designated as "trust" or "escrow." TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.14(a).

The Austin Court of Appeals has discussed the distinction between a retainer and an advance fee for purposes of complying with accounting. *Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736, 739-40 (Tex. App.—Austin 2007, no pet.). A retainer is a fee to secure counsel's availability and compensate counsel for the lost opportunity to represent others. *Id*. If the fee is not paid for this purpose, it is a prepayment for services, not a true retainer. *Id*. at 740. A retainer is earned upon receipt. *Id*. A prepayment, however, is deemed to be the property of the client until services are rendered. *Id*. Therefore, it needs to be held in a trust account. *Id*. Additionally, a fee designated as non-refundable by contract is not counsel's property until it is earned. *Id*.

Proper accounting under this rule is crucial. Personal and business-related expenses cannot be mixed with client funds held in an IOLTA account. *Neely v. Commission for Lawyer Discipline*, 302 S.W3d 331, 346-47 (Tex. App.—Houston [14th] 2009), pet. denied, 2010 Tex. LEXIS 198 (Tex. Mar. 5, 2010). This means that the firm's payroll cannot be distributed from the account, and personal funds cannot be deposited into the account. *Id.*

Frivolous Appeals

Rule 3.01, titled "Meritorious Claims and Contentions" states: "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." TEX. DISCIPLINARY R. PROF'L. CONDUCT 3.01.

The United States Supreme Court has acknowledged this requirement: "An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal." *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 435 (1988) (citing the American Bar Association's analogues); *see also In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) ("The attorney's duty to withdraw is based upon his professional and ethical responsibilities as an officer of the court not to burden the judicial system . . . ."). The mode of compliance for appointed and paid counsel differ, however. After conducting a thorough review of the record and applicable law and determining that no meritorious grounds exits, retained counsel must advise the client that it would be uneconomical and unethical to appeal. *McCoy*, 486 U.S. at 436-37.

Appointed counsel's obligations are set out in *Anders v. California*:

> If the appointed attorney finds the 'case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.' It is the motion to withdraw that is required in this situation. The so-called '*Anders*' brief accompanies the motion to withdraw as an assurance to the appellate court that the attorney has indeed made a thorough and conscientious examination of the record, has provided the appellate court with the appropriate facts of the case and its procedural history, and has pointed out any potentially plausible points of error.

In re Schulman, 252 S.W.3d at 406; *see also McCoy*, 486 U.S. at 438-39 (stressing that counsel is not justified in moving to withdraw until a thorough investigation of the facts and the law has been conducted). Additionally, counsel must forward a copy of the

Anders brief to the client, inform the client of deadlines, the right to file a *pro se* response, respond to the client's questions, send the client a copy of the court of appeals' decision, and advise the client of the right to file a PDR. *In re Schulman*, 252 S.W.3d at 411. With the exception of forwarding the court's opinion to the client, counsel is relieved of any obligations once the motion to withdraw is granted.[5] *Id.* 411, 412 n.33.

With respect to the State's right to appeal the granting of a motion to suppress, Texas Code of Criminal Procedure Article 44.01(5) imposes a special requirement to deter frivolous appeals. The State must certify that the appeal is not for purposes of delay and that the evidence is of "substantial importance" to its case. TEX. CODE CRIM. PROC. art. 44.02(5). This is in line with the legislative directive that the primary duty of prosecutors is to see that justice is done. TEX. CODE CRIM. PROC. art. 2.01. This directive should be kept in mind throughout the post-conviction process. The State should not be opposed to confessing error and recommending that habeas relief be granted when the facts and law support it.

Candor

Rule 3.03, titled "Candor Toward the Tribunal," prohibits, among other things, an attorney from knowingly making a false statement of material fact or law to a court and requires the disclosure of adverse authority not already referenced by opposing counsel. TEX. DISCIPLINARY R. PROF'L. CONDUCT 3.03(a)(1), (4).

Appellate counsel owes a duty to accurately represent the record. *In re City of Lancaster*, 228 S.W.3d 437, 440 (Tex. App.—Dallas 2007, no pet.); *see, e.g.*, *Bullock v. State*, No. 05-08-01246-CR, 2009 Tex. App. LEXIS 8872, at *10-11 n.1 (Tex. App.—Dallas Nov. 18, 2009) (not designated for publication) (noting that the State's misrepresentation of the facts was challenged by defense counsel at oral argument and later corrected by the State as a result), pet. ref'd, 2010 Tex. Crim. App. LEXIS 47 (Tex. Crim. App. Mar. 17, 2010). The Fourteenth Court of Appeals held that "Rule 3.03(a)(1) applies to an attorney who knowingly makes a false statement to a tribunal whether or not the attorney is advocating for a client" or on his or her own behalf. *Cohn v. Commission for Lawyer Discipline*, 979 S.W.2d 694, 699-700 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Diaz v. Commission for Lawyer Discipline*, 953 S.W.2d 435, 438 (Tex. App.—Austin 1997, no pet.).

