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Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 through 4.04.

Barbara Hanson Nellermoe

Fidel Rodriguez Jr.

PROFESSIONAL RESPONSIBILITY AND THE LITIGATOR: A COMPREHENSIVE GUIDE TO TEXAS DISCIPLINARY RULES 3.01 THROUGH 4.04

BARBARA HANSON NELLERMOE*
FIDEL RODRIGUEZ, JR.**

* B.S., Concordia College (Moorhead, Minnesota); M.A., Mankato State University (Minnesota); J.D., St. Mary's University School of Law. Ms. Nellermoe is a staff attorney for the Fourth Court of Appeals in San Antonio, Texas. The opinions expressed in this Article are solely those of the authors and are not necessarily in accordance with the Fourth Court of Appeals.

** B.S., Texas A&M University; J.D., University of Texas; Board certified in personal injury law, Texas Board of Legal Specialization. Mr. Rodriguez practices personal injury, negligence, and products liability law at the Law Offices of Fidel Rodriguez, Jr., in San Antonio, Texas.

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> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof . . . to conduct himself so as to reflect credit on the legal profession and inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.[1]

I. INTRODUCTION

In 1991, the Supreme Court of Texas addressed a problem familiar to most attorneys who practice in the state of Texas. In *Braden v. Downey*,[2] the court noted that "we recognize that discovery abuse is widespread and we have given trial courts broad authority to curb such abuse."[3] This is no easy task. Technological advancements have brought new challenges to an attorney's conduct in litigation and in the discovery process.[4] Further, it is common for

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6 (1969); State Bar Rules, art. X, § 9, EC 9–6 (1984) (former Texas Code of Professional Responsibility).

> The lawyer assumes high duties, and has imposed upon him grave responsibilities. . . . Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession.

State Bd. of Law Exam'rs v. Sheldon, 7 P.2d 226, 227 (Wyo. 1932).

2. 811 S.W.2d 922 (Tex. 1991) (orig. proceeding).

3. *Braden*, 811 S.W.2d at 930.

4. *See* John M. Cunningham, *What Is a High Tech Lawyer? An Essay in Self Definition*, 10 COMPUTER LAW. 23, 24–25 (1993) (analyzing needs and tools of lawyers in increasingly technological world); Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role, and Law Approach*, 62 FORDHAM L. REV. 1411, 1422 n.65 (1994) (asserting that as profession enters "a new age of lawyering," bar association must ensure that disciplinary rules meet demands of high-tech society and that current rules are too general in this respect); Erik Hromadka, *Navigat/ The .High.Tech.Law.Pract*, 38 RES GESTAE 10, 10–13 (1995) (discussing technological advancements and their profound effect on practice of law); J. B. Ruhl, *Malpractice and Environmental Law: Should Environmental Law "Specialists" Be Worried?*, 33 HOUS. L. REV. 173, 188 (1996) (discussing ways to keep law practice current in today's "high-tech world of lawyering").

lawyers to practice in many cities and jurisdictional regions.[5] Some in the profession, however, narrow-mindedly feed at the "winner-take-all" banquet, thinking, "I don't have to work with this attorney or this judge tomorrow. I'll be trying my next case in another city, another courthouse."[6] Unfortunately, the time-honored tradition of building solid, respected relationships with other members of the bar is too often cast aside by many members of our profession.[7] The authors of this Article remain convinced that as attorneys, our reputations are the most important thing we retain throughout our careers.[8] Indeed, our reputations precede us in any case in which we become involved. The manner in which other lawyers will treat us tomorrow as an advocate of our clients and as

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5. *See* Edmund B. Spaeth, Jr. et al., *Teaching Legal Ethics: Exploring the Continuum*, LAW & CONTEMP. PROBS., Fall 1995, at 153, 157 (noting that teaching in law schools and continuing education classes must be parochial because many lawyers practice in several jurisdictions in today's society); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 685 (1995) (reporting that transaction lawyers "often—some habitually" practice law in jurisdictions other than those in which they are admitted); *Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1586 (1994) (discussing jurisdiction over lawyers' conduct and noting that "many lawyers are now admitted to general practice in more than one jurisdiction, and even more are admitted *pro hac vice*").

6. *See* Robert J. Araujo, *Humanitarian Jurisprudence: The Quest for Civility*, 40 ST. LOUIS U. L.J. 715, 719–20 (1996) (noting that law, "an institution designed to promote civil healing," is increasingly characterized by uncivil behavior by attorneys); Eugene A. Cook, *foreword to* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1 (1990) (identifying "Rambo-type" attitudes as those at heart of problem, driving need for disciplinary rules designed to bring about "a new professionalism"); Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177, 178–80 (1996) (discussing improper behavior by increasing number of lawyers and public's negative perception of profession as result thereof).

7. *See* Daniel J. Pope & Helen Whatley Pope, *"Take Care of Each Other,"* 63 DEF. COUNS. J. 270, 270–71 (1996) (reporting that discovery process has devolved into petty and brutal battle between lawyers and that there was time when courtesy between attorneys was rule, and attorneys, while doing battle in courtroom, left as friends and respected each other as colleagues); W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 921–23 (1996) (discussing morality of discovery practice and arguing for increased ethical litigation practices by lawyers).

8. *See* Contico Int'l, Inc. v. Alvarez, 910 S.W.2d 29, 33 (Tex. App.—El Paso 1995, orig. proceeding) (discussing lawyer's unique and "lofty position in the political and judicial fabric of the United States"). "An honest and ethical lawyer has long been part of the foundation for the historically elevated and well-deserved role lawyers have played in our culture." *Id.* Lawyers must place themselves above the "madding crowd" of society and remain constant in their ethics and standards. *Id.*

their adversary is, to a significant degree, a direct consequence of how we treated various lawyers and their clients in our previous cases.

The Order of Adoption of the *Texas Lawyer's Creed—A Mandate for Professionalism*, promulgated by the Supreme Court of Texas and the Texas Court of Criminal Appeals in 1989, requires that "[t]he conduct of a lawyer should be characterized at all times by honesty, candor, and fairness."[9] It is therefore mandatory that attorneys refrain from engaging in conduct involving dishonesty, deceit, or misrepresentation to other lawyers.[10] The rules governing the State Bar of Texas have the same force and legal effect upon the matters to which they relate as the Texas Rules of Civil Procedure have upon the matters to which they relate.[11] Ultimately, our own consciences are the touchstones for testing whether our conduct as lawyers merely meets the minimum stan-

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9. *See The Texas Lawyer's Creed—A Mandate for Professionalism* (asserting that lawyers must be "ever mindful of the profession's broader duty to the legal system. . . . [T]he desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct."), *in* TEXAS RULES OF COURT 495 (1996); *see also* Schware v. Board of Bar Exam'rs of N.M., 53 U.S. 232, 247 (1957) (Frankfurter, J., concurring) (relating that "[c]ertainly since the time of Edward I, through all the viscitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities."); Bray v. Squires, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ) (emphasizing that "[i]t is every lawyer's ethical responsibility to maintain the highest standards of professional conduct."); State Bar Rules, art. X, § 9, DR 1-102 (Texas Code of Professional Responsibility), EC 1-5 (stating that "[b]ecause of [a lawyer's] position in society, even minor violations of law by a lawyer tend to lessen public confidence in the legal profession.").

10. TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(3) (1994), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1996) (STATE BAR RULES art. X, § 9); *see* Horner v. Rowan Cos., 153 F.R.D. 597, 603 (S.D. Tex. 1994) (interpreting former Disciplinary Rule 1-102(a)(4) and noting that disciplinary rules are mandatory and have force of law).

11. *See Horner*, 153 F.R.D. at 603 (assessing attorneys' fees under court's "inherent powers" to punish attorneys for violations of disciplinary rules); State v. Malone, 692 S.W.2d 888, 896 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (acknowledging that disciplinary rules are to be given same force and effect as statutes), *rev'd on other grounds*, 720 S.W.2d 842 (Tex. App—Beaumont 1986, no writ); *see also* State Bar of Tex. v. Edwards, 646 S.W.2d 543, 544 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (noting that power of court to impose punishment under disciplinary rules is "derived from the rules; these same rules also limit the power to such punishment prescribed therein"), *aff'd as modified*, 691 S.W.2d 747 (Tex. App.—Texarkana 1985, no writ); Cochran v. Cochran, 333 S.W.2d 635, 640 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (discussing force and effect of rules governing State Bar of Texas).

dards of the profession, or rises to a higher level.[12] As noted in the preamble to the rules of professional conduct,

> [t]he desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.[13]

In 1990, the Texas Code of Professional Responsibility was repealed by an order of the Texas Supreme Court dated October 17, 1989.[14] The Code was replaced by Article 10, § 9 of the State Bar Rules (the Texas Disciplinary Rules of Professional Conduct), ef-

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12. *See* TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶¶ 1, 9 (1991) (stating that fulfillment of lawyers' vital role in society requires their understanding of their unique relationship with and function in legal system, and that "[e]ach lawyer's conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules"); *The Texas Lawyer's Creed,* Order of Adoption (1989) (demanding that lawyers always be cognizant of their duty to legal profession as whole and stating that compliance with rules depends primarily upon voluntary compliance and attorneys' own desire for respect and confidence); *see also* Board of Law Exam'rs of Tex. v. Stevens, 868 S.W.2d 773, 775 (Tex. 1994) (citing TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 1, which states "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."), *cert. denied*, 114 S. Ct. 2676 (1994); Pannell v. State, 666 S.W.2d 96, 98 (Tex. Crim. App. 1984) (en banc) (describing history of regulation of legal profession and determining that legal ethics rules are administrative, rather than statutory in nature, and thus self-regulated by State Bar); Hexter Title & Abstract Co., Inc. v. Grievance Comm., State Bar of Tex., 179 S.W.2d 946, 948 (Tex. 1944) (describing history of regulation of Texas legal profession and recalling state legislature's creation of state bar to regulate profession).

13. TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 9 (1991).

14. TEX. DISCIPLINARY R. PROF. CONDUCT adoption and effective date of rules (1989); *see* Industrial Accident Bd. v. Spears, 790 S.W.2d 55, 57 (Tex. App.—San Antonio 1990, orig. proceeding) (noting that by order of Supreme Court of Texas, as of January 1, 1990, Texas Disciplinary Rules of Professional Conduct went into effect and "are imperatives, cast in the terms 'shall' or 'shall not'"), *overruled on other grounds sub nom.* Spears v. Fourth Ct. of App., 797 S.W.2d 654 (Tex. 1990) (orig. proceeding); David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 8 n.43, 22 n.67, 147–48 (1991) (explaining that when Texas Code of Professional Responsibility was repealed, all canons, disciplinary rules, and ethical considerations were replaced); David S. D'Ascenzo, *Federal Objective or Common Law Champerty?—Ethical Issues Regarding Lawyers Acquiring an Interest in a Patent*, 3 TEX. INTEL. PROP. L.J. 255, 269 (1995) (adding that nature of Texas Rules of Professional Conduct is mandatory, while nature of Texas Code of Professional Responsibility was aspirational and discretionary).

fective January 1, 1990.[15] In October of 1990, Professor Robert P. Schuwerk of the University of Houston Law Center and Professor John F. Sutton, Jr., of the University of Texas School of Law published *A Guide to the Texas Disciplinary Rules of Professional Conduct.*[16] That article gave exhaustive treatment to the history, purpose, and scope of the new Texas Disciplinary Rules and compared each rule with the American Bar Association's Model Rules

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15. TEX. DISCIPLINARY R. PROF. CONDUCT preamble (1989); *see* Thomas v. Pryor, 847 S.W.2d 303, 305 n.1 (Tex. App.—Dallas 1992, writ granted) (indicating that notwithstanding court's awareness that Texas Code of Professional Responsibility was no longer in effect, court was nevertheless persuaded by policies underlying Code's ethical considerations), *remanded for judgment on settlement agreement,* 863 S.W.2d 462 (Tex. 1993); Clarke v. Ruffino, 819 S.W.2d 947, 949 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd w.o.j.) (asserting that because of differences between Texas Disciplinary Rules of Professional Conduct and Texas Code of Professional Responsibility, relator was wrong to ignore Texas Disciplinary Rules and rely solely on case law interpreting former Texas Code); W. Frank Newton, *The Proposed Texas Disciplinary Rules of Professional Conduct Should Be Adopted*, 52 TEX. B.J. 557, 557 (1989) (encouraging adoption of Texas Disciplinary Rules of Professional Conduct, and stressing importance of self-governance in maintaining high level of public confidence in lawyers); *Texas' New Disciplinary Rules Become Effective Jan. 1, 1990*, 52 TEX. B.J. 1023, 1023 (1989) (illustrating results of Texas State Bar referendum and showing that adoption of rules prevailed by margin of 23,539 to 4,411 votes); *cf.* Ronald D. Rotunda, *Professional Responsibility*, 45 Sw. L.J., 2035, 2053 (1992) (surveying professional responsibility and legal ethics developments one year after January 1, 1990, effective date of Texas Rules of Disciplinary Conduct). Professional conduct engaged in by a Texas attorney prior to January 1, 1990, remains under the governance of the Code of Professional Responsibility. Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 743 n.5 (Tex. App.—Austin 1995, writ denied). The following synopsis exemplifies how the Texas Disciplinary Rules of Professional Conduct were created:

> The proposed Texas Disciplinary Rules of Professional Conduct are the work product of the Model Rules of Professional Conduct Special Committee of the State Bar of Texas. In 1984 this special committee, chaired by Orrin W. Johnson, was appointed to consider the propriety of adopting the 1983 American Bar Association Rules of Professional Conduct, perhaps with amendments, to replace the existing Texas Code of Professional Responsibility. The Model Rules Committee divided into working groups to review the 1983 ABA Model Rules. In 1987 the committee as a whole then reviewed a comprehensive draft and presented it to the board of directors of the State Bar of Texas. The comprehensive draft was the subject of a public hearing held at the June 1987 annual convention in Corpus Christi. Comments from that hearing and comments submitted after the hearing, including comments offered by sections and committees, prompted changes in the proposed rules. A comprehensive set of rules was presented to the board of directors in late 1988. After its January 1989 meeting the board of directors notified the Supreme Court that new rules were ready. On Feb. 1, 1989 the Supreme Court ordered a referendum to be held on the proposed rules.

