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THE TOP TEN REASONS CLIENTS FILE GRIEVANCES AGAINST THEIR LAWYERS†

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INTRODUCTION

Lawyers must abide by their ethical duties and responsibilities before, during, and after representing a client. Failing to do so exposes a lawyer to disciplinary action and legal malpractice. Unfortunately, many lawyers, through calculated risk or carelessness, violate the very rules that protect their profession.

The following article is based on a compilation of the actual number of grievances filed in Texas grievance committees. Although these numbers are not the whole story of why grievances were filed against lawyers, they serve as signals to the bar of major pitfalls to avoid. This paper includes an outline of the grievance procedure and a short history of the different bodies of law governing professional responsibility for future reference for those readers snared by disciplinary proceedings.[1]

I. NEGLECTING A CLIENT'S CASE: TEXAS RULE 1.01

"Neglect" means to ignore the client's case and includes an element of gross negligence in consciously disregarding the responsibility owed to a client.[2] A lawyer shall not neglect a client's matter, nor frequently fail to carry out his or her obligation owed to the client.[3] This

† This paper is compiled from a speech given by Justice Kinkeade at the REVIEW OF OIL AND GAS LAW XIII symposium sponsored by the Energy Law Section of the Dallas Bar Association, chaired by Professor Joseph Shade of Texas Wesleyan University School of Law. Accordingly, the examples provided are directed toward an audience whose primary activities are in the oil and gas industry.

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1. *See* chart following this article.

The original Cannons of Professional Ethics was adopted by the American Bar Association (ABA) on August 27, 1908. Approximately fifty-five years later, the ABA empanelled a committee to assess whether changes should be made to the cannons. Subsequently, the House of Delegates produced the Model Code of Professional Responsibility. The Model Code was then adopted by a majority of state and federal jurisdictions. In 1977, the ABA reconsidered its professional ethics guidelines and produced the Model Rules of Professional Conduct, which were again adopted by a majority of state and federal jurisdictions. The Model Rules were significantly changed in 1983. In 1989, Texas adopted its version of the Model Rules effective January 1, 1990. *See* preface of Annotated Model Rules of Professional Conduct, Second Edition, Page 1.

2. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(c).

3. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(b)(1)-(2).

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is the most common cause for grievances filed on lawyers. Lawyers often fail to address timely their clients' cases; they sometimes seem frozen by an event that occurs and, for an extended period of time, fail to even take the file out of the file drawer. Lawyers debate the reasons that cases are neglected. Often the neglect stems from more than one source of distraction, but the most frequent culprits seem to be the fee involved and the type of relationship the lawyer has with the client.

First and foremost, every lawyer must organize the way he or she handles cases. A timeline should be drafted at the beginning of each litigated case, setting out the critical time periods that must be met. At regular intervals, lawyers, not just paralegals, must examine the progress and status of every case. Discovery must be planned, or it inevitably will be delayed until the time for trial is at hand.

A tickler system that is monitored weekly should be maintained for all files in litigation.[4] The system must address dates that are applicable to the timeline mentioned earlier. A tickler system prevents the lawyer from missing all deadlines created by the law or by the court. New lawyers should not reinvent the wheel; however, they should find a first rate system and modify that system to their own style of practice. Software packages now exist that are extremely helpful in setting up a case management system.

Every lawyer should take a course in Law and Economics—a study that would enlighten lawyers with their motives in aggressively or passively pursuing cases.[5] When the value a lawyer places on a case is exceeded by the hours expended, multiplied by the hourly fee for the time involved, the lawyer is no longer motivated by money to pursue the matter. Once that occurs, the attorney should be motivated to proceed, because ethically he or she is required to continue. It seems that profit overtakes ethics in some cases, and the unprofitable case is put on the shelf indefinitely. To prevent this phenomenon, every lawyer should have a system that reminds the lawyer to pursue the case in an orderly fashion, even if the profit diminishes with each hour spent. Pursuing a case that is a losing proposition is not easy. A lawyer should consider honestly telling the client about the problem, and then renegotiating the fee arrangement.

A similar problem occurs when a lawyer works only the cases that are easy to settle and ignores the more difficult cases. A system that reminds the lawyer about the more difficult cases helps remedy this

4. A tickler system is an organizational system where folders are set with one folder for each day of the month. When an attorney gets something new on his desk, he places it in a day in the future when it should be reviewed. Each day, the attorney examines the folder with the corresponding date on it and reviews the documents in the folder. After review, the contents are placed in another folder for review at a later date.

5. In the alternative, the author recommends CHARLES J. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS (1984).

problem. Every client is entitled to first class representation, regardless of the size of the matter or the size of the fee; no client should ever receive second class representation. This applies even to the pro bono, brother-in-law case.