In *Walker v. State*, the Dallas Court of Appeals noted that the State made several misleading

[5] TEX. R. APP. P. 6.5 sets out the procedures for withdrawal by appellate counsel.

and inaccurate statements in its brief. No. 05-12-00353-CR, 2013 Tex. App. LEXIS 9434, at *7-8 (Tex. App.—Dallas June 29, 2013, no pet.) (not designated for publication). As a result, the court repeatedly ordered the State to provide supporting authority for its statements, which the State eventually did. *Id*. Citing Rule 3.3, the court "cautioned the State to take greater care in the future." *Id*. at *8-9.

The Fourteenth Court of Appeals' opinion in *Schlafly v. Shlafly* provides insight into the duty to be truthful from the court's perspective:

> Counsel who mischaracterize or misrepresent the facts in the appellate record impose a tremendous hardship on the reviewing court and its staff. The voluminous case load and the sheer size of the appellate records in many cases often make for a very time-consuming appellate review. When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload but also render a tremendous disservice to their clients. It is also very poor strategy to misrepresent the record because any material misstatements and/or omissions will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff.

33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Finally, pointing to the duty of candor, the Dallas Court of Appeals has accepted counsel's unsworn, uncontroverted statements as evidence of timeliness for perfecting an appeal. *Davis v. State*, 130 S.W.3d 519, 521-22 (Tex. App.—Dallas 2004, no pet.). The court specifically determined that counsel's letter brief describing his usual practice of mailing documents on the date in the certificate of service, along with counsel's certification concerning the mailing date of a motion for new trial, provided sufficient proof that the notice of appeal was timely and therefore invoked the jurisdiction of the court. *Id*. at 522.

Impartiality

Rule 3.05, titled "Maintaining Impartiality of Tribunal," prohibits an attorney from improperly influencing a court and engaging in *ex parte* communications with a court about

a pending matter for the purposes of influencing the court about the matter.[6] TEX. DISCIPLINARY R. PROF'L. CONDUCT 3.05(a)-(b).

The El Paso Court of Appeals has discussed this Rule in relation to e*x parte* communications[7] between counsel and a member of court staff.[8] *In re J.B.K.*, after oral argument, one of the attorneys contacted a member of the court's staff to ask about his "chances" and "whether he should 'settle' his case." 931 S.W.2d 581, 582 (Tex. App.—El Paso 1996, no pet.). The court held: "as a matter of law that any attempt to solicit or receive information on the merits of a pending case from a staff member of an appellate court constitutes an impermissible *ex parte* communication with chambers." *Id*. at 584. The court also pointed out that it is improper to solicit private information from a public servant that is accessible by virtue of employment if the solicitation is to obtain a benefit or defraud or harm another. *Id*. (citing TEX. PENAL CODE § 39.06(c)). Regarding the judiciary's role, the court acknowledged that a judge shall refer a matter to the State Bar if there is a "substantial question as to the lawyer's honesty, trustworthiness or fairness or fitness as a lawyer in other respects." *Id*. Additionally, the court pointed out its inherent power to punish by contempt. *Id*.

---

[6] The following are exceptions to the rule prohibiting *ex parte* communications: (1) communications made in the course of official proceedings: (2) communications in writing if a copy is promptly delivered to the opposition; and (3) oral communications upon adequate notice to the opposition. TEX. DISCIPLINARY R. PROF'L. CONDUCT 3.05(b)(1)-(3).

[7] Texas courts have defined what constitutes an *ex parte* communication and explained the basis for prohibiting such communications:

> An *ex parte* communication is one that involves fewer than all parties who are legally entitled to be present during the discussion of any matter with the judge. *Erskine v. Baker*, 22 S.W.3d 537, 539 (Tex. App.—El Paso 2000, pet. denied). *Ex parte* communications are prohibited because they are inconsistent with the right of every litigant to be heard and with the principle of maintaining an impartial judiciary. *Abdygapparova v. State*, 243 S.W.3d 191, 208 (Tex. App.—San Antonio 2007, pet. ref'd).

Youkers v. State, 400 S.W.3d 200, 206 (Tex. App.—Dallas 2013), pet. ref.d 2013 Tex. Crim. App. LEXIS 1193 (Tex. Crim. App. Aug. 21, 2013).

[8] TEX. R. APP. P. 9.6 states that parties and counsel may communicate with the court about a case through the clerk only.