John F. Sutton, Jr. & W. Frank Newton, *Proposed Texas Disciplinary Rules of Professional Conduct: Commonly Asked Questions*, 52 TEX. B.J. 561, 561 (1989).

16. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1 (1990).

of Professional Conduct.[17] For readers interested in these issues, the Schuwerk and Sutton article remains an invaluable resource. The purpose of this Article is to provide the reader with an understanding of the rules of disciplinary conduct that govern attorneys' conduct during the discovery process and during litigation. Every significant Texas and Fifth Circuit case located by the authors citing to, discussing, or interpreting Rules 3.01 through 4.04, and every opinion issued by the Supreme Court of Texas's Professional Ethics Committee, is referenced herein.[18] Through an examination of the interpretive case law and ethics opinions, this Article strives to provide the reader with a comprehensive and practical guide to each of the disciplinary rules governing professional conduct during the discovery process, as well as a thorough understanding of the interpretation and application of these rules.

II. THE LAWYER'S ROLE AS AN ADVOCATE

A. *Rule 3.01: Meritorious Claims and Contentions*

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.[19]

As advocates, we must balance our duty to use legal procedure and the rules governing the discovery process for the fullest benefit of the client's cause against our duty to not abuse legal procedure and rules.[20] Attorneys are prohibited from filing frivolous pleadings, motions, or other papers and from presenting frivolous or knowingly false arguments to the court.[21] A claim or contention is

17. *See generally id.* (providing comprehensive guide to Texas Disciplinary Rules).

18. There is a dearth of interpretive case law and ethics opinions for some of the rules discussed in this Article. In these situations, the authors have attempted to give thorough treatment to the interpretive comments and make analogies to other rules in order to provide the reader with the greatest possible insight into the operation of these rules. In some situations, secondary authority is also cited in support of the authors' interpretations of these rules.

19. TEX. DISCIPLINARY R. PROF. CONDUCT 3.01 (1990); *see* David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 109 (1991) (applying ethical violations of frivolous claims or defenses to area of law concerning insurance defense).

20. TEX. DISCIPLINARY R. PROF. CONDUCT 3.01 cmt. 1 (1990).

21. *Id.* at cmt. 2; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.011(2)–(3), 10.001(1) (Vernon Supp. 1997) (providing that pleadings or motions signed by signatory should not be presented to promote any improper purpose, including causing needless increase in

frivolous if made primarily for the purpose of harassing or maliciously injuring another person.[22] An argument is frivolous if the

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litigation costs, harassing party, or inducing unnecessary delay); Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.) (ruling that because medical malpractice plaintiff, who alleged that opposing counsel filed suit "without proper investigation" and "without an informed basis of determining prior to the filing of such suit that such suit had reasonable merit," did not file grievance in accordance with State Bar Rules procedures, he was left with no remedy, and that attorney's violation of disciplinary rules does not by itself create private cause of action).

22. TEX. DISCIPLINARY R. PROF. CONDUCT 3.01 cmt. 2 (1990); *see* Jeffery v. State, 903 S.W.2d 776, 779 (Tex. App.—Dallas 1995, no writ) (explaining that appointed appellate counsel is precluded from making frivolous claims on appeal); *see also* Attorney Gen. of Tex. v. State, 874 S.W.2d 210, 215–16 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (imposing sanctions on Attorney General after finding no arguable basis for Attorney General's claim where notice of delinquency in child support payments were groundless, frivolous, and without legal authority); McAllister v. Samuels, 857 S.W.2d 768, 779 (Tex. App.—Houston [14th Dist.] 1993, no writ) (recognizing that claims for damages stemming from frivolous lawsuits are claims for affirmative relief); Fina Oil & Chem. Co. v. Salinas, 750 S.W.2d 32, 35 (Tex. App.—Corpus Christi 1988, no writ) (explaining that when attorney's strategy is delay and obstruction, justice is defeated because "courts are reduced to impotency, and public confidence and esteem is impaired"); *cf.* Ibarra v. State, 782 S.W.2d 234, 235 (Tex. App.—Houston [14th Dist.] 1989, no writ) (admonishing criminal defense attorney for attempting to delay imposition of defendant's sentence, and finding that attorney violated Rule 3.01 by submitting identical "fill-in-the-blank" briefs previously filed in other cases before same court without trying to distinguish present case from past cases); Graham v. State, 767 S.W.2d 271, 271–72 (Tex. App.—Amarillo 1989, no writ) (stating that ordinarily, when counsel files briefs similar in substance to those that have been previously submitted in other cases, notwithstanding that counsel always received same response by court, State's motion to order rebriefing would be sustained based partly on Rule 3.01; however, to promote judicial economy, State's motion was overruled); Mazuera v. State, 778 S.W.2d 192, 193 (Tex. App.—Houston [1st Dist.] 1989, no writ) (striking appellant's brief and ordering rebrief where appellant's lawyer continued to file same form brief when representing numerous clients previously but failing to distinguish their cases from present case). *But see* Anders v. California, 386 U.S. 738, 744 (1967) (insisting that in penurious defendant's right to appointed representation, advocate's role extends through appeal process, and implying that arguable points of error are not frivolous); Brown v. State, 915 S.W.2d 533, 535 (Tex. App.—Dallas 1995, rev. granted) (reiterating that by definition, points of error that are "arguable" are not frivolous); David Lopez, *Why Texas Courts Are Defenseless Against Frivolous Appeals: A Historical Analysis with Proposals for Reform*, 48 BAYLOR L. REV. 51, 55, 129 (1996) (emphasizing that attorneys, who have ethical duty to avoid frivolous litigation, can escape penalty under Texas Rule of Appellate Procedure 84, which is state's foremost vehicle for recognizing and sanctioning frivolous appeals, and illustrating that ironically, four most common reasons that Texas appellate cases are deemed "frivolous" are matters within attorneys', rather than their clients', control). As an addendum, the appellant's attorney in *Mazuera*, *Ibarra*, and *Graham* was the same person, Rokki Ford Roberts. *Mazuera*, 778 S.W.2d at 193; *Ibarra*, 782 S.W.2d at 234; *Graham*, 767 S.W.2d at 271. Determining whether a claim or defense is unwarranted under existing law or whether it is based upon a good-faith argument that existing law should be modified or reversed, is a matter of law. Barnes v. State Bar of Tex., 888 S.W.2d 102, 107 (Tex. App.—

attorney cannot in good faith assert that the position taken is consistent with existing law, or that it is supported by a good-faith argument for an extension, modification, or reversal of existing law.[23] A filing or contention is considered frivolous if it contains statements of fact known by the lawyer to be false.[24] However, a filing

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Corpus Christi 1994, no writ). However, Rule 3.01 further specifies the actor's culpable mental state: knowledge. *Id.* The attorney must know that a good-faith argument cannot be made for a reversal or modification of the law, or know that under existing law, a claim is unwarranted. *Id.* This knowledge requirement is a factual question to be determined by a jury. *Id.* Furthermore, there is no authority mandating a court to instruct a jury in a criminal proceeding on such a disciplinary rule as Rule 3.01. Hefner v. State, 735 S.W.2d 608, 626 (Tex. App.—Dallas 1987, writ ref'd).

23. TEX. DISCIPLINARY R. PROF. CONDUCT 3.01 cmt. 2 (1990); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.011(1), 10.001(2) (Vernon Supp. 1996) (asserting that to signatory's best knowledge, each pleading or motion must be brought in good faith and be warranted by either existing law, establishment of new law, or nonfrivolous argument for modification, reversal, or extension of current law); Resolution Trust Corp. v. Tarrant County Appraisal Dist., 926 S.W.2d 797, 802 & n.4 (Tex. App.—Fort Worth 1996, n.w.h.) (disapproving of RTC's tactic of filing suit and then asserting for first time on appeal that trial court lacked jurisdiction); *Barnes*, 888 S.W.2d at 107 (stating that culpable mental state of lawyer is question of fact); *see also* Maddox v. State, 613 S.W.2d 275, 280 (Tex. Crim. App. 1980) (mentioning that one of criminal attorneys' biggest challenges is representing defendants who insist on testifying falsely, especially in light of attorneys' duty to not knowingly use perjured testimony). In *Tarrant County Appraisal Dist.*, the court noted that "Rules 3.01, 3.02, and 3.03 collectively prohibit a lawyer not only from filing frivolous suits or claims, but also from taking actions that unreasonably increase the costs of litigation for the opposing party or failing to disclose a material fact or legal argument to the court." *Tarrant County Appraisal Dist.*, 926 S.W.2d at 802 n.4. Failing to raise an issue such as sovereign immunity until the courts and parties were months into the litigation was, "at a minimum . . . conduct [that] falls within the broad range of 'abusive tactics' which the Supreme Court of Texas sought to eliminate" through its adoption of "The Texas Lawyer's Creed." *Id.* Notwithstanding the court's determination that the attorneys' *tactics* violated the disciplinary rules, Resolution Trust was allowed to assert sovereign immunity for the first time on appeal. *Id.* at 802.

24. TEX. DISCIPLINARY R. PROF. CONDUCT 3.01 cmt. 3 (1990); *see* Tex. Comm. on Professional Ethics, Op. 499, 58 TEX. B.J. 178, 178–79 (1995) (addressing question of whether Disciplinary Rule 3.01 would be violated if in-house lawyer for governmental agency knowingly misrepresented to opposing attorney and administrative law judge that factual basis existed for jurisdiction of administrative proceeding initiated by agency); *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.011, 10.001(3) (Vernon Supp. 1997) (stating that each allegation or factual contention in signatory's pleadings or motions shall not be groundless and shall have evidentiary support or probably have evidentiary support after reasonable opportunity to investigate further or obtain through discovery). In Ethics Committee Opinion No. 499, the Professional Ethics Committee posed the following hypothetical situation: "A government agency initiates an administrative proceeding against [another party]." Tex. Comm. on Professional Ethics, Op. 499, 58 TEX. B.J. 179 (1995). "The [opposing party] raises an affirmative defense that the proceeding was not commenced according to existing law and regulations, and requests that the in-house attorney for the agency provide a delegation of authority to demonstrate that the proceeding was

or contention will not be considered frivolous simply because the facts have not been fully substantiated, or because the lawyer expects to later develop the facts during discovery.[25]

False statements of fact, knowingly made by an attorney, fatally taint any filing or contention. However, this does not mean that an attorney must fully substantiate every fact prior to filing, or refrain from filing a general denial or another motion containing other positions when she believes that her clients may not ultimately prevail.[26] For example, when representing a criminal defendant or a respondent in a commitment proceeding, an attorney may force the opposing party to establish each and every element of its case.[27] A lawyer's conduct must not only conform to Rule 3.01, but all filings must meet the more stringent standards imposed by Federal Rule of Civil Procedure 11 and/or Texas Rule of Civil Procedure 13.[28]

B. *Rule 3.02: Minimizing the Burdens and Delays of Litigation*

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.[29]

Comment 1 to Rule 3.02 suggests a distinction between reasonable and unreasonable delays in a case.[30] Reasonable delays that result in an increase in costs and other burdens of litigation do not violate this rule, if the tactics used further the legitimate interests

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commenced by an agency representative with authority to do so." *Id.* No delegation of authority is issued, but the government attorney represents to the opposing party and to the administrative law judge that jurisdiction exists. *Id.* Based on this representation, "the judge denies the opposing party's motion to dismiss," and the judge ultimately hands down a ruling in favor of the agency. *Id.* The Committee stated in Opinion No. 499 that "if the in-house attorney for the government agency did not know that a delegation of authority existed, he should have had a reasonable basis for believing that one existed before representing to the judge that a basis for jurisdiction existed. If he had no reasonable basis for believing that a delegation of authority existed, he violated DR 3.01." *Id.*

25. TEX. DISCIPLINARY R. PROF. CONDUCT 3.01 cmt. 3 (1990).

26. *Id.*

27. *Id.*

28. *Id.* at cmt. 4.

29. TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 (1990).

30. *Id.* at cmt. 1; *see* David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 109 (1991) (explaining that insurance defense counsel's participation in unreasonable increases in costs or unreasonable delays violates Texas Disciplinary Rules of Professional Conduct).

of the client in the lawsuit.[31] Attorneys may seek reasonable delays to accommodate other clients, or to accommodate their own multiple obligations.[32] Further, if the case involves a complex issue or extensive discovery, they may legitimately seek more time than the rules generally permit to prepare a proper response.[33]

On the other hand, "unreasonable" delays are strictly prohibited by this rule.[34] In this context, a delay is considered unreasonable if it is: (1) a dilatory practice indulged in simply for the convenience of the attorney,[35] (2) primarily for the purpose of harassing or maliciously injuring another person,[36] or (3) motivated primarily by the lawyer's desire to receive a larger fee.[37] Further, attorneys may not seek or assist clients in seeking to increase the costs or other burdens of litigation.[38] For example, attorneys who represent well-financed clients may not use their "deep pockets" to wear down a less-wealthy opponent by increasing the costs and burdens of litigation on that opponent.[39] However, not all actions taken by attorneys that result in increased costs, fees, or burdens of litigation are considered unreasonable.[40]

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31. TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 cmt. 6 (1990).