II. FIRING A CLIENT OR BEING FIRED: TEXAS RULE 1.15

Upon termination of the lawyer-client relationship, many lawyers forget that the obligation to protect the interest of the client survives and that they must take certain steps to protect the client's interest.[6] Often, a client's stinging rejection makes a lawyer forget this obligation. This obligation includes, but is not limited to, giving proper notice to the client, giving the client proper time to retain new counsel while still making necessary appearances, surrendering the file to the client, and refunding any unearned retainer fees.[7] Even if the client unfairly discharged the lawyer and the lawyer followed Rule 1.15, the lawyer must expect the possibility that the client may file a grievance. Moreover, if the lawyer ignored Rule 1.15, he must expect with certainty that he will be subject to a grievance. The lawyer must pass the client to the next lawyer while causing the least amount of problems for the client.[8] Retaining the file as a lien for a fee is dangerous, and the rules state that doing so is permissible only where the retention does not prejudice the client in the subject matter of the representation.[9]

Rule 1.15 (a)(1)-(3) establishes when a lawyer must withdraw from representing a client.[10] A lawyer shall decline to represent a client if such representation would violate a rule of professional responsibility or any other law, if the lawyer is fired by the client, or if the lawyer has a physical, mental or psychological condition that materially impairs his fitness to represent the client.[11] Lawyers often run afoul of this rule when they allow their personal lives to interfere with their ability to devote proper attention to their clients' cases. Lawyers must anticipate personal problems before they arise and cope with them once they do arise. A plan to refer cases to other lawyers in the event of a crisis must be made when the lawyer is healthy and thinking clearly. Clients deserve, and the law demands, competent representation, regardless of what is happening in the life of the attorney.[12]

Rule 1.15 (b) offers why an attorney "may" terminate representations.[13] A "may" rule allows an attorney the latitude to determine

6. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14 cmt. 2.
7. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15.
8. *See id.*
9. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(d) & cmts. 9-10.
10. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(a)(1)-(3).
11. *See id.*
12. *See generally* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 & cmt. 6.
13. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(b) & cmt. 7.

when and whether to end a lawyer-client relationship.[14] "May" provisions release an attorney from being subject to discipline, no matter how the attorney decides to resolve the issue.[15]

III. CLIENT TRUST ACCOUNTS: TEXAS RULE 1.14

Perhaps the most egregious and clear violation of lawyer ethics occurs when a lawyer steals (or borrows without permission) client trust funds. Rule 1.14 states that client funds should be kept separate from a lawyer's operating account.[16] When a lawyer holds a client's money or property, much like a bank, the lawyer has a fiduciary duty not to use the money or property himself.[17] Just as a banker is prohibited from going to an ATM machine to withdraw twenty dollars from a depositor's account, a lawyer is prohibited from writing a check against a client's trust account to cover his or her mortgage or Lexus payment.[18] Currently, the State Bar seemingly takes the position that if an attorney diverts one cent, for one second, from a trust account, the least punishment available is a public reprimand.

When disputes arise over whether a fee should be deposited into a trust account, some lawyers might forge a client's endorsement signature on a check, deposit that check, and take what they perceive as their share. If this occurs, some criminal defense lawyer will represent a new "lawyer-client" charged with the felony of forgery. To properly handle the problem, a lawyer should meet with his client and resolve the disputed fee or cost. If that fails, the lawyer and the client should try to isolate the disputed portion of the fee. Then the lawyer should suggest distributing all but the disputed amount and mediate or arbitrate to reach an agreement on the remaining sum.[19]

In some instances, third parties may claim part of the money in a client's trust account. In these cases, a lawyer should not attempt to unilaterally arbitrate the dispute with the creditor. When disputed claims arise, either by the lawyer or a third party, the lawyer should deposit the funds into the registry of the court and file an action to have the court resolve the dispute.

IV. FEES: TEXAS RULE 1.04

In the movie, *The Firm*, a lawyer portrayed by Tom Cruise discovered that his law firm overbilled its clients.[20] Cruise's character reported the overbilling to those clients.[21] Unscrupulous practitioners

14. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10.
15. *See id.*
16. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14.
17. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14 cmt. 1.
18. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14.
19. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14 cmt. 1.
20. *See* THE FIRM (Paramount Pictures 1993).
21. *See id.*

have popularized several improper practices, such as inflating the number of hours worked, double billing, charging partner rates for paralegal work, and making a profit from non-lawyer services such as copying, transporting, and transcribing. Rule 1.04 outlines eight factors to use when determining what constitutes a reasonable fee.[22] Those eight factors are the time and labor required; that the representation precludes other cases; the customary fee; the amount involved and the results obtained; the time limitations; the length of the relationship with the client; the experience of the lawyer; and whether the fee is fixed or contingent.[23]

Clearly a lawyer considers the amount of time involved in setting a fee. Time becomes an area of grievance when a lawyer creatively bills two clients for the same time without their consent. A typical example might involve a lawyer driving from Dallas to Shreveport, Louisiana, to attend a thirty-minute hearing. The lawyer began billing when he left his office. Client A paid an hourly rate for the travel time. While on the trip, the lawyer made two hours worth of phone calls billable to several other clients. Client A receives a bill that reflects the entire time away from the office. The proper method of billing would be to deduct from Client A's bill the two hours spent on the phone working other cases. Clients may consent to some of this creative time keeping such as charging minimum time to any phone call. The key question is whether the client gives informed consent. Also, just as inflating the number of hours worked is improper, charging attorneys' fees for work actually performed by non-lawyers is improper, because the attorney performed no work or less work than what is reflected on the bill.