As a corollary, Canon 3(B)(8) of the Texas Code of Judicial Conduct prohibits a judge from having any direct or indirect *ex parte* communications about the merits of a pending case. *Youkers*, 400 S.W.3d at 206. The Dallas Court of Appeals addressed this prohibition in association with social media. Generally, the court opined, a "friend" designation on Facebook between a victim's family member and a judge is permissible and therefore does not call for a recusal due to impartiality. *Id*. A judge does, however, have a duty not to let the family member give the impression that he holds a position of special influence. *Id*. at 207.

Advertisement and Solicitation

Rule 7.02 bars counsel from making any false or misleading communication about the qualifications or services of an attorney or firm. TEX. DISCIPLINARY R. PROF'L. CONDUCT 7.02(a). False or misleading communication "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." TEX. DISCIPLINARY R. PROF'L. CONDUCT 7.02(a)(1).

This Rule applies only to commercial speech, *i.e.*, speech that proposes a commercial transaction or professional employment; it does not apply to speech outside the context of the legal profession.[9] *Neely v. Commission for Lawyer Discipline*, 196 S.W.3d 174, 181 (Tex. App.—Houston [1st] 2006), pet. denied, 2007 Tex. LEXIS 723 (Tex. Aug. 24, 2007); *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995) (discussing Part VII's enactment and the principles involved in identifying commercial speech), *aff'd* 100 F.3d 953 (5th Cir. 1996). The text of the speech and extraneous evidence is considered to determine whether it is commercial. *Neely*, 196 S.W.3d at 184. An advertisement that does not convey to the reader that it is intended to obtain clients is not commercial speech. *Id*. at 181. Commercial speech is protected under the First Amendment; however, commercial speech that is false or misleading is not.[10] *Id*. at 182; *Texans Against Censorship, Inc.*, 888 F. Supp. at 1346-47, 1350. "A

[9] An example of non-commercial speech protected under the First Amendment includes statements made by defense counsel during a press conference that proclaimed his client's innocence, accused a detective of being the actual perpetrator, and challenged witness credibility. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-39 (1991) (plurality as to Parts I and II, which are cited here).

[10] Likewise, Rule 8.04(a)(3), which prohibits counsel from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, does not constitute an infringement on First

notice or advertisement regarding qualifications or services of a lawyer or firm is inherently misleading when it omits information regarding the identity of the lawyer or firm and is not susceptible to reasonable verification by the public." *Neely*, 196 S.W.3d at 183 (citing *Rodgers v. Commission for Lawyer Discipline*, 151 S.W.3d 602, 612-13 (Tex. App.—Fort Worth 2004), pet. denied, 2005 Tex. LEXIS 243 (Tex. Mar. 11, 2005)).

Judicial Integrity

Rule 8.02, which addresses conduct before the judiciary states, in part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office." TEX. DISCIPLINARY R. PROF'L. CONDUCT 8.02(a).

The U.S. Court of Appeals for the Fifth Circuit and the Texas Supreme Court have confronted instances in which the integrity of the judiciary was erroneously questioned by appellate attorneys. In *Hartfield v. Thaler*, the Fifth Circuit struck a petition for rehearing based on the Texas Assistant Solicitor General's "disturbingly unprofessional tone" that demonstrated "a lack of respect for the court." 498 Fed. Appx. 440, 442 (5th Cir. 2012). In *Merrell Dow Pharmaceuticals v. Havner*, the Texas Supreme Court ordered Havner's counsel to address why it should not impose sanctions for briefs that the lower court characterized as "insulting, disrespectful, and unprofessional." 953 S.W.2d 706, 732-33 (Tex. 1997). In doing so, the court pointed out that it has inherent power to discipline counsel and can refer counsel to the State Bar, prohibit counsel from further practice in Texas, and impose monetary penalties. *Id*. at 733.

Rule 8.03 addresses the duty to report professional misconduct. A lawyer who knows that a peer committed a violation that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" is required to report the misconduct if the disclosure does not include confidential information under Rule 1.05. TEX. DISCIPLINARY R. PROF'L. CONDUCT 8.03(a), (c).

The Waco Court of Appeals invoked this rule when referring an appellate attorney to the State Bar for failing to timely file an appellate brief. *Lopes v. State*, 68 S.W.3d 286, 288

Amendment rights. *Walter v. Commission for Lawyer Discipline*, No. 05-03-01779-VRC, 2005 Tex. App. LEXIS 3432, at *3 (Tex. App.—Dallas Mar. 5, 2005) (not designated for publication), pet. denied, 2005 Tex. LEXIS 699 (Tex. Sept. 9, 2005), cert. denied, 2006 U.S. LEXIS 3634 (May 1, 2006).

(Tex. App.—Waco 2002, no pet.). In that case, appellate counsel failed to file her client's brief until a year after its original due date. *Id*.