32. *Id.* at cmt. 3.

33. *Id.* at cmt. 4.

34. TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 (1990).

35. *Id.* at cmt. 3.

36. *Id.* at cmt. 5. In making this determination,

> the question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable.

Id.

37. *Id.* at cmt. 1. This type of conduct is also governed by Rule 1.04 and Comment 6 thereto. *Id.*

38. TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 cmt. 7 (1990); *cf. In re* Office Prods. of America, Inc., 136 B.R. 964, 977 (Bankr. W.D. Tex. 1992) (holding that law firm's rendering of services in cooperating with client's change of representation after case was converted to Chapter 11 bankruptcy was not unreasonable means of increasing costs of litigation).

39. TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 cmt. 7 (1990); *see* Resolution Trust Corp. v. Tarrant County Appraisal Dist., 926 S.W.2d 797, 802 n.4 (Tex. App.—Fort Worth 1996, n.w.h.) (noting that lawyers may not unreasonably increase cost or other burdens of litigation, and implying that Rules 3.01, 3.02, and 3.03 work in conjunction to prohibit attorneys from abusing legal process).

40. TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 cmt. 6 (1990). Litigation is almost always burdensome and expensive and, like delay, increases in costs or other burdens can serve many purposes. *Id.* Attorneys may take whatever actions necessary not specifically

C. *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.[41]

A lawyer's duty to present a case persuasively must be balanced against a duty of candor to the court.[42] This means that attorneys have a duty to be forthright, honest, sincere, and unreserved in making their persuasive arguments.[43] It is dishonest, and a viola-

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prohibited by the rules "in order to fully and effectively protect the legitimate interests of a client that are at stake in litigation." *Id.*

41. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 (1990).

42. *Id.* at cmt. 1; *see* Plunkett v. State, 883 S.W.2d 349, 355 (Tex. App.—Waco 1994, writ ref'd) (holding that under Rule 3.03(a)(2), attorney had duty to inform court of his belief that jury had been compromised by representations and improper influence of his client); *cf. In re* Placid Oil Co. v. United States, 158 B.R. 404, 409, 411–12 & n.8 (Bankr. N.D. Tex. 1993) (dismissing summarily appellant's contention that bankruptcy court erred in disbarring him for numerous instances of professional misconduct, including violation of Rule 3.03, as bankruptcy court has inherent power and jurisdiction to take such action when attorney practicing before it makes express misrepresentations to court).

43. *See In re* Mflex Corp., 172 B.R. 854, 858 (Bankr. W.D. Tex. 1994) (determining that intentional filing of false pleading or Application Requesting Approval for Employment "is a blatant violation of the obligation of candor to the court and fiduciary obligation to the estate" that could warrant denial of all compensation); Contico Int'l, Inc. v. Alvarez, 910 S.W.2d 29, 34 (Tex. App.—El Paso 1995, orig. proceeding) (stating that lawyers owe duty to courts of "scrupulous honesty, forthrightness, and the highest degree of ethical conduct"). Courts must rely on an attorney's word, and cases will often turn on such representations. *Contico*, 910 S.W.2d at 34. If that word is doubted, "the court is empowered, if not required, to investigate the lawyer's performance." *Id.*

tion of this rule, for attorneys to make a legal argument when they know that the law is not as they represent it to the court.[44]

The duty of candor to the court takes on new meaning when attorneys engage in an ex parte proceeding. In those limited instances when such a proceeding may be necessary and appropriate, as when attorneys seek a temporary restraining order (TRO), they must be particularly careful to disclose any nonprivileged information that the lawyer believes the court may need to make a just decision.[45] The court has an affirmative duty to give just consideration to the absent party's position, and attorneys have a duty to assist the court by disclosing nonprivileged information that they

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44. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 3 (1990); *see* Resolution Trust Corp. v. Tarrant County Appraisal Dist., 926 S.W.2d 797, 802 n.4 (Tex. App.—Fort Worth 1996, n.w.h.) (explaining that plaintiff violated Rule 3.03 by asserting for first time on appeal that trial court lacked jurisdiction when parties knew that such jurisdiction did not exist at time of filing suit); Eubanks v. Mullins, 909 S.W.2d 574, 576 & n.1 (Tex. App.—Fort Worth 1995, orig. proceeding) (comparing duty of appellate court to clearly state in its opinions that it disagrees with existing law from other courts of appeals to lawyer's duty to disclose to court "'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'" under Rule 3.03(a)(4)); Volcanic Gardens Mgmt. Co. v. Paxson, 847 S.W.2d 343, 347–48 (Tex. App.—El Paso 1993, orig. proceeding) (comparing lawyer's duty under Rule 3.03(a)(1)–(2) to crime-fraud exception to attorney-client privilege); *see also* Concha v. Concha, 808 S.W.2d 230, 231 (Tex. App.—El Paso 1991, no writ) (noting in passing that Rule 3.03(a)(1) requires lawyer to refrain from making false statement of material fact or law to court, and that whether attorney's "misrepresentation of status of law was one of perception or deception is not for us to decide"); Tex. Comm. on Professional Ethics, Op. 499, 58 TEX. B.J. 178–79 (1995) (concluding that it would be violation of Rule 3.03 for in-house attorney for government agency to represent to administrative law judge and opposing party that court had jurisdiction when he knew that it did not). Not only must an attorney refrain from making false or misleading statements to the court, but he must also disclose authority that is directly adverse to his position in the controlling jurisdiction if his adversary does not raise such authority in the proceeding or documents therein. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 3. The Dallas Court of Appeals took this principle a step further in *HL Farm Corp. v. Self*, when it asserted that an attorney may not "ignore" relevant and applicable case law and fail to address such precedent merely because he believes his opponent's reliance thereupon is misplaced. HL Farm Corp. v. Self, 820 S.W.2d 372, 375–76 & n.2. (Tex. App.—Dallas 1991), *rev'd on other grounds*, 877 S.W.2d 288 (Tex. 1994). The court determined that a certain case presented by the opposing party was determinative of the issue before the court, but noted that opposing counsel did not cite the case in his brief. *Id.* at 375 n.2. At oral argument, counsel acknowledged that the case was directly contrary to his position, but admitted that "he did not bring the case to the Court's attention because he thought the case was wrong." *Id.* The court "did not condone" the action of the attorney for "knowingly ignoring contrary authority that is directly on point." *Id.*

45. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 4 (1990).

reasonably believe the court must take into consideration to make a just decision.[46]

Under Rule 3.03, lawyers are also prohibited from offering evidence that they know to be false.[47] In *American Airlines, Inc. v. Allied Pilots Association*, the United States Court of Appeals for the Fifth Circuit addressed the application of Rule 3.03 in a situation involving the introduction of evidence and the making of false statements of material fact to the court in an ex parte proceeding.[48] The *American Airlines* case involved a labor dispute between the airline and the pilots' association.[49] The attorneys for American filed a complaint for injunctive relief and attached seven written declarations in support of their motion for a TRO against the union to prevent it from engaging in tactics that were designed to hamper the airline's business operations.[50] Two of the declarations filed by the attorney were not signed because the declarants were unavailable at the time of filing.[51] One of the attorneys had made last minute changes to the declarations and received verbal approval for the changes from the declarants over the telephone.[52] The airline's local counsel was not aware that the originals had not been signed by the declarants. He thought instead that the other attorneys simply did not have the signed copies in their possession. He then advised lead counsel that it would be permissible to file the declarations, provided that the originals were substituted as soon as possible.[53]

At the ex parte hearing on the airline's motion for a TRO against the union, the trial judge specifically relied upon the declarations in making his decision to grant the motion.[54] The judge learned of the deception when the attorneys attempted to substitute an original signature page for the conformed copies, and he

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46. *Id.*

47. *Id.* at cmt. 5; *see* American Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992) (holding that all counsel involved in case violated Rule 3.03 by presenting declarations in form that "implicitly represented to the court that signed declarations were on file" when they were not).

48. *American Airlines*, 968 F.2d at 523.

49. *Id.* at 525.

50. *Id.*

51. *Id.*

52. *Id.*

53. *American Airlines*, 968 F.2d at 525.

54. *Id.*

held the attorneys in contempt of court for violating Rule 3.03.[55] The Fifth Circuit agreed that there was sufficient evidence to hold the attorneys in contempt for violating the Texas Rules of Disciplinary Procedure and Federal Rule of Civil Procedure 11.[56] The circuit court affirmed the trial court's imposition of substantial fines against the attorneys and the revocation of their privileges to appear in the pending case or in any future litigation in front of the district court.[57]

Another violation of Rule 3.03 was addressed by the El Paso Court of Appeals in *Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric Co.*[58] In *Cap Rock*, the appellant's attorneys deliberately misled the trial court and opposing counsel as to the existence of contracts, induced a key witness into giving false and misleading testimony regarding the contracts, and encouraged the witness to destroy original contracts that were the subject of discovery requests.[59] The offending counsel reprinted draft copies of a contract from his computer files, authenticated them, and passed along these draft copies of the contracts as originals, when signed originals had actually been executed.[60] At a hearing and subsequent conference in the judge's chambers, Cap Rock's attorneys were less than forthright in responding to the court's queries about the existence of the original contracts.[61] The trial court held that the attorney had acted knowingly and in bad faith by participating in a scheme designed to mislead the court about the existence of the signed contracts.[62] The court also concluded that the attorney

55. *Id.* at 526. The attorneys were also held to have violated Rule 3.04 for presenting falsified evidence, and Rules 4.01 and 8.04 for "making a false statement of material fact" and for engaging in "conduct involving dishonesty, deceit, and misrepresentation." *Id.* at 528.

56. *Id.* at 528–30.

57. *Id.* at 533.

58. 874 S.W.2d 92 (Tex. App.—El Paso 1994, no writ).

59. *Cap Rock*, 874 S.W.2d at 95–97.

60. *Id.* at 96.

61. *Id.* at 96–97. In chambers, Cap Rock's attorney told the judge that the two signed successor fee contracts were never approved by the Board of Directors, although the contracts were approved by the Board in 1991. *Id.* at 96. Mr. Collier, the other party to the contract, then advised the court that no rescission contract ever existed between him and Cap Rock. *Id.* at 96–97. Mr. Collier also told the court that although "he was willing to rescind the agreement," written documents were not needed. *Id.*

62. *Id.* at 97.

gave misleading testimony in direct opposition to an earlier court order regarding production of the documents.[63]

The court of appeals affirmed the trial court's imposition of sanctions under Texas Rule of Civil Procedure 215 for abuse of the discovery process.[64] The appellate court was especially harsh in its criticism of the offending attorneys, stating in response to the attorneys' contention that the sanctions were too severe that there was

> ample support in the evidence [to] indicat[e] an alarming and deliberate scheme . . . to hide material evidence from and mislead TU Electric and the trial court. Such trickery and deceit can not *and will not* be tolerated by the Courts of the State of Texas. Sanctions imposed to punish and deter this abominable conduct are not only permissible, they are mandatory.[65]

The appellate court not only affirmed the sanctions, but also ordered the clerk of the court to forward a copy of the opinion to the State Bar of Texas for appropriate disciplinary action.[66]

While *American Airlines* and *Cap Rock* stand for the proposition that attorneys must not deliberately offer false evidence on their own volition in an effort to zealously pursue their clients' claims, lawyers must also refrain from offering false evidence at the direction or insistence of their clients.[67] Should a client or anyone else urge an attorney to offer evidence known to be false or fabricated, the attorney must refuse to do so, despite the client's wishes.[68] If the client persists, the attorney may justifiably withdraw from the case.[69] If the court permits the attorney to withdraw, the attorney may discuss these concerns with any lawyer subsequently retained by the former client[70] pursuant to the terms of Rule 1.05(c)(7), which permits the revelation of confidential information that is reasonably believed to be necessary to prevent the former client from committing a criminal or fradulent act. If the attorney does not or

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63. *Cap Rock*, 874 S.W.2d at 97.

64. *Id.*

65. *Id.* at 98.

66. *Id.* at 98 n.1; *cf. Contico*, 910 S.W.2d at 43 n.11 (citing Rules 1.09, 3.03, and 8.04 for proposition that courts may forward copy of opinion to State Bar if allegations of professional misconduct are made in case related to attorney's refusal to account for his court-related conduct, as such rule benefits litigants and general public).

67. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmts. 5–6 (1990).

68. *Id.* at cmt. 5.

69. *Id.* at cmt. 6.

70. *Id.*

cannot withdraw from such a case, one should again urge the client not to offer the false testimony or other evidence and explain the steps the attorney is obligated to follow if the client does not heed this advice, which, as described below, may require disclosure of the deception to the court.[71]

If an attorney discovers the introduction of or inadvertent assistance in introducing false evidence, the attorney must immediately urge the client to correct or withdraw the false evidence.[72] If the client refuses to follow this advice, the attorney has no alternative but to disclose the existence of the deception to the court or the other party.[73] Such a situation creates serious tension—the client will feel betrayed, and may possibly face a potential loss of the case and prosecution for perjury. However, the attorney should not let such consequences allow any waiver in making this decision. To do otherwise would be to deceive the court or the jury and to subvert the truth-finding process that is the heart of our justice system.[74] By keeping silent, the attorney would become a party to a fraud upon the court.[75]

The Professional Ethics Committee of the Supreme Court of Texas provides some guidance for attorneys in such situations in Ethics Opinion No. 480.[76] In that opinion, the following hypotheti-

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71. *Id.* at cmts. 6–8; *see* Maddox v. State, 613 S.W.2d 275, 280–85 (Tex. Crim. App. [Panel Op.] 1980) (discussing attorney's obligation to reveal to court information concerning possibility of false testimony, even in light of attorney-client privilege). If the attorney still does not feel that the client or other witness will heed the legal advice and testify truthfully, the lawyer may call that person as a witness as to other matters that he believes will not result in the introduction of false evidence without violating Rule 3.03. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 6 (1990).

72. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 7 (1990).

73. *Id.* at cmt. 8; *see* Tex. Comm. on Professional Ethics, Op. 480, 56 TEX. B.J. 705, 705 (1993) (stating that duty continues even after action has taken place); *cf.* Tex. Comm. on Professional Ethics, Op. 473, 55 TEX. B.J. 521, 521 (1992) (concluding that Rule 3.03 requires attorney appointed to represent defendant in criminal case to disclose to court fact that defendant is not indigent if attorney discovers such fact and client has signed sworn statement attesting to his indigency). The lawyer would have the same duty if the client was indigent at the time the attorney was assigned, but then gained employment and was able to retain and pay for counsel on his own. Tex. Comm. on Professional Ethics, Op. 473, 55 TEX. B.J. 521, 521 (1993).

74. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 8 (1990).

75. *Id.; see Volcanic Gardens*, 847 S.W.2d at 347 (citing Rule 1.05 for proposition that attorneys may, "and in some cases must, reveal confidential information of a client '[w]hen the lawyer has reason to believe it is necessary to prevent the client from committing a criminal or fraudulent act'").

76. Tex. Comm. on Professional Ethics, Op. 480, 56 TEX. B.J. 705 (1993).

cal situation is discussed: Attorney A represented the defendant, a corporation, against an involuntary petition for Chapter 7 bankruptcy filed by the plaintiff, another corporation.[77] The plaintiff alleged that it was entitled to funds received by the defendant as settlement of an unrelated state court suit between the defendant and a third-party, and that the defendant's transfer of funds to one of the defendant's other creditors was a preferential transfer that the plaintiff would have been able to recover in bankruptcy.[78] The court denied the contentions that the transfer to the third party was a scam or trick and that the plaintiff had an adequate state court remedy available to it.[79] The plaintiff did not appeal the bankruptcy court's decision but filed a state court suit against the party who had recovered the settlement funds, as well as a separate suit against the defendant.[80] Attorney A no longer represents the defendant in the state court suits.[81]

Several months after the bankruptcy court's decision, the plaintiff filed a Motion for Relief from Order Denying Involuntary Petition on other grounds.[82] The defendant consulted Attorney A for advice as to how to respond to the plaintiff's Motion for Relief, telling him that the settlement funds paid to the third party had been given to the defendant corporation's president and placed into a "trust," drafted so that the president and sole shareholder was the sole grantor, trustee, and beneficiary of the trust.[83] Attorney A had no knowledge of the "trust" at the time of trial, and the defendant has not released him from the attorney-client privilege.[84]

The issue that arises in this situation is whether the attorney has a duty to reveal to the bankruptcy court that the third-party returns the settlement funds to the corporation, and that the funds are then placed into the purported "trust." The opinion states that under Rule 3.03, the attorney's duty to disclose information to the court that is necessary to prevent a fraudulent or criminal act "continues

77. *Id.* at 705.
78. *Id.*
79. *Id.*
80. *Id.*
81. Tex. Comm. on Professional Ethics, Op. 480, 56 TEX. B.J. 705, 705 (1993).
82. *Id.*
83. *Id.*
84. *Id.*

until remedial legal measures are no longer reasonably possible."[85] Under the facts presented, the attorney would be required

> to make a good faith effort to persuade the former client to authorize him/her to tell the bankruptcy court that the settlement funds were returned by the third-party to the former client to be placed in what purports to be a Trust. And, if this effort is not successful, to disclose such fact to the bankruptcy court without the client's consent.[86]

Situations involving disclosure become more complex and the attorney's corresponding obligations somewhat different if a witness presented by an attorney testifies truthfully on direct examination but testifies falsely when questioned by another party. The attorney must urge the witness to correct or withdraw testimony believed to be false or misleading.[87] As long as the attorney does not use the false testimony, the ethical obligation is fulfilled.[88] If the attorney subsequently uses the false evidence, however, the rule has been violated.[89]

The issues lawyers face when dealing with false evidence are equally complicated when they represent clients in criminal matters. Clearly, lawyers must urge their clients not to commit perjury.[90] If this situation arises prior to trial, attorneys will ordinarily be permitted to withdraw from cases if they cannot divert their clients from this course.[91] If it is not possible to withdraw, the official commentary to this rule suggests that attorneys must take reason-

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85. *Id.* On the other hand, there are situations in which disclosure may be premature. In Ethics Opinion No. 482, the Commission stated that while Rule 3.03 dictates that a lawyer reveal information to the court when disclosure would avoid assisting a fraudulent or criminal act, a threat of perjury by an opposing party may not warrant disclosure to the court. Tex. Comm. on Professional Ethics, Op. 482, 57 TEX. B.J. 200, 200 (1994). The attorney's client had tape-recorded and transcribed a telephone conversation with the opposing party in which the opposing party indicated his intent to perjure himself unless he received a financial benefit for testifying truthfully. *Id.* The attorney sent the party a copy of the transcribed conversation and warned the litigant of the consequences of perjury. *Id.* The Commission stated that such warning may have been sufficient to change the litigant's mind. *Id.* Additionally, the Commission noted that "[u]ntil the attorney has some more indication that the defendant intends to perjure himself, he may not disclose the transcript [of the conversation]." *Id.*

86. Tex. Comm. on Professional Ethics, Op. 480, 56 TEX. B.J. 705, 705 (1993).

87. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 13 (1990).

88. *Id.*

89. *Id.*

90. *Id.* at cmts. 9–10.

91. *Id.* at cmt. 9.

able remedial measures, which may include revealing their clients' perjury:

> A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence.[92]

The attorney's duty to rectify a false or misleading presentation of evidence continues as long as there is a reasonable possibility of taking corrective action before the court.[93] But what should an attorney do with evidence that a client insists on presenting and that the attorney only *suspects* is untrustworthy? The attorney may reasonably refuse to offer such evidence.[94] The attorney should use discretion so as not to impair the client's legitimate interests. If the lawyer decides to offer the evidence, the jury may share the attorney's suspicions and choose not to accept the evidence as credible.[95] So long as the attorney does not know that the evidence is actually false or fabricated, Rule 3.03 has not been violated.

Ethics Opinion No. 504 provided insight into the attorney's duty of candor toward the court in criminal proceedings by stating that attorneys must also *correct* the trial judge and prosecutor if they have inaccurate information about the defendant's prior felony convictions.[96] Under Rule 3.03(a)(1), if a judge specifically asks the defendant's lawyer whether the defendant has any prior criminal convictions after an inaccurate statement by the prosecutor regarding such convictions, the lawyer may not simply "remain

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92. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 12 (1990).

93. *Id.* at cmt. 14. Professor Robert Nelson suggests that the balance of power between inside and outside counsel has shifted in litigation matters, placing additional pressures on litigators. Robert L. Nelson, *Uncivil Litigation,* 7 RESEARCHING LAW (American Bar Foundation, Chicago, Ill., Fall 1996) at 1, 8. Inside counsel, in an effort to control costs, may restrict discovery to certain personnel. *Id.* Outside counsel are increasingly found to be unaware of key documents or evidence at the time written discovery is undertaken. *Id.* "In these situations, outside counsel are put in an embarrassing position that may tempt them to withhold documents they might have produced at an earlier time." *Id.*

94. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 15 (1990).

95. *Id.*

96. Tex. Comm. on Professional Ethics, Op. 504, 58 TEX. B.J. 718, 718–19 (1995).

silent."[97] The lawyer must correct the inaccurate information made in court by a person other than the lawyer or the client, or make some other statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement.[98] Additionally, the lawyer may ask to be excused from answering the question.[99]

D. *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;

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97. *Id.; see* Naupe v. Illinois, 360 U.S. 264, 269 (1959) (finding prosecutorial silence as detrimental as false testimony); Burkhalter v. State, 493 S.W.2d 214, 217 (Tex. Crim. App.) (equating prosecutor's silence as misleading and harmful to defendant), *cert. denied*, 414 U.S. 1000 (1973); *see also* Alcorta v. Texas, 355 U.S. 28, 31–32 (1957) (stating that prosecutor's knowledge of witness's sexual relationship with victim, which was knowingly withheld from the jury by way of silence to detriment of defendant, was reversible error); Anderson v. Anderson, 620 S.W.2d 815, 817 (Tex. App.—Tyler 1981, no writ) (finding silence in fraud cases same as false representations).

98. Tex. Comm. on Professional Ethics, Op. 504, 58 TEX. B.J. 718, 718–19 (1995). "If the lawyer refuses to corroborate the inaccurate statement or asks to be excused from answering the question, the court is at least alerted to the problem and presumably will inquire further to discover the truth." *Id.* at 719. However, such silence should not be considered the "use" of false testimony as described in Rule 3.03(a)(5). *Id.*

99. *Id.* at 718–19.

(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.[100]

In any given proceeding, the introduction and exclusion of evidence will play a major role in the outcome of the case.[101] Therefore, it is essential to the integrity of the legal system that attorneys competitively yet fairly control access to evidence within the adver-

100. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04 (1990); *see* Christopher Carr, Note, *Sudden Death: The Supreme Court of Texas Kills Mary Carter:* Elbaor v. Smith, 824 S.W.2d 240 (Tex. 1992), 24 TEX. TECH L. REV. 1227, 1247 (1993) (discussing Rule 3.04 and its prohibition of destruction of evidence, tainting witness testimony, including suborning perjury, and obstructive discovery tactics and procedures).

101. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04 cmt. 2 (1990); *see* Brimage v. State, 918 S.W.2d 466, 484 (Tex. Crim. App. 1994) (holding that introduction of inadmissible evidence was reversible error); Dresser Indus. v. Lee, 880 S.W.2d 750, 754 (Tex. 1993) (finding exclusion of evidence was reversible error); McCraw v. Maris, 828 S.W.2d 756, 757–58 (Tex. 1992) (discussing importance of excluded evidence and determining exclusion was reversible error).

sarial system.[102] In a nutshell, an attorney violates Rule 3.04 if the attorney: (1) falsifies, destroys or conceals evidence; (2) unlawfully obstructs the opposing party's access to evidence or improperly influences a witness's testimony; (3) unlawfully pays a witness for his testimony;[103] (4) degrades a witness or otherwise disrupts the proceedings;[104] or (5) employs other obstructive measures during discovery.[105] In the discovery context, it is important to note that obstructing access to evidence not only violates Rule 3.04 but also constitutes a crime when an attorney destroys evidence to prevent it from being used in a pending or foreseeable legal proceeding.[106]

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102. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04 cmt. 1 (1990); *cf.* Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) (en banc) (acknowledging that prosecutor in criminal case has ethical and constitutional duty to correct evidence that is known to be false, since prosecutor's primary duty is to see that justice is done rather than to obtain conviction).

103. *See* Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 424–25 (Tex. 1996) (acknowledging that lawyer and firm could have violated Rule 3.04 by basing client's case on lawyer's testimony when members of firm were compensated based on lawyer's success, but dismissing argument because not raised at trial or in appellate court); Elbaor v. Smith, 845 S.W.2d 240, 247 n.14 (Tex. 1992) (discussing Rule 3.04's prohibition against paying witness contingent upon content of testimony in context of Mary Carter agreements and asserting that Rule "mandates that an attorney has an ethical duty to refrain from making a settlement contingent, in any way, on the testimony of a witness who was also a settling party"). In *Anderson Producing*, Justices Owen and Hecht took a stronger stance, arguing that there was "no question that [the attorney] violated this disciplinary rule. It is doubtful whether a lawyer who has a financial interest contingent on the outcome of the case can ever testify as to matters other than those listed in Rule 3.08(a)(1) through (4) and comply with 3.04." *Anderson Producing*, 929 S.W.2d at 430 (Owen and Hecht, JJ., dissenting).

104. *See* Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 172 (Tex. 1993) (orig. proceeding) (noting that trial lawyers are subject to disciplinary action under Rule 3.04 for improper trial conduct).

105. *See* Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (noting that asking witness to swear to facts that are knowingly false violates Rule 3.04). However, in an interview with the witness, the lawyer's attempt to persuade the witness that witness's initial version of facts is incomplete or inaccurate (if attorney has good-faith basis for such attempt) is completely acceptable under the Rules. *Id.*; *see also* American Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992) (holding that attorneys violated Rule 3.04 by preparing signatures on declarations to make them appear as though they had been signed and submitting such documents to court).