Making profit centers out of non-lawyer services violates the excessive fee ban.[24] Some lawyers, rather than inform clients of an increase in their hourly rate, hide the increase by charging a premium on copying, outsourcing and other non-legal services. This violates the ban on excessive fees. A lawyer's profit should be based upon fees, not hidden profit from costs. Lawyers provide legal services, and their general overhead should be covered in their fees. Special costs are billable to clients, but an attorney should never make a profit above those costs.

V. LAWYER'S COMPETENCY: TEXAS RULE 1.01

Inadequately training lawyers for the real world has often been a complaint levied at the legal profession. Unlike a doctor, when a lawyer takes on a new case, he or she often makes a maiden voyage as the

22. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b)(1)-(8).
23. *See id.*
24. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a)-(b).

captain of a ship without any other sailor on board who is experienced in these strange waters. The result often leads to a grievance.

"Competency" is defined as possession of or the ability to acquire timely the legal knowledge, skill, and training reasonably necessary for the representation of a client.[25] Certainly this does not mean that a lawyer is not allowed to take a case in a new area without a seasoned lawyer working with the neophyte. What the rule requires is that a lawyer must be willing to spend the time necessary to become competent in the new area.[26] A lawyer who spends extra time to become competent in a new area often overbills clients for training, instead of only billing for the time to perform the task at hand. A client should not have to pay more in legal fees to any lawyer than a competent lawyer would have charged.

One of the best ways to resolve this dilemma is by seeking a mentor. Mentoring gives a lawyer hands-on experience while being guided by a skilled practitioner. How one finds a mentor might be illustrated by this author's desire to handle a sizable bankruptcy case for the first time. The first task was to contact friends and find a lawyer who would fit the mold of a willing, competent teacher. A lawyer should look for someone with a reputation and personality compatible with the lawyer's own work style. Phone calls were made, a lunch arranged, and the process was off to a good start. The mentor agreed to provide "training" under a clear set of guidelines. The fee was to be split three-fourths for the mentor and one-fourth for the "student" lawyer. The "student" lawyer provided the bulk of time and research toward the case guided by the mentor. The arrangement was not one of referral alone, but allowed the lawyer an opportunity for learning while guided by a seasoned veteran. The total fee was not in excess of what the client would have paid the mentor, if he had acted alone. The arrangement benefited the client by providing high quality representation and benefited the profession by providing a training tool for teaching a lawyer competency in a new area of law.

VI. COMMUNICATION: TEXAS RULE 1.03

Often lawyers do not return phone calls. The typical attitude seems to be that if the matter is important, the client will call again. Rule 1.03 requires a lawyer to keep clients informed of the status of their cases.[27] Clients make the ultimate decision on all matters concerning settlements or their equivalents in criminal cases.[28] Therefore, all explanations should be simple enough to enable clients to make informed decisions about their representation.

25. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01.
26. *See id.*
27. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03.
28. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(2) & cmt. 1-2.

Two explanations reveal why grievances are filed against lawyers for failing to communicate. One reason is that lawyers may believe returning most client phone calls is handholding or a waste of time and resources. Too many attorneys presume that phone calls keep them from performing the legal tasks necessary to resolve a client's case. The typical grievance occurs when a client calls or faxes the lawyer and the lawyer chooses not to respond for weeks. If an adverse result then occurs in the case, the client will often equate the delay in responding with the reason for the poor result.

Attorneys need to inform their clients at every step of representation. Some attorneys send memos to clients on a monthly basis, revealing the progress of the case. Other lawyers mark the calendar and call their clients at least once a week, or once a month, to update them on progress in the case. Most communication grievances are preventable by outlining how phone calls will be answered and by keeping clients informed throughout the case. In this day of fax machines and mobile phones, some lawyers prepare written reports and fax those to the client. This technique allows a lawyer the chance to communicate with the client at a convenient time and in a way familiar and acceptable to the client even though the communication is in writing. The advent of the mobile phone allows lawyers to use otherwise downtime, such as daily commutes, to return phone calls. Each lawyer should adopt a plan of communication and then commit to it, because clients prefer predictability and they should remain informed about their cases.

Other lawyers set aside a specific time of the day to return calls. Clients get used to the time and feel satisfied with this predictable communication. Still other lawyers call clients back as soon as possible after they receive the message. Lawyers often forget that because of attorney-client privilege, the only person in whom the client should confide and trust is their lawyer. Most clients need to be reassured and updated regularly. In most cases, the lawsuit facing a client is the most important problem in his life, and he assumes his lawyer understands that fact.