106. *See* 18 U.S.C. §§ 1501–1515 (1996) (providing criminal penalties for those who obstruct justice by tampering with evidence); TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1996) (stating that alteration, falsification, or destruction of evidence with intent to impair official investigation or proceeding is felony offense); TEX. PENAL CODE ANN. § 37.10 (a)(3) (Vernon 1996) (establishing crime for intentionally destroying, removing, or hindering availability of governmental record). Commission of a "serious crime" or "any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness

Falsifying evidence also constitutes both an ethical violation and a criminal offense.[107] Destroying computer files generally falls within the prohibitions of Rule 3.04 as well.[108]

It seems obvious that it is a violation of the rule to pay a witness to testify based on the content of the witness's testimony, but there are some unusual situations in which this issue can arise.[109] In Ethics Opinion No. 510, the Ethics Commission addressed the issue of whether it violates Rule 3.04 for an attorney engaged in a contingency fee arrangement with a client to advise that client to hire an investigator on a contingency fee basis.[110] In this scenario, this type of contingency arrangement is expressly allowed in the attorney's own arrangement with the client, and the attorney explains the implications of such an arrangement with the investigator.[111] The client enters into the arrangement with the investigator whereby the investigator will perform all work "for a fee equal to a percentage of the client's recovery on the matter plus the investigator's costs and expenses."[112] The contract further states that if the investigator is forced to testify as a fact witness at trial, the contingency arrangement would become void, and the investigator would

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as a lawyer" is itself a basis for professional discipline. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(2) (1990).

107. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04 cmt. 2. (1990); *see* TEX. PENAL CODE ANN. § 37.09(a)(2) (Vernon 1996) (stating that person who makes, presents, or alters evidence with intent to effect course of official proceeding is criminal); TEX. PENAL CODE ANN. § 37.10(a)(1), (2) (Vernon 1996) (making it crime to alter governmental documents with intent to introduce altered document as authentic).

108. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04 cmt. 2 (1990).

109. *See* Tex. Comm. on Professional Ethics, Op. 458, 51 TEX. B.J. 924, 924 (1988) (interpreting former DR 7-109(c), now Rule 3.04). In Opinion 458, the question presented was whether the Code prohibited an attorney from participating in or recommending to a client that the client enter a contingency fee arrangement with a medical/legal consulting firm. *Id.* The consulting firm would enter into a contingency fee arrangement with the plaintiff, and in return, provide various services, such as providing expert witness testimony. *Id.* The opinion identified several problems with such an arrangement, but stated that "the most troubling problem in this area" comes in light of the rule prohibiting a lawyer from paying or acquiescing in payment, if compensation to a witness is contingent upon the content of the testimony or the outcome of the case. *Id.* The commission concluded that "when you pay a fee based on a percentage of the recovery to a consulting firm providing expert witnesses, in essence you are paying for testimony. Theoretically, the better the testimony, the larger the recovery and hence, the larger the fee to the witness." *Id.*

110. Texas Comm. on Professional Ethics, Op. 510, 58 TEX. B.J. 1058, 1058 (1995).

111. *Id.*

112. *Id.*

be paid by the hour for work performed.[113] The investigator is not employed by the lawyer and will receive no portion of the attorney fees.[114] The opinion stated that while Rule 3.04(b) prohibits a lawyer from paying a witness to testify contingent upon the content of his testimony, this situation would not violate the rule because of the clause in the contract whereby the contingency would become void if the investigator had to testify at trial.[115]

Attorneys may be disbarred for attempting to induce a witness to testify falsely under oath.[116] It is also a serious violation of the rule to falsely accuse an opponent of manufacturing evidence.[117] In *Circle Y of Yoakum v. Blevins,* plaintiff's counsel made several remarks during closing argument that implied or directly accused opposing counsel of "making up" evidence.[118] The *Blevins* court held that counsel's closing statements "charging defense counsel with manufacturing evidence were intemperate, improper, and inflammatory, and were wholly without support in the evidence. . . . Additionally, plaintiff's counsel insist[ed] that defense counsel's fraudulent acts were done with full knowledge and approval of Cir-

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113. *Id.*

114. *Id.*

115. Texas Comm. on Professional Ethics, Op. 510, 58 TEX. B.J. 1058, 1058 (1995). The opinion noted that "the lawyer should also take appropriate steps to ensure that the investigator receiving a contingent-fee payment does not make any payment to a witness that is contingent upon the outcome of the case." *Id.*

116. *See In re* J.K.B., 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ) (discussing ethical duties and obligations of attorneys and judges in context of ex parte communications); Bethany v. State, 814 S.W.2d 455, 467 (Tex. App.—Houston [14th Dist.] 1991, writ ref'd) (reversing conviction of criminal defendant because judge improperly acted as advocate rather than neutral arbiter); Texas Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 867–69 (Tex. App.—San Antonio 1990, writ denied) (discussing obligation of judges to prevent lawyers from making improper arguments to juries and to maintain judicial integrity).

117. *See* Circle Y of Yoakum v. Blevins, 826 S.W.2d 753, 758 (Tex. App.—Texarkana 1992, writ denied) (stating that jury argument accusing opposing counsel of manufacturing evidence is generally incurable).

118. *Blevins*, 826 S.W.2d at 757–58. For example, the attorney stated during a dispute over the introduction of evidence, "I don't know where he got this, and anybody with a typewriter can do it." *Id.* at 757. During closing, he went on to state to the jury:

> You look in those records. That ain't nowhere in there. You heard the judge sustain the objection. . . . Well, if you're not going to call any witnesses and you ain't going to put nobody on the stand, just make something up. . . . If you can't get a doctor to come in here and say she's not hurt, come up with a half page of something that don't even have his letterhead on it and put it in front of the Jury, when it's not even in evidence.

Id.

cle Y, and urg[ed] that the jury 'punish' Circle Y for those actions."[119] The court considered the prejudice that this argument inflicted incurable, and reversed and remanded to the trial court for a new trial.[120] Attorneys are also prohibited from abusing the discovery process by continually violating a rule of evidence or procedure.[121] The rule puts the onus on attorneys to disclose their clients' intended or actual noncompliance with a rule or a court ruling.[122]

E. *Rule 3.05: Maintaining Impartiality of the 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.[123]

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119. *Id.* at 759.

120. *Id.* at 759, 760 (deciding that essential fairness of trial was so impaired by improper argument that only new trial could afford parties substantial justice).

121. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04 cmt. 3 (1990). "A lawyer in good conscience should not engage in even a single intentional violation of those rules, however, and a lawyer may be subject to judicial sanctions for doing so." *Id.*

122. *Id.* at cmt. 6. The lawyer must "openly acknowledge the client's noncompliance." *Id.* This may be avoided if one of two circumstances exists: (1) the attorney asserts that no valid obligation exists, or (2) the attorney agrees with the client that the cost of the sanctions is outweighed by the costs of complying with the rule or ruling. *Id.* at cmt. 7.

123. TEX. R. DISCIPLINARY PROF. CONDUCT 3.05 (1990).

Unfortunately, many forms of improper conduct confront judges.[124] These actions are proscribed not only by the Rules of Professional Conduct, but also by criminal law, the Texas Code of Judicial Conduct, and by applicable rules of practice or procedure.[125] Attorneys have a duty to be familiar with these proscriptions and must avoid contributing to any violation of such rules.[126] This rule applies not only to judges in the formal tradition of bench and robe, but it must be scrupulously followed when the tribunal is a decision-maker in any form of alternative dispute resolution.[127]

Ex parte contacts are rigorously monitored because of their inherent potential for abuse and undue influence.[128] Ex parte affidavits do not carry evidentiary weight.[129] Attempts to establish a privilege must be done with full notice to opposing counsel and not in any ex parte fashion.[130] This rule is well-illustrated in a 1992 mandamus proceeding before the Supreme Court of Texas. In

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124. *See id.* at cmt. 1 (noting that there are numerous types of improper influence prohibited by criminal law); Bradt v. State Bar of Tex., 905 S.W.2d 756, 757–60 (Tex. App.—Houston [14th Dist] 1995, no writ) (rejecting appellant's argument that State Bar's classification of his complaint that judge accepted opposing counsel's handwritten note regarding judge's contempt order against appellant violated his constitutional rights).

125. TEX. DISCIPLINARY R. PROF. CONDUCT 3.05 cmt. 1 (1990); *see In re* Duncan, 898 S.W.2d 759, 760–62 (Tex. 1995) (discussing requirement of State Bar of Texas to take disciplinary measures against attorneys convicted of crimes); Orion Enters., Inc. v. Pope, 927 S.W.2d 654, 660 (Tex. App.—San Antonio 1996, n.w.h.) (holding that second judge may hear reassigned case and that it was improper under Rule 3.05, as well as violation of Code of Judicial Conduct, for first judge to submit affidavit in support of plaintiff's opposition to defendant's motion for reconsideration as result of ex parte communication with plaintiff's attorney); State Bar of Tex. v. Edwards, 646 S.W.2d 543, 544 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (stating that State Bar Rules are to be given same force as statutes).

126. TEX. DISCIPLINARY R. PROF. CONDUCT 3.05 cmt. 1 (1990).

127. *Id.* at cmt. 2.

128. *Id.* at cmt. 3.

129. *See* Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988) (orig. proceeding) (issuing writ of mandamus because judge improperly considered ex parte affidavits that accompanied documents for *in camera* inspection, stating this was violation of procedural rules preventing ex parte communications except in extraordinary situations); Tyler v. State, 288 S.W.2d 517, 520 (Tex. Crim. App. 1956) (stating that court does not consider ex parte affidavits that were not part of original record); Reeves v. State, 252 S.W.2d 468, 469 (Tex. Crim. App. 1952) (emphasizing that "this court is not authorized to consider the ex parte affidavits filed in this court which attempt to dispute the record as so made").

130. Remington Arms Co., Inc. v. Canales, 837 S.W.2d 624, 626 (Tex. 1992) (orig. proceeding); State v. Lowry, 802 S.W.2d 669, 671 n.2 (Tex. 1991) (orig. proceeding); *Barnes*, 751 S.W.2d at 495 n.1; *see* TEX. R. CIV. P. 166(b)(4) (stating that affidavits must be served seven days prior to hearing).

Remington Arms Co. v. Canales, Remington was seeking a protective order from discovery requests, and provided the court with affidavits ex parte in an attempt to establish the privileged nature of the documents and thereby obtain an *in camera* review.[131] The principal affidavit stated that a copy was not being provided to the plaintiffs.[132] The Supreme Court declared that because of the ex parte nature of the document, it could not carry the defendant's burden of proof.[133] The procedure employed by the defendant directly conflicted with "codes of conduct which restrict ex parte communications between the bar and the judiciary."[134] However, Remington must have had second thoughts, because even though the affidavit stated it was an ex parte communication, the plaintiff referred to it at a hearing before the court, and Remington ultimately offered the affidavit into evidence and tendered the documents claimed to be privileged to the court.[135] The Supreme Court ruled that the trial court was obligated under these circumstances to conduct an *in camera* inspection of the disputed documents.[136]

In *Marks v. Feldman*,[137] a district court held an ex parte *in camera* hearing and then sealed the record of that hearing, stating: "We set ourselves upon a new course like Columbus who sailed the ocean blue. He did not sail by [a] course that was known before he chartered [a] new path."[138] The case involved the impaneling of a grand jury to investigate certain criminal activity in Arkansas.[139] The independent counsel told Marks that he was a target of the investigation with respect to his alleged failure to report income and file income tax returns.[140] Marks asked his former accountant, Stephen L. Feldman, to produce his records reflecting Marks's tax returns, which the accountant refused to do.[141] Marks filed suit against Feldman to perpetuate his testimony in the matter.[142] The

131. *Canales*, 837 S.W.2d at 626.
132. *Id.*
133. *Id.*
134. *Id.* at 626 n.3.
135. *Id.* at 626.
136. *Canales*, 837 S.W.2d at 626.
137. 910 S.W.2d 73 (Tex. App.—Dallas 1995, writ granted).
138. *Marks*, 910 S.W.2d at 74–75.
139. *Id.* at 75.
140. *Id.*
141. *Id.*
142. *Id.*

trial court ordered Feldman to turn over the records.[143] Feldman filed a motion to reconsider the order, and the court ordered a hearing and granted the Government's motion to intervene.[144] The Government also filed a motion to reconsider its order, and the trial court held a hearing in open court on the motion.[145] However, the court agreed to hear the Government's evidence and argument in chambers, excluding Marks, Feldman, and their attorneys.[146] The district judge informed the parties that he would hold the hearing with the Government and would seal the record from the ex parte hearing.[147]

The judge reconvened the trial and informed Marks and Feldman that during the hearing he had "tried to work out a plan that would be acceptable to Marks, Feldman, and their attorneys."[148] Naturally, Marks objected to the *in camera* hearings and the trial court's "plan" and appealed the ruling.[149] The appellate court flatly rejected the trial court's decision, derisively stating that "the trial court's course was well marked and well known. We need not chart a new course to decide this appeal. Our forefathers long ago clearly charted the judiciary's course under circumstances such as these."[150] Under Rule 3.05, ex parte communications are strongly disfavored, and "submitting secret affidavits to gain the final word during judicial deliberations conflicts with decision of the Texas Supreme Court and the codes of conduct restricting ex parte communications between the bar and the judiciary."[151] While the *Marks* case is perhaps an obvious example of a violation of the prohibition of ex parte communications, it should remind the

143. *Marks*, 910 S.W.2d at 75.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Marks*, 910 S.W.2d at 75.
149. *Id.*
150. *Id.*
151. *Id.* at 76.

reader to be aware of such actions[152] and to avoid them except in the rarest of acceptable situations.[153]

F. *Rule 3.06: Maintaining Integrity of the 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.

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152. *Cf.* Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992) (demonstrating that such violations may arise in borderline situations by opining that Mary Carter agreements may "force attorneys into questionable ethical situations under Rule 3.05," possibly forcing them to engage in conduct that could be construed as corrupting or unfairly influencing decision-maker); Kahn v. Garcia, 816 S.W.2d 131, 133–34 & n.1 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding that trial court's order denying party right to any further motions as sanction was an abuse of discretion). The court also stated that the party who is denied such an opportunity can no longer effectively and properly communicate with the court, potentially forcing the party into violation of Rule 3.05 by communicating to court ex parte. *Kahn*, 816 S.W.2d at 133–34.

153. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.05 cmt. 4 (1990) (citing certain classes of zoning questions as example of proper ex parte communication).

(g) As used in this Rule, the terms "matter" and "pending" have the meanings specified in Rule 3.05(c).[154]

All members of the bar have a fundamental responsibility to safeguard the impartiality of the judicial process.[155] Lawyers may not personally or through a representative contact any venireman or juror outside the courtroom prior to or during the trial.[156] Investigations into the background of the veniremen or the jury panel must be done with extreme caution.[157] Any hint of harassment emanating from this procedure can seriously impair the effectiveness of the jury system.[158] When a juror converses with an unauthorized person, injury to the accused is presumed.[159] However, this presumption is rebuttable.[160]

Should an attorney learn of any activity that threatens the integrity of the jury system, the attorney is obliged to promptly report it to the court.[161] In *Mize v. State*, the prosecutor failed to notify the court and defense counsel as soon as he learned that a juror had received a harassing telephone call the morning the jury was to

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154. TEX. DISCIPLINARY R. PROF. CONDUCT 3.06 (1990).

155. *See* Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972) (stating that crucial component of fair trial is impartial judge); Sun Exploration & Prod. Co. v. Jackson, 783 S.W.2d 202, 206 (Tex. 1989) (stating that public policy mandates impartiality of all judicial officers).

156. TEX. DISCIPLINARY R. PROF. CONDUCT 3.06 cmt. 1 (1990).

157. *Id.* at cmt. 2.

158. *Id.*

159. *See* Mayo v. State, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986) (en banc) (discussing case in which foreman of jury made telephone call to witness who testified on behalf of defendant in punishment phase of capital murder trial), *cert. denied*, 502 U.S. 898. In *Mayo*, the foreman told the witness he appreciated his testimony "because he . . . felt that if given a chance, possibly to learn a trade in prison, [the defendant] could be a benefit to society when he got out." *Mayo*, 708 S.W.2d at 856.

160. *See id.* at 856 (holding that state rebutted presumption of harm under *McMahon* test because witness's plea for leniency to juror was disregarded and not communicated to other jurors). *McMahon* held that before a new trial will be ordered because of an unauthorized communication between a juror and a third party, injury to the defendant must be shown. McMahon v. State, 582 S.W.2d 786, 793 (Tex. Crim. App. 1978) (en banc), *cert. denied sub nom.* McCormick v. State, 444 U.S. 919 (1979). In *McMahon*, a juror was offered a bribe and rejected it, and nothing further occurred between the juror and the anonymous caller. *Id.* The juror did not discuss the matter with any of the other jurors. *Id.* The Court of Criminal Appeals held that no prejudice to the defendant was demonstrated and that the State had discharged its burden. *Id.*

161. TEX. DISCIPLINARY R. PROF. CONDUCT 3.06 cmt. 4 (1990); *see* Mize v. State, 754 S.W.2d 732, 740 (Tex. App.—Corpus Christi 1988, writ ref'd) (interpreting former Disciplinary Rule 7-108(G)'s provision providing that lawyer must promptly reveal improper conduct by juror to court).

begin deliberations in the punishment phase of a murder trial.[162] The defense counsel learned of the jury-tampering incident late in the afternoon, just before the jury returned its verdict, and informed the court.[163] The appellate court chided the prosecutor for his unethical behavior in violating a rule of professional conduct:

> By 'deciding to risk that the juror had not been influenced,' the prosecutor decided to usurp the judicial function of the trial court. By secreting information of jury tampering from the trial court and the appellant, the prosecutor prevented a full inquiry into the matter when it would have been most appropriate, substituted his judgment for that of the trial court, violated DR 7–108(G), and ignored the Code of Criminal Procedure.[164]

It is important, therefore, that attorneys not only fashion their own behavior in a way that complies with Rule 3.06, but that they be aware of what is going on in the proceedings and initiate appropriate disciplinary proceedings should they learn of any potential violations.[165]

Attorneys may contact jurors after trial, but they must guard against asking any questions or making any comments that tend to harass or embarrass the jurors.[166] Post-trial contact with jurors is also governed by procedural rules, and the violation of these rules could result in disciplinary action under the rules of professional conduct.[167] No matter how disappointed attorneys might be with the outcome of a jury trial, they have a duty to the profession to treat those who struggled with this decision with consideration and respect.

The Court of Appeals in Corpus Christi recently held in *Benton v. Commission for Lawyer Discipline*[168] that Rule 3.06(d) is unconstitutionally vague and therefore void.[169] In *Benton*, the appellant

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162. *Mize*, 754 S.W.2d at 737.

163. *Id.*

164. *Id.* at 740.

165. TEX. DISCIPLINARY R. PROF. CONDUCT 3.06 cmt. 4 (1990); Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 172 (Tex. 1993) (orig. proceeding); *Mize*, 754 S.W.2d at 740. The courts are also required to refer a lawyer to appropriate disciplinary authorities for unprofessional conduct that undermines the integrity of the judicial system. TEX. CODE JUD. CONDUCT, Canon 3, pt. D, § 2 (1994); *Caldwell*, 850 S.W.2d at 172.

166. TEX. DISCIPLINARY R. PROF. CONDUCT 3.06 cmt. 1 (1990).

167. *Id.*

168. 933 S.W.2d 784 (Tex. App.—Corpus Christi 1996, n.w.h.).

169. *Benton*, 933 S.W.2d at 786.

was an attorney who had lost a personal injury lawsuit at the district court level.[170] He sent a letter to the members of the jury several months after they had been discharged that criticized their verdict:

> I was so angry with your verdict that I could not talk to you after the trial. I could not believe that 12 allegedly, good people from Cameron County, who swore to return a verdict based on the evidence, could find that the Salases were not damaged. . . . The only reason I can see as to why you ignored the evidence is that you were affected by the "Lawsuit Abuse" campaign in the Valley. . . . [W]hen you make a finding in a trial which is not based on the evidence[,] you are perverting our civil justice system and hurting everyone in the community.[171]

The appellate court held that Rule 3.06's language prohibiting lawyers from directing a comment to members of a discharged jury that is calculated "merely to harass or embarrass the juror or to influence his actions in future jury service" contains words that have no settled usage or tradition of interpretation of law and is therefore unconstitutionally vague.[172] The reader should note that this opinion is merely a slip opinion and under Texas Rule of Appellate Procedure 90 is subject to revision or withdrawal until published.[173] The authors surmise that if the opinion stands as released, Rule 3.06(d) will survive such a constitutional challenge in a higher court and remain a binding disciplinary rule. In any case, all attorneys should strictly follow the provisions of Rule 3.06 until the Supreme Court of Texas decides the issue.

G. *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.*

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170. *Id.* at 785.

171. *Id.* at 786.

172. *Id.* at 787–88.

173. *See* TEX. R. APP. P. 90 (Vernon 1996) (discussing requisites of publication of appellate court opinions—until opinion is published, it is subject to withdrawal or revision).

(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.[174]

This rule reflects an attempt to balance the right to a fair trial with the right to free expression.[175] The rule addresses not only high profile cases, but also ones involving extrajudicial statements made by an attorney "that a reasonable person would expect to be disseminated by means of public communication . . . that [has] a substantial likelihood of materially prejudicing an adjudicatory proceeding."[176] Whether an attorney's statement "materially prejudices" an adjudicatory proceeding depends on the particular facts and circumstances.[177]

The rule is helpful in the sense that it gives examples of what types of statements may and may not violate the rule itself. However, this list is not exhaustive. In criminal cases, prosecutors have additional restrictions on their ability to comment to the media.[178] An appellate court has held that prosecutors and law enforcement officials do not violate these rules, however, when merely making

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174. TEX. DISCIPLINARY R. PROF. CONDUCT 3.07 (1994).

175. *Id.* at cmt. 1; *see* Davenport v. Garcia, 834 S.W.2d 4, 28 & n.3 (Tex. 1992) (Hecht, J., concurring) (identifying that Rule 3.07(a) might be used, while still mandating fundamental right of expression).

176. TEX. DISCIPLINARY R. PROF. CONDUCT 3.07 (1994); *see* Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 107 (Tex. App.—Dallas 1992) (orig. proceeding) (noting that district judge found relator had violated Rule 3.07(a) by sending letter to state Attorney General suggesting civil quo warranto proceeding against opposing party in suit, but failing to address violation in mandamus action); *see also* Wilson v. State, 854 S.W.2d 270, 275–76 (Tex. App.—Amarillo 1993, writ ref'd) (overruling appellant's point of error that argued that district attorney violated Rule 3.07 by making general statements concerning arrested person's past convictions).

177. TEX. DISCIPLINARY R. PROF. CONDUCT 3.07 cmt. 3 (1994); *see Davenport*, 834 S.W.2d at 28 & n.3 (noting that court did not reasonably consider use of disciplinary measures or sanctions under Rule 3.07, which addresses propriety of extra-judicial statements during pending litigation, but instead implemented gag order and restricted relator's rights, and qualifying such opinion by stating that relator should be disciplined); *cf.* Fred Hagans, *Confidentiality Agreements and Orders: When Should Discoverable Materials Be Kept Secret?*, 31 S. TEX. L. REV. 455, 468–69 & n.86 (1990) (likening sale of discovery material from case to acquisition of publication rights, as "both actions may steer a lawyer 'consciously or unconsciously, to a course of conduct that will enhance the value of the discovery materials or the publication rights to the prejudice of his client'").

178. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.09(e) & cmt. 6 (1990) (stating that prosecutor should exercise reasonable care to refrain from making extrajudicial comments that he would be prohibited from making under Rule 3.07, and that such duty extends to discouraging others from making such statements to extent feasible).

general comments dealing with the background events surrounding arrests or the commission of crimes.[179]

H. *Rule 3.08: Lawyer As a 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.*[180]

Rule 3.08 is perhaps the most controversial of those rules discussed in this Article.[181] The rule provides that attorneys may not

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179. *See Wilson*, 854 S.W.2d at 275 (finding no violation of rules regarding unfair trial publicity, and holding that if such violation occurred, change of venue and not dismissal of case would be proper remedy).

180. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 (1994); *cf.* Koch Oil Co. v. Anderson Producing, Inc., 883 S.W.2d 784, 787 (Tex. App.—Beaumont 1994) (submitting that Rule 3.08 is not subject to compromise), *rev'd on other grounds*, Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 425 (Tex. 1996).

181. *See* Ayres v. Canales, 790 S.W.2d 554, 556 n.1 (Tex. 1990) (noting that advocate-witness rule "has long been an issue for bench and bar," and is "not without criticism"). Prior to the 1989 enactment of the current rules, Disciplinary Rules 5–101 and 5–102 provided guidance; however, the same controversies persisted under these rules as did under

be counsel for clients as well as witnesses at those clients' trials unless one of five exceptions is met: (1) the testimony relates to an uncontested issue,[182] (2) the testimony relates solely to a matter of formality and it is unlikely that the attorney's testimony will be contested by substantial evidence,[183] (3) the lawyer is acting pro se as a party to the suit,[184] (4) the attorney's testimony involves a fee dispute or other matter regarding the type or amount of services rendered,[185] or (5) the lawyer notifies opposing counsel and the continued representation would not work a substantial hardship to the client.[186]

The purpose of the rule is to: (1) ensure that the client's case is not compromised by the fact that the attorney may be a better witness than advocate in the case at bar, (2) ensure that the client does not have to face a situation wherein the attorney may be forced to give testimony that is adverse to a client's case, (3) avoid confusion for the fact finder, and (4) avoid prejudice to the opposing party

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Rule 3.08. *See* Supreme Beef Processors, Inc. v. American Consumer Indus., 441 F. Supp. 1064, 1067 (N.D. Tex. 1977) (noting issue of possible disqualification of co-counsel who testified under Disciplinary Rules 5–101 and 5–102).

182. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 5 (1994) (noting that in regard to exception allowing attorney to be witness on uncontested issue, "the ambiguities in the dual role are purely theoretical"); Spears v. Fourth Ct. of App., 797 S.W.2d 654, 657–58 (Tex. 1990) (orig. proceeding) (noting limitations placed on lawyer who may be called as witness to establish necessary fact); May v. Crofts, 868 S.W.2d 397, 399 (Tex. App.—Texarkana 1993, no writ) (identifying that Rule 3.08 has not been violated where there is no evidence that attorney testifying as witness would establish necessary fact for client); Randell v. State, 770 S.W.2d 644, 647 (Tex. App.—Amarillo 1989, writ ref'd) (stating that former Disciplinary Rule 5–101, now Rule 3.08, does not prohibit calling of district attorney to testify "for the limited purpose of proving a prior conviction, when it was not obvious that his testimony would relate to a contested matter"; such conduct did not warrant disqualification, since testimony related to "matter of formality and there was no reason to believe that substantial evidence would be offered in opposition to the testimony").

183. *See* Health & Tennis Corp. of America v. Jackson, 928 S.W.2d 583, 591 (Tex. App.—San Antonio 1996, writ filed) (holding that attorney's testimony as to certification of class action was not grounds for disqualification because testimony "related solely to the procedural issue . . . [which is] a matter of formality under the disciplinary rule and no substantial evidence was offered in opposition to the . . . testimony").

184. *See Ayres*, 790 S.W.2d at 557 (identifying that Rule 3.08's exceptions allow attorney to represent self).

185. *See id.* at 557–58 (allowing attorney to represent himself in underlying suit involving fee agreement and oral agreement regarding referral fee and holding that it was abuse of discretion to disqualify attorney and other nontestifying attorneys in his firm).

186. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 (1994); *see Ayres,* 790 S.W.2d at 557 (recognizing that attorney may be witness at trial if disqualification from role as advocate would work substantial hardship on client).

that can arise from a single person acting as both advocate and fact witness.[187]

Before a lawyer can testify as a witness in the client's case, the lawyer must first consider the potential conflict and problems that will be attendant with such a dual role.[188] The threshold question for the lawyer is whether the anticipated testimony will be substantially adverse to the client's position.[189] If the lawyer foresees the

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187. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmts. 4, 8, 9 (1994); *see* FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1311 (5th Cir. 1995) (citing Model Code for four justifications for advocate-witness rule: "(1) the lawyer may be a less effective witness because he is more easily impeachable for interest; (2) opposing counsel may be inhibited in challenging the credibility of a lawyer who also appears as an advocate; (3) a lawyer-witness must argue his own credibility; and (4) while the role of a witness is to objectively relate facts, the role of an advocate is to advance his client's cause"); *Health & Tennis Corp. of America*, 928 S.W.2d at 591 (noting that purpose of rule is to "protect opposing party from unfair prejudice"). Another rationale for the rule is the impropriety that may be created by a lawyer testifying on a client's behalf. *United States Fire*, 50 F.3d at 1311; *see also* Skidmore v. State, 838 S.W.2d 748, 756 (Tex. App.—Texarkana 1992, writ ref'd) (Bliel, J., concurring) (discussing role of lawyers within system and noting that combining roles of advocate and witness can unfairly prejudice opposing party); Tex. Comm. on Professional Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (noting purposes of rule in discussion of whether it is violation of rule for attorney to represent family member in action). The Texas Commission on Professional Ethics stated in Ethics Opinion No. 468 that it would not be a violation of Rule 3.08 for a husband "who is an attorney to represent his wife in a matter in which he is not a named party," regardless of whether he shares common liability with his wife, but in which he will likely testify as a witness for his wife, and also to accept attorneys' fees awarded by the court in such suit "provided that the attorney's wife would experience substantial hardship if the attorney did not represent her and provided that required notification is given to opposing counsel." Tex. Comm. on Professional Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991).

188. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 1 (1994); *cf.* Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc., 927 S.W.2d 146, 149–50 (Tex. App.—Corpus Christi 1996, n.w.h.) (discussing Rule 3.08 in light of defendants' assertions that all attorneys in case were "players in the events that lead to the alleged causes of action," and condemning attorneys for their actions in "exchanging clients and ultimately their opposing counsel"); Syntax, Inc. v. Hall, 881 S.W.2d 719, 722 (Tex. App.—Houston [1st Dist.] 1994) (refusing to address party's complaint that opposing party's affidavit violated Rule 3.08, because such objection to affidavit was not made at trial court level), *rev'd on other grounds,* 899 S.W.2d 189 (Tex. 1995).

189. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 2 (1994); *see Koch Oil Co.*, 883 S.W.2d at 788 (stating that attorney's decision to testify, especially as expert, should not be viewed only from viewpoint of client's interest, but attorney must also give consideration to preservation of public trust in legal system and concept of fairness to opposing interest); Smith, Wright & Weed v. Stone, 818 S.W.2d 926, 928 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) (disagreeing with contention that attorney's deposition concerning his role as attorney in another case that involved separate matter should not be allowed, because it would make him fact witness in present case, which would prevent him from representing real parties in interest).

possibility of furnishing testimony that may be harmful to the client's position, the lawyer may continue in the representation, but only if the client fully understands the situation and agrees to the continued representation under these circumstances.[190] However, the rule isn't *just* about informed consent. It is true that it is of paramount importance that a client be fully informed of the implications and likely consequences should her attorneys pursue her case and eventually have to testify. However, the attorney's first and foremost obligation as the client's advocate is to objectively consider the impact the attorney's own testimony and opposing counsel's cross-examination will have on the client's case.[191] If the attorney-witness role will likely produce an adverse impact on the client's case, the attorney should withdraw as the courthouse lawyer for the matter at hand.[192] In most cases and with the client's approval, another member of the lawyer's firm may be able to handle the representation in the lawyer-witness's stead.[193] While Rule

190. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 3 (1994).

191. *See id.* at cmt. 2 (stating that important aspect of rule is anticipated tenor of attorney's testimony). *But see* Harrison v. State, 788 S.W.2d 18, 24 (Tex. Crim. App. 1990) (en banc) (interpreting former Disciplinary Rule 5-101, now Rule 3.08, and holding that contrary to trial court's conclusion, rule was not violated, because it was not shown that defense attorney might be witness prejudicial to his client). The prosecutor had stated that he *might* call defense counsel as witness, not that he *would* call him as witness. *Id.*

192. *See* Medrano v. Reyes, 902 S.W.2d 176, 177-78 (Tex. App.—Eastland 1995, no writ) (noting that Disciplinary Rule 1.15 requires attorney to withdraw if continued representation of client would result in violation of Rule 3.08); Moore v. State, 811 S.W.2d 197 (Tex. App.—Houston [1st Dist.] 1991, writ ref'd) (partially published opinion) (stating in unpublished portion of opinion that rules generally prohibit lawyer from acting as witness in client's case, and if lawyer discovers he will be called as witness, he should withdraw); *cf.* Micheaux v. State, No. C14-93-00552-CR, 1993 WL 487503, at *1-2 (Tex. App.—Houston [14th Dist.] Nov. 24, 1993, no writ) (not designated for publication) (holding that it was not violation for attorney to continue representing client after motion to withdraw was denied when client had filed grievance against attorney, even if attorney will be required to furnish testimony against client in grievance suit). However, when an attorney is ordered to continue representing a client, he must do so, notwithstanding good cause for terminating the relationship. TEX. DISCIPLINARY R. PROF. CONDUCT 1.15(c) (1990).

193. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 8 (1994); *cf. Spears*, 797 S.W.2d at 657-58 (dismissing argument that lawyer and firm should be disqualified from representing client against state agency that previously employed different attorney now working for same firm when no evidence was presented showing that attorney's testimony, if any, would be adverse to party); Solvex Sales Corp. v. Triton Mfg. Co., 888 S.W.2d 845, 848 (Tex. App.—Tyler 1994, writ denied) (holding that it was not violation of rule for attorney to notify opposing counsel nine days before trial that he was withdrawing from case and that another attorney would conduct trial since he would be testifying for client); Stanley v. State, 880 S.W.2d 219, 221-22 (Tex. App.—Fort Worth 1994, no writ) (holding that rule

3.08 prohibits attorneys from testifying as advocates before a tribunal, it does not prohibit them from engaging in "pretrial, out of court matters such as preparing and signing pleadings, planning trial strategy, and pursuing settlement agreements."[194] The Professional Ethics Committee also stated in Opinion No. 471 that "with the informed consent of the client, a law firm may represent a client in an appeal from a trial at which an attorney in the law firm, other than the attorney who will argue the appeal before the appellate tribunal, testified as a fact witness on behalf of the client at trial."[195]

In *Schwager v. Texas Commerce Bank, N.A.*,[196] the court was called upon to interpret Rule 3.08 under an unusual set of facts. While there are many cases addressing the issue of whether an attorney may testify as a witness in a trial in which the attorney represents one of the parties, the First Court of Appeals addressed for the first time in *Schwager* whether a witness who testified at trial may later serve as appellate counsel representing the party for whom the attorney testified at the earlier trial.[197] At trial, the appellate counsel gave testimony as an accountant, although he was

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does not preclude one attorney in district attorney's office from prosecuting criminal matter in which another attorney from same office will testify as fact witness). *But cf.* Tex. Comm. on Professional Ethics, Op. 447, 51 TEX. B.J. 81, 81 (1988) (interpreting former Disciplinary Rule 5–101, now generally Rule 3.08, to mandate that law firm should not "accept and continue employment on behalf of all Defendants in a suit brought against multiple Defendants, one of whom is a member of such Law Firm, when it is known that such Law Firm Member will be a witness" on contested material fact issues). Any testifying attorney who could not serve as the client's advocate is prohibited from taking an "active role before the tribunal in the presentation of the matter." TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 8 (1994).

194. *Anderson Producing, Inc.*, 929 S.W.2d at 422–23 (holding that lawyer who represented party at pretrial proceedings and testified at trial as expert and fact witness did not violate Rule 3.08); *Ayres*, 790 S.W.2d at 558 (recognizing that disqualification of nontestifying attorney in multiple lawyer situation was improper since it would be permissible for other attorney on "team" to testify and not be party to suit).

195. Tex. Comm. on Professional Ethics, Op. 471, 55 TEX. B.J. 520, 520 (1992). The opinion stated that

> [o]nce an attorney has testified in a trial without violation of Rule 3.08, the participation of the attorney or another lawyer in his firm in appellate proceedings would not be contrary to any of the primary purposes of the Rule except possibly in the event that an attorney-advocate presented oral argument to an appellate tribunal regarding disputed factual matters as to which the attorney gave essential testimony at trial.

Tex. Comm. on Professional Ethics, Op. 471, 55 TEX. B.J. 520, 520 (1991).

196. 813 S.W.2d 225 (Tex. App.—Houston [1st Dist.] 1991, no writ) (per curiam).

197. *Schwager*, 813 S.W.2d at 226.

not a licensed attorney at the time of the trial.[198] The court held that since the attorney was not a lawyer at the time he testified, he was not bound by the disciplinary rules.[199] Further, because the attorney was to serve only as the appellate counsel, and the appellate court would not act as a factfinder, there was no risk of confusion in such a setting.[200]

The risk of confusing the jury should be weighed carefully.[201]

> A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.[202]

In *Brown v. State*,[203] the Court of Criminal Appeals reversed an appellate court decision that held that it was error to allow a prosecutor to continue prosecuting a narcotics possession/distribution case after she had already testified in the trial.[204] The defendant had been arrested along with the passenger in his car, both of whom possessed narcotics.[205] The case against the passenger was dismissed because he had passed a polygraph test, and the passenger testified at trial against the defendant.[206] The defendant's

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198. *Id.*

199. *Id.*

200. *Id.* at 227; *see* Tex. Comm. on Professional Ethics, Op. 513, 59 TEX. B.J. 84, 84 (1996) (concluding that "a lawyer who uses an in-house accountant as a testifying expert witness would be in violation of . . . [Rule 3.08], unless the accountant's testimony is the same nature as would permit an attorney to testify as an expert on a case in which he is representing a party"). Under Rule 5.03, if the attorney could not serve as a testifying expert witness, an employee of that attorney could not serve as a testifying expert witness either. *Id.*

201. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 4 (1994); *see Ayres*, 790 S.W.2d at 557 & n.4 (discussing dangers of allowing counsel to act as witness and advocate, as "opposing party may be handicapped in challenging the credibility of the testifying attorney" as witness); *Health & Tennis Corp. of America*, 928 S.W.2d at 591 (stating that most common justification cited for rule is to avoid potential danger that jury will confuse dual roles of counsel); *see also Skidmore*, 838 S.W.2d at 756 & n.6 (noting that there are four classes of participants in legal proceedings: (1) judge, (2) attorneys, (3) witnesses, and (4) jurors, all of whom have unique roles and purposes; lawyer cannot testify because of potential for confusing jurors by acting in dual roles).

202. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 4 (1994); *Ayres*, 790 S.W.2d at 557 n.4.

203. 921 S.W.2d 227 (Tex. Crim. App. 1996).

204. *Brown*, 921 S.W.2d at 230.

205. *Id.* at 228.

206. *Id.* at 228–29.

counsel attempted to impeach the passenger's testimony because he had presumably cut a deal with the State for his testimony in order to have the charges against him dropped.[207] The prosecutor attempted to offer a copy of the dismissal of the case, which showed the true reasons for the dismissal, but the trial court rejected its admission.[208] The prosecutor wanted to rebut the defendant's claim that there was a deal, and the trial court allowed her to testify that there was no deal with the passenger requiring him to testify in order to have the charges against him dropped.[209] The State argued that no disciplinary rule was violated because the prosecutor's testimony was not directed toward establishing any essential fact in the case.[210] The Court of Criminal Appeals agreed, citing *Texas Prosecutor Standards and Guidelines*, Section 2.5(c), which provides that a prosecutor need not be disqualified as a witness "'when the need of the testimony arises during a proceeding.'"[211] The court went on to state that a violation of a disciplinary rule does not require a reversal unless the defendant can show that the violation affected his substantial rights or deprived him of a fair trial.[212]

The rule defines proper conduct for lawyers who would be witnesses. It "should rarely be the basis for disqualification."[213] The

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207. *Id.* at 229.

208. *Id.* at 228–29.

209. *Brown*, 921 S.W.2d at 229.

210. *Id.*

211. *Id.* at 229 & n.2.