One suggestion about communication is for the lawyer to candidly reveal his or her plan to the client early in the representation. This often assists clients by preventing unrealistic expectations. Many clients view the legal system like the "Land of Oz,"[29] and they long for a peek behind the wizard's curtain to understand what is happening. Through regular, predictable communication, the lawyer allows the client to peek behind the curtain. This minimizes communication problems and the risk of a grievance, should unexpected results occur with the lawsuit.

29. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

A second reason why clients file grievances against attorneys concerning communication is they often feel that the lawyer patronizes them. They sense that the typical attitude is "trust me, I know best, not you." Most clients want to know all the possibilities; otherwise, the parade of horribles imagined by the client includes a Frankenstein or two when Casper the Friendly Ghost is more likely. Lawyers should be sensitive to their clients' perceptions, and most clients perceive regular communication as paramount to quality representation. For lawyers, the watchword with clients should be "information, information, information." Instead clients too often receive the following responses, "She is in conference," "She is in court," "He is not available," "I'll give him the message," or "Both your lawyers are out of the country."

Every lawyer must have a plan for answering phone calls. No single plan works with all styles, but a plan tailored to the lawyer's work style is the best. One prominent Dallas lawyer actually answers her own phone unless she is on the phone or "actually" in a meeting. Her clients know they are important to her, because she makes herself available to them. When asked how she has time to answer the phone, she said that no one knows more about the case than the client, and if they are concerned enough to call, then she needs to listen to them.

VII. HONESTY OR CANDOR WITH THE COURT: TEXAS RULE 3.03

In Texas, the ability of a judge to trust the word of an attorney is critical. Texas Rule 3.03 requires lawyers to be candid with judges about the law and not make false statements of fact to the court or opposing attorneys.[30] As mentioned earlier, a lawyer is not required to voluntarily reveal facts that he or she has been able to uncover in a case.[31] That is what an adversarial system generally requires of lawyers; both sides gather the facts, and then each offers those facts in front of the judge or jury. The judge or jury then determines the truth based on the evidence presented in the courtroom. That lawyers are not required to volunteer facts in a case should not be seen as a relaxation of all responsibility to truthfully respond to a proper discovery request. After proper discovery, both sides of a suit should have a grasp of all key evidence in a case. Pursuant to Rules 3.03 and 3.04, lawyers must answer discovery truthfully and not make false statements.[32]

The only time a lawyer must volunteer facts is when he or she is presenting a matter ex parte to the court.[33] The law requires that one

30. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03.
31. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1)-(2).
32. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03-3.04.
33. *See id.* Rule 3.03(a)(3).

side lay out all the facts of the matter at hand, because only one side is present before the court and the judge does not have the benefit of the perspective from opposing counsel.[34] In a typical request for a temporary restraining order, the lawyer may not know who represents the other side, and the emergency nature of the issue may prevent the lawyer from having enough time to find out who the opposing counsel will be in the case. This responsibility of the lawyer often places him in the unenviable position of revealing facts that may militate against the relief desired. The temptation is to exclude facts that the court should know to help it make an informed decision. If the court discovers any omission, often a grievance will result. No lawyer should ever trade integrity for a favorable ruling.

Rule 3.03(a)(4) requires lawyers to disclose any authority (generally case law) from the "controlling jurisdiction" that is "directly adverse" to the position of their clients.[35] The important terms of art are "controlling jurisdiction" and "directly adverse." If a case is pending in state district court in Texas, "controlling jurisdiction" refers to those cases from the appeals court in the jurisdiction of that trial court, cases from the Texas Supreme Court, and in few instances, the United States Supreme Court.[36] Federal appellate court decisions that follow state law are helpful, but not controlling.[37] Decisions from Texas appellate courts in other jurisdictions are also helpful, but not controlling.[38]

"Directly adverse" means the case must cover the same area of law and the same issue.[39] If the lawyer must make an analogy before a case applies to the current facts, then the case is not directly adverse. Common sense dictates that a lawyer reveal analogous cases or run the risk of appearing careless or deceptive to the judge. Generally, when the requirement of candor about the law arises, the lawyer will be allowed ten minutes to present the case to the judge, who will either render a decision or take the case for further study. Either way, this is the only opportunity the lawyer has to make an argument distinguishing the case that seems to be on point. A lawyer should never pass up the only chance to make this argument.

Clients must be told about cases that are adverse to their positions.[40] Keeping information from a client by painting a rosey scenario invites the grievance committee to second-guess all decisions made

34. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 4.

35. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4).

36. *See* Lofton v. Texas Brine Corp., 777 S.W.2d 384 (Tex. 1989).

37. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 171 cmt. d (1997).

38. *See id.*

39. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 171 cmt. c (1997).

40. *See generally* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a).

by the lawyer. Remember that the best surprise a client can receive is NO SURPRISE.