212. *Id.* at 230; *see* Purser v. State, 902 S.W.2d 641, 649 (Tex. App.—Corpus Christi 1995, no writ) (addressing appellant's contention that trial court erred in allowing prosecutor to continue prosecuting case after he testified on rebuttal by dismissing argument for failure to preserve error). The court noted that even if the defendant had preserved error, his contention was without merit because a violation of State Bar Rules does not provide criminal defendants with affirmative rights, and "[i]t is only when an ethical breach on the part of a prosecutor rises to the level of a due process violation that a trial court is authorized to disqualify a district attorney or his staff." *Id.* The appellate court in *Brown* erred in relying solely on a violation of a disciplinary rule to reverse the conviction. *Id.*

213. *See United States Fire Ins. Co.*, 50 F.3d 1304, 1314–15 (5th Cir. 1995) (noting that objection for conflict of interest should be made carefully, because of potential for use as harassment tool, and stating that conflict problems should be resolved by lawyer and his client); Contico Int'l v. Alvarez, 910 S.W.2d 29, 45 (Tex. App.—El Paso 1995, no writ) (announcing that disqualification is severe remedy, and "mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice" to meet movant's burden of establishing with specificity violation of one or more rules warranting disqualification); May v. Crofts, 868 S.W.2d 397, 399 (Tex. App.—Texarkana 1993, orig. proceeding) (noting that attorney should not automatically be dis-

preamble to the State Bar Rules also cautions that the rules can be abused when invoked primarily as a procedural weapon.[214] If an attorney does attempt to disqualify opposing counsel on this ground, the moving party must demonstrate that actual prejudice would result from the opposing counsel's dual roles.[215]

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qualified when he also participates as witness); *see also* Robert K. Wise, *The Lawyer-Witness Rule: A Comparison of a Lawyer's Ability to Be Both a Witness and an Advocate Under the Texas Code of Professional Responsibility and the Texas Disciplinary Rules of Professional Conduct*, 31 S. TEX. L. REV. 651, 655–56 (1990) (noting that under Rule 3.08, potential for disqualification is limited). *Compare* Spain v. Montalvo, 921 S.W.2d 852, 856 (Tex. App.—San Antonio 1996) (orig. proceeding) (finding that it was not abuse of discretion to disqualify attorney under Rule 3.08 when client alleged conversion against former attorney for failing to turn over client's files and new attorney would be only one who could testify as to circumstances of missing and incomplete files, as subject matter of his testimony would be "at the very heart of the dispute in th[e] case"), *with* Warrilow v. Norrell, 791 S.W.2d 515, 520–521 (Tex. App.—Corpus Christi 1989, writ denied) (holding that it was abuse of discretion not to disqualify attorney when he testified as client's expert witness on ultimate issue of whether insurer had acted in bad faith because of "concern over confusion of jury and how public would perceive the situation," and fact that independent expert could have provided credible testimony as to ultimate issue). *But see* Mauze v. Curry, 861 S.W.2d 869, 870 (Tex. 1993) (orig. proceeding) (per curiam) (holding that it was abuse of discretion for trial court to deny motion to disqualify lawyer when lawyer testified as expert in controverting affidavit to defeat defendant's motion for summary judgment when attorney was only witness). Courts generally disapprove of a party's attempt to use Rule 3.08 as a tactical weapon to disqualify a worthy adversary because this effort subverts the purpose of the rule. *See May*, 868 S.W.2d at 399 (finding lack of actual prejudice resulting from dual participation of attorney overruling disqualification argument); *Ayres*, 790 S.W.2d at 556 n.2 (noting that Rule 3.08 is more suited as disciplinary rule than "as a procedural rule of disqualification"); *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 10 (1994) (identifying that spirit of rule is disciplinary versus procedural, and should not be used to limit party's choice of attorney).

214. TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶ 4 (1991); *see* Tex. Comm. on Professional Ethics, Op. 475, 55 TEX. B.J. 882, 882 (1992) (addressing issue of whether attorney who represents plaintiff must withdraw when he learns that he may be called by defendant as witness). The facts presented by this opinion are as follows: A and B were involved in contract negotiations. *Id.* The attorney for B, a corporation, claimed that if the dispute over whether a valid contract existed went to trial, the attorney for A would be called as a witness since he had been involved in the negotiations. *Id.* The attorney's testimony would be cumulative, and the facts upon which he based it would not be strongly disputed. *Id.* The Committee concluded the lawyer for A did not need to withdraw, and cited *Ayres* for the proposition that Rule 3.08 should not be used as a tactical weapon to "'deprive the opposing party of his right to be represented by the lawyer of his or her choice.'" *Id.*

215. *Ayres*, 790 S.W.2d at 558; *Solvex*, 888 S.W.2d at 848; *May*, 868 S.W.2d at 399; *see* Gilbert McClure Enters. v. Burnett, 735 S.W.2d 309, 311 (Tex. App.—Dallas 1987, orig. proceeding) (showing of genuine need for attorney's testimony required by movant on disqualification issue). A party is prejudiced when the opposing attorney acts as both advocate and witness, and the attorney-witness failed to show an attempt to contact other

It must be remembered that when an attorney testifies in the client's case about: (1) an uncontested issue, (2) solely as a matter of formality that is unlikely to elicit an objection from the opposing party, (3) the value of legal services rendered to the client, or (4) as a party pro se, the attorney's dual role as advocate-witness does not violate the rule.

I. *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.*[216]

Prosecutors play a unique and important role in the criminal justice system.[217]

> As a trustee of the State's interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and jury may render justice. Thus, the prosecutor is

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persons who could act as expert witness and failed to find an expert who has sufficient knowledge in the area. *Koch*, 883 S.W.2d at 788; *Warrilow*, 791 S.W.2d at 523.

216. TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 (1990).

217. *See* TEX. CODE CRIM. PROC. art. 2.01 (Vernon 1987) (stating that "it shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done").

> more than a mere advocate, but a fiduciary to fundamental principles of fairness.[218]

A prosecutor's overriding duty is to see that justice is done.[219] This duty entails several specific obligations, including the obligation to ensure that no one is subjected to or threatened with prosecution without good cause,[220] seeing that all defendants have the opportunity to retain and confer with counsel,[221] making sure that a defendant is afforded procedural justice,[222] and refraining from making extrajudicial statements that are prejudicial to the accused.[223]

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218. Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). Prosecutors must "police themselves at the trial court level because of their status as independent members of the judicial branch of government . . . like all elected officials, [they] must answer to the will of the electorate." State *ex rel.* Hill v. Pirtle, 887 S.W.2d 921, 943–44 (Tex. Crim. App. 1994, orig. proceeding) (en banc) (Baird, J., dissenting on relator's application for writ of mandamus).

219. TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 cmt. 1 (1990).

220. *See id.* at cmt. 2 (stating that rule does not apply when prosecutor uses grand jury to determine if crime has been committed, even if prosecutor has some doubt as to whether that charge should be brought "as long as he believes that the grand jury could reasonably believe that some charge is proper"); *see also* Lehman v. State, 792 S.W.2d 82, 85 n.2 (Tex. Crim. App. 1990) (stating that under Rule 3.09, prosecutor is not allowed to include unfounded allegations in indictment in hope that large number of accusations therein will make defendant look like criminal). The *Lehman* court also noted that Texas limits the power of felony prosecutors by requiring grand juries to screen all felony charges unless defendant waives his right to indictment. *Lehman*, 792 S.W.2d at 85 n.2; *see* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.1 (5th ed. 1985) (reviewing grand jury screening function to prevent unjust prosecutions).

221. TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 cmt. 1 (1990); *see id.* at cmt. 3 (declaring that prosecutor may lawfully question "any person who has knowingly, intelligently, and voluntarily waived the rights to counsel and to silence"); *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 4.03 (1990) (mandating that when attorney deals with unrepresented person, he must fully disclose attorney's role and not act in interested manner). A prosecutor may advise an unrepresented person who: (1) has not stated that he wants representation, (2) is not entitled to appointed counsel, and (3) has declared in open court that he wants to plead guilty of his pretrial, trial, and post-trial rights, as long as such information is accurate. TEX. DISCIPLINARY R. PROF. 3.09 cmt. 4 (1990).

222. TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 cmt. 1 (1990); *see* Armstrong v. State, 897 S.W.2d 361, 365–66 & n.3 (Tex. Crim. App. 1995) (en banc) (holding that prosecutor had no affirmative duty to disclose personal relationship with juror where such information was obtainable by defense counsel on voir dire); *Duggan*, 778 S.W.2d at 468 (noting that prosector has constitutional duty to correct known false evidence); Williams v. State, 513 S.W.2d 54, 56 (Tex. Crim. App. 1974) (noting that if prosecutor knowingly allows false testimony, state violates defendant's due process rights).

223. TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 cmt. 1 (1990); *see* TEX. DISCIPLINARY R. PROF. CONDUCT 3.07 (1994) (limiting extrajudicial statements).

In some cases, it will be necessary for a special prosector to be appointed because of a district attorney's special position in the legal system. In Ethics Opinion No. 454, the Professional Ethics Committee addressed the issue of whether a lawyer from the district attorney's office may prosecute a criminal complaint where the complainants are also attorneys within the same district attorney's office.[224] Relying on a Missouri appellate court decision,[225] the committee stated that the prosecuting attorney should request that the court appoint a new counsel for the State to "insure the defendant a fair trial while protecting the integrity of the District Attorney's Office from the shadow of impartiality."[226] If it is necessary for a member of the prosecuting attorney's office to testify as to an element of the offense charged (a likely contested issue), it will usually be necessary for that office to seek appointment of an outside prosecutor to try the case. The defendant's right to a fair trial will outweigh the expense to be borne by the taxpayers.[227]

J. *Rule 3.10: Advocate in Nonadjudicative Proceedings*

> *A lawyer representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.04(a) through (d), 3.05(a), and 4.01.*[228]

If an attorney appears before a legislative committee, a municipal council, or an administrative agency, the attorney's professional reputation is on the line in the same manner that it would be before a court.[229] Rule 3.10 requires that attorneys deal with the agency or committee honestly and in conformity with applicable rules of procedure.[230] The body before which they appear should

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224. Tex. Comm. on Professional Ethics, Op. 454, 51 TEX. B.J. 1060, 1060 (1988).

225. State v. Whitworth, 704 S.W.2d 230, 231 (Mo. App.—E.D. 1984).

226. Tex. Comm. on Professional Ethics, Op. 454, 51 TEX. B.J. 1060, 1060 (1988).

227. *Id.*

228. TEX. DISCIPLINARY R. PROF. CONDUCT 3.10 (1990).

229. *Id.* at cmt. 1; *cf.* Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 557–58 (Tex. 1973) (discussing importance and relevance of attorney's reputation for honesty of intention and motive in context of inherent conflict between insurer and insured in insurance defense case).

230. TEX. DISCIPLINARY R. PROF. CONDUCT 3.10 cmt. 1 (1990); *see* Rangel v. State Bar of Tex., 898 S.W.2d 1, 3–4 (Tex. App.—San Antonio 1995, no writ) (discussing attorney's apparent disdain for grievance committee proceeding against him and his subsequent failure to abide by relevant rules of procedure and common professional courtesy).

be able to rely on the integrity of the information they supply. Attorneys must disclose their representative capacities and should reveal the identities of their clients, unless such information is otherwise privileged.[231] In this way, the decision-making body can weigh the attorneys' presentations more accurately.[232] This advice is never more pertinent than when an attorney deals with a state bar grievance committee.[233]

III. NON-CLIENT RELATIONSHIPS

A. *Rule 4.01: Truthfulness in Statements to Others*

> *In the course of representing a client a lawyer shall not knowingly:*
> *(a) make a false statement of material fact or law to a third person; or*
> *(b) fail 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.*[234]

Materiality is the guidepost of this rule. Some types of statements are not usually considered material because they are understood to be matters of opinion or conjecture, such as price or value estimates, or the settlement value of a case.[235] If an attorney knowingly makes a false statement of law or of a material fact, however, the attorney violates this rule.[236]

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231. TEX. DISCIPLINARY R. PROF. CONDUCT 3.10 cmt. 1 (1990); *cf. In re* Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 926 F.2d 1423, 1425–29 (5th Cir. 1991) (analyzing attorney's duty to reveal client's identity when weighed against attorney-client privilege in case where attorney was held in contempt for failure to identify third-party intervenor paying for criminal defendant's case).

232. TEX. DISCIPLINARY R. PROF. CONDUCT 3.10 cmt. 1 (1990). It appears that Rule 3.10 is designed to promote attorney disclosure of lobbying efforts on behalf of a third party. *Cf.* Inwood West Civic Ass'n v. Touchy, 754 S.W.2d 276, 278–79 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding) (upholding trial court's denial of discovery into defendant's lobbying efforts on basis that "lobbying the Texas Legislature is not an illegal act" and that disclosure would not aid trier of fact).

233. *See Rangel*, 898 S.W.2d at 3 (noting that failure to respond to grievance committee's requests for information "clearly warrants disciplinary action"). The court in *Rangel* felt that the attorney's actions constituted serious misconduct and that disbarment was warranted because "[a]llowing complaining clients to see lawyers fail to respond to disciplinary proceedings without any serious consequences to the attorney could seriously damage the credibility of the profession and its ability to police itself." *Id.*

234. TEX. DISCIPLINARY R. PROF. CONDUCT 4.01 (1990).

235. *Id.* at cmt. 1.

236. *Id.* at cmts. 1–2; *see* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 352–53 (1996) (discussing how Model Rule

In *American Airlines,* the attorneys representing American were found to have intentionally misled the trial judge into believing that some of the declarations offered in support of a motion for a TRO had been executed by the declarants, when in fact the declarants had not yet signed the originals.[237] The Fifth Circuit found that this conduct "constituted the making of a false statement of material fact to the union opposing counsel and conduct involving dishonesty, deceit and misrepresentation, in violation of Rule 4.01."[238]

It is unethical not only to mislead the court,[239] but also to intentionally