VIII. CONFLICTS OF INTEREST: TEXAS RULES 1.06-1.09 AND 1.12

Ronald Rotunda wrote an article entitled "One Potato, Two Potato, Three Potato, Four," which depicts lawyers struggling to juggle the representation of a client with a limited amount of money while representing a new client with deep pockets and the possible conflict between the two clients.[41] Too often lawyers are either blinded by greed or oblivious to conflicts. An example for oil and gas counsel might involve an attorney who represents two entities with competing interests in existing or future oil and/or gas fields. The competition for these resources is often fierce and marked by secrecy. An attorney may forget that his or her client often has a different objective than the lawyer personally. The client may want to control the field completely, where the lawyer may want to have two clients generating fees rather than just one. Texas Rules 1.06 – 1.09 cover the area of conflict of interest. Rule 1.06 covers the general rule of conflict of interest; Rule 1.07 covers the lawyer as an intermediary; Rule 1.08 details prohibited transactions; and Rule 1.09 governs conflicts of interest with former clients.[42] Rule 1.12 outlines a lawyer's responsibilities when representing an organization with regard to possible conflicts with the employees or members within the organization.[43]

Rule 1.06(a) prohibits lawyers from representing both sides in the same litigation, even with the consent of both parties.[44] Under 1.06(b), a lawyer shall not represent a potential client if that client's interest involves a matter that is substantially related to a current client and is materially and directly adverse to the current client's interest.[45] A conflict can also arise if the common interests between two clients are adversely limited by a lawyer's own interest, responsibilities to another client, or any third person.[46] If an attorney reasonably believes that representation of each client will not be materially affected and each client consents, then an attorney may represent both clients.[47] If a dispute later arises, the attorney must withdraw from any representation on the matter involved unless all clients consent to the lawyer staying and representing one of the parties involved.[48]

41. *See* Ronald D. Rotunda, *One Potato, Two Potato, Three Potato, Four*, TEXAS LAWYER, Aug. 19, 1991, at 16.

42. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06-1.09.

43. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12.

44. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(a).

45. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(1)-(2).

46. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2).

47. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(1)-(2).

48. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(d).

An example of a potential conflict is an attorney that decides to represent two competing oil companies in negotiating and drafting oil and gas leases. After concluding that no conflict exists in performing transactional work for the two companies, the lawyer discovers the second client wants to lease the same oil field that the first company wants to lease. Once this occurs, the attorney must decide whether the situation constitutes a "matter" within the term of the rule. If it is, then the attorney must withdraw from representation.

A matter usually involves real parties (not laws drafted and passed by an attorney) who will be concerned if their lawyer later works against them. A matter, as defined by Rule 1.10, includes an adjudicatory proceeding, an application, a request for a ruling, or other similar, particular transactions involving a specific party or parties and any other action or transaction covered by the interest rule of a government agency.[49] It does not include rule-shaping proceedings, nor does it include work that a lawyer accomplished on behalf of drafting a regulation or law.[50] In the oil and gas area, an attorney who drafts a lease or contract is prohibited from attacking that agreement at a later date. Where the conflicts or apparent conflicts are between current clients, the term "matter" is defined as previously described.[51] The question of the seriousness of the conflict focuses on the phrases "materially" and "directly adverse" or the lesser conflict of "adversely limited."[52] The attorney may proceed and represent the second client if the lawyer reasonably concludes the representation of neither client will be materially affected, and both clients consent.[53] The careful attorney will recognize that reliance on client consent in this area is fraught with danger. Rule 1.06(c)(2) demands that the attorneys obtain the consent only after "full" disclosure to each client affected.[54] The problem in this area is that the client may remember the full disclosure differently under the pressures of a lawsuit. A careful attorney should put the consent in writing.

When a lawyer attempts to represent more than one party in a typical business deal, conflicts often arise. For example, three investors approach an attorney about representing them in a new oil and gas venture. One of the proposed venturers is already a client of the lawyer and is supplying the capital, another is a drill operator, and the third is a salesman. Under Texas Rule 1.07, the lawyer may choose to represent all of the parties, but not before satisfying several criteria under the rule.[55] The lawyer must decide whether the transaction can

49. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10(f)(1)-(2).
50. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10(f)(1).
51. *See supra* note 47.
52. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(1)-(2).
53. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(1)-(2).
54. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(2).
55. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07.

be consummated on terms compatible with each client, whether each client is able to make adequately informed decisions in the matter, and whether there is little risk of material prejudice to any client if the deal fails to consummate on the terms discussed.[56] The careful attorney must explain to each client the advantages, risks involved, and the effect in using one lawyer.[57]

To accomplish this task, the lawyer should carefully explain to each client that if the partners ever dissolve their relationship and litigate among themselves, there would be no attorney-client privilege protecting their communications with the lawyer.[58] Even more so, the lawyer may likely become the key witness in the dispute. Problems arise when any one of the partners approaches the attorney and says, "Do not tell the others what I'm telling you!" The lawyer must explain that he cannot agree to that arrangement because there are no privileged secrets among themselves.[59] The only attorney-client privilege that survives dissolution of a partnership involves actions against the partners versus the rest of the world.[60]

Whether the transaction can be consummated on terms compatible with the desires of each client usually involves a case by case analysis. One factor often implicated is the tax considerations for each client. A wealthy client will likely seek an entity as a tax shelter, while a less wealthy client may not desire a tax shelter as much as an entity that passes all income through to the investors as quickly as possible. Whether partners share income equally is normally a key issue to be resolved. If one client will own more than fifty percent of the venture, does that prevent the lawyer from balancing competing interests between the partners, since the client owning the majority of stock will be able to dictate the arrangement to the other partners?

Another problem may arise if one of the partners is elderly and likely investing most of the money. Sometimes it may be unclear whether that person is reasonably able to make adequately informed decisions. The attorney should consider whether the elderly partner is being dominated by the desires of the other younger and less well healed partners, or whether one partner is less sophisticated in the oil and gas business than the other partners. A factor that must be considered when deciding to serve as an intermediary is the risk of failing to consummate the agreement. The lawyer also needs to be sure that if an agreement is not reached, the disclosures by the parties will not do harm to themselves.[61] If one of the partners has information that, if not protected, would harm his ability to use that information at a

56. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07(a)(2).
57. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07(a)(1).
58. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07 cmt. 6.
59. *See id.*
60. *See id.*
61. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07 cmt. 1.

later time, then perhaps that partner should be represented separately.

Generally, all partners should be brought to the law office, told in detail of all the advantages and risks, and then they all should agree in writing to common representation. A videotaped interview is an even better way to record their consent. Another solution for this potential conflict is to advocate for the partner that the lawyer has previously represented and allow the other partners to retain their own lawyers.

Typically, a lawyer will represent the person supplying the capital, because that partner is the one paying the attorney's fee. The partner with the money normally wants the agreement drafted with the greatest benefit to his or her own interest. If that occurs, the attorney should explain that he represents the one partner and that partner only. The lawyer should further explain that he will draft the partnership-agreement protecting only that one client, and the others have the privilege to hire their own attorneys. The lawyer should state that the one client will pay his fee, and the lawyer's duty of loyalty is to that one client alone. The careful attorney should outline this in a letter given to each party and signed by them as confirming receipt of and having received the letter acknowledging that the lawyer represents only the one client. This type of arrangement is usually preferable to trying to represent all of the partners. The lawyer's loyalties under this arrangement are not divided, but flow to the one discreet client. This arrangement helps lawyers avoid disputes involving divided loyalties to two clients. The risk of hindering a proposed business arrangement is outweighed by the clear line of loyalty that a lawyer needs to maintain client trust.

Under Rule 1.06, lawyers who serve as general counsel to a corporation and serve on its board of directors should reconsider that arrangement. When a lawyer serving on the board advises a corporation about matters involving the actions of the board, a conflict of interest arises, because of the lawyer's dual roles. No absolute prohibition exists under the rule, but lawyers need to remain objective and independent as to their advice, and such advice should not be influenced by their votes as directors.[62]

IX. LYING AND MISCONDUCT: TEXAS RULES 4.01 AND 8.01-8.04

The general sin of lying by attorneys is covered by Rule 4.01 and Rules 8.01 – 8.04 of the Texas Disciplinary Rules of Professional Conduct. Rule 4.01 deals with truthfulness to others and is discussed in detail in a separate paragraph.[63] Section VIII of the State Bar Rules, titled "Maintaining the Integrity of the Profession," includes Rules

62. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 16.
63. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01.

8.01 - 8.04, which cover several topics concerning false statements.[64] Rule 8.01 covers bar admission and reinstatement, disciplinary matters and making false statements in connection therewith.[65] Rule 8.01 includes an unusual provision that punishes non-lawyers under rules that govern lawyer misconduct.[66] If an applicant for bar admission or petitioner for reinstatement to the bar makes a false statement about a material fact on his application, fails to correct a false conclusion ("misapprehension"), or fails to respond truthfully to a lawful request for information, that person is subject to discipline.[67] Rule 8.02 subjects a lawyer to discipline for lying or making a statement with reckless disregard for the truth about a judge or candidate for judge or other legal officer.[68] Rule 8.03 addresses a lawyer's obligation to report misconduct, while Rule 8.04 addresses the general category of lawyer misconduct.[69]

The principal rule in Texas covering general misconduct requires that a lawyer must not violate the Texas Disciplinary Rules of Professional Conduct or assist another to do so.[70] Rule 8.04(a)(2) prohibits a lawyer from committing a serious crime or a crime of moral turpitude—any crime that adversely reflects upon the lawyer's honesty, trustworthiness, or fitness.[71] This ban generally includes all felonies and crimes involving dishonesty, fraud, deceit or misrepresentations.[72] Moral turpitude is defined as "the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita."[73] Possession of a small amount of marijuana is not necessarily a serious crime.[74] Conversely, any theft offense, even a class C misdemeanor of shoplifting a candy bar is forbidden as lawyer misconduct.[75] Lawyers practicing oil and gas law, as well as those practicing in any transactional area, must re-

64. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.01-8.04.

65. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.01.

66. *See id.*

67. *See id.*

68. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02.

69. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03-8.04.

70. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(1).

71. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(2).

72. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(2)-(3); TEX. R. DISCIPLINARY P. 1.06(U), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 1998).

73. BLACK'S LAW DICTIONARY 1008-09 (6th ed. 1990).

74. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(1)-(2) (Vernon 1997) (noting that possession of a small quantity of marijuana (under four ounces) is a misdemeanor); TEX. R. DISCIPLINARY P. 1.06(U) (acknowledging that in order for an attorney to commit a serious crime involving moral turpitude, the crime must be a felony or involve theft, embezzlement, or misappropriation).

75. *See* Duncan v. Board of Disciplinary Appeal, 898 S.W.2d 759, 760 (Tex. 1995); TEX. R. DISCIPLINARY P. 1.06(U); TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(2)-(3).

main mindful that their actions outside the practice of law may subject them to discipline, even though they do not litigate.

The primary rule in Texas dealing with truthfulness is Rule 4.01. Every lawyer is prohibited from knowingly making a "false statement of material fact or law to a third person or failing to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."[76] Understanding the term "material" is the key to Rule 4.01. Material usually relates to a matter upon which the person listening will rely in making a decision.[77] Whether an attorney handles transactional work or litigation, the issue of what is material must be viewed on a case by case basis. Although this appears to avoid taking a clear position on what is material, the case by case analysis necessary to resolve what is material serves to make the practitioner wary of the pitfalls in deciding this question. One difference between material and non-material involves deciding what is opinion or conjecture—this is sometimes referred to as "puffing." Puffing consists of statements that no one would rely upon to make decisions. Examples of puffing include statements such as "that looks like a honey of an oil deal," "that suit for royalties owed is worth ten times what you are offering me," and "what a wonderful opportunity you have to look at this deal." These statements constitute opinion or conjecture upon which no reasonable person would rely.

The following three scenarios are examples of lying. A lawyer, only having evidence consisting of testimony from two experts that they found tire marks matching the defendant's truck, states, "I have two witnesses that saw the sludge dump on my client's ranch!" A lawyer knows a well now only produces 5 barrels per day and quit producing 25 barrels per day eight months ago, but states, "The well produced 25 barrels per day." A lawyer claims, "The operating costs were over $100,000 last year," when actually some of the operating costs were attributable to ten other wells and the costs for the particular well were under $25,000. Those examples of lying are statements of fact made so that others will rely upon them. Even if the statements were true at one time, they were not true at the time of the statement.[78] Unfortunately, some attorneys mistakenly view lying as simply another way to be persuasive, especially in negotiation. By lying, attorneys risk disciplinary action.

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76. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01(a)-(b).

77. *See* BLACK'S LAW DICTIONARY 977 (6th ed. 1990).

78. *See generally* Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); Christopher J. Shine, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722 (1989); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L. J. 1 (1987).

Under the rules governing confidentiality, an attorney is not required to divulge voluntarily confidential facts unless otherwise required by law.[79] This generally includes discovery rules in litigation. The key to that statement lies in the visual of Forrest Gump walking up to the podium during a war protest rally in Washington, D.C. to the sound of Jefferson Airplane blasting out the song "Volunteers."[80] Lawyer "Forrest" need not volunteer his client's confidential information, but if he does, he must be truthful about all material facts. The term of art is "volunteer." If an attorney makes a statement as to material facts about his client, then he or she must be truthful. The rules tolerate puffing, but not lying.

If a lawyer discovers a client has committed a crime or fraud, and the lawyer's services were used to commit the crime or fraud, or the client is committing or intends to commit a crime or a fraud, the Texas Model Rules[81] require the lawyer to take certain remedial steps to rectify that crime or fraud.[82] Although Rule 1.02 appears to govern only the actions of attorneys practicing criminal law, it actually governs the actions of all attorneys, including attorneys practicing oil and gas law. If a client uses a lawyer's services to commit a crime or fraud, a lawyer should take reasonable steps to convince the client to correct the criminal or fraudulent act. If the client intends to commit a crime or fraud "that is likely to result in substantial injury to the financial interest or property of another," the lawyer should persuade the client not to commit the act.[83] In either situation, if the lawyer's attempt proves unsuccessful, the attorney should disclose the crime or fraud, including disclosure of any confidential information that he or she believes necessary to prevent the client from committing the crime or fraud. These rules, effective since January 1, 1990, improve the ABA Model Code, which mandated disclosure by the attorney to a third party of any crime or fraud but then excluded from disclosure any information gained under confidentiality.[84] Thus, the last part of the rule virtually obliterated the first part, since nearly all information is gained under some form of confidentiality.

Lawyers shall not offer false evidence in court.[85] If they discover that they have offered false evidence, they must first try to convince the client to allow the attorney to withdraw or correct the evidence.[86] If that effort fails, then the lawyer must take reasonable remedial

79. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(4).

80. FORREST GUMP (Paramount Pictures 1994); JEFFERSON AIRPLANE, *Volunteers*, *on* VOLUNTEERS (RCA 1969).

81. *See* TEX. GOV'T CODE ANN., tit. 2, sub. tit. G app. (West 1997).

82. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(c)-(f).

83. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(d).

84. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1969).

85. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1)-(2).

86. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(b).

measures, including disclosing the truth.[87] The obligation to rectify continues as long as there remains a reasonable possibility to take corrective legal steps.[88] In a criminal case, that time generally ends with any verdict. In a civil case the corrective measures are available through all appeals since no constitutional issues prevent an earlier termination.

X. CONFIDENTIALITY: TEXAS RULE 1.05

An attorney, like any other person, may be tempted to gossip about the sordid details of the cases he or she handles. However, Texas Disciplinary Rule 1.05 requires lawyers to keep in confidence all information concerning the representation of a client, whether the information is gained before, during, or after representation.[89] This rule provides greater protection than was afforded under the Model Code Disciplinary Rule 4-101(A), which only provided protection for secrets and confidences (information protected by the attorney-client privilege) gained during the course of the representation.[90] Confidentiality may be breached only under the following conditions: the attorney is authorized to do so to carry out the representation; the client consents; the communication is made to the client or his agents; to satisfy a court order or a law; to the extent necessary to collect a fee; to defend a civil or criminal claim against the attorney arising out of the representation; to prevent a crime or fraud in the future; or to rectify a crime or fraud of the client where the lawyer was used in the crime or fraud.[91]

Under Texas Rule 1.05, an attorney may not use confidential information of a current or former client to the disadvantage of the client without the client's consent.[92] In addition, the attorney is restricted from using the information to the "attorney's advantage" without the consent of the client, even if the client is not "disadvantaged."[93] This is the standard under the Model Code,[94] as well. In 1983, the Model Rules only promulgated the standard that an attorney may not use information gained in the course of the relationship to the "disadvantage" of his client without the client's consent.[95] The Model Rules adopted this standard because in theory, it provides sufficient protec-

87. *See id.* The disclosure of otherwise confidential information should be limited to what is necessary to reveal the truth.

88. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(c).

89. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05. *reprinted in* TEX GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

90. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969).

91. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(1)-(8).

92. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(2)-(3).

93. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(4).

94. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(3) (1969).

95. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(b) (1983).

tion for the client.[96] The term "confidential information" as used by the Texas rule includes all information gained during, prior to, or after the course of representation.[97] For example, an attorney practicing oil and gas law may be tempted to purchase mineral rights to a particular tract of land after a client expresses an intention to drill an oil well on the adjoining lot. Unless the attorney gains the permission of his client before purchasing the mineral rights, he violates this rule because he used confidential information to his advantage. The careful attorney must disclose his desire to the client and obtain the client's consent.

Confidentiality is the key to establishing the trust of any client. If an attorney has a problem gossiping or tends to talk too much after drinking alcohol, then that lawyer must change his behavior. To prevent unintentional gossip about a client, an attorney may speak with a colleague within his firm about the case, thereby satisfying both the need to discuss the case and the need to gain an additional perspective on the matter. For the drinker with active lips, the best solution is moderation at all times or to take a non-drinking member of the firm along to monitor his activities and conversations. Moderation seems to be a much easier course of action than keeping a personal watchdog available.

Lawyers who outsource work create numerous opportunities for breaches of confidentiality. In the cost conscious days of 1998, lawyers utilize outside entities to perform jobs that cannot be performed cost effectively in-house. Library maintenance, computer hardware repair and upgrades, general office maintenance, janitorial services, copy services, court reporters, telephone services, among many other services are being performed by outside companies. Although outside companies save attorneys the cost of a full-time staff, they create confidentiality problems when they have access to client files. Lawyers must maintain a system to prevent these agents from violating confidences. A careful attorney should put in place a system, whereby the outside resource company agrees to maintain the confidentiality of the client files, including a penalty for failure to do so.[98] Each person or company that has access to any information in client files should sign an agreement expressing this condition.[99]

CONCLUSION

Lawyers can avoid these top ten grievances by conscientiously abiding by the Texas Disciplinary Rules of Professional Conduct. Violating the disciplinary rules for personal gain or carelessness is not worth

96. *See id.*

97. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a).

98. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 95-398 (1995).

99. *See id.*

the risk it creates on one's career. Lawyers should remain mentally aware to behave appropriately before, during, and after representing a client. Before representing a client, lawyers should ensure that no conflict of interest would arise by doing so. While representing a client, lawyers should effectively communicate with that client, charge only reasonable fees, diligently attend to the case, refrain from lying and deceiving others, and take special care to protect the client's money and property. After representation, lawyers should keep the client's confidences and refuse to prejudice the client in any manner. Following these guidelines will lead to a more successful career, as well as keep your malpractice insurance at a reasonable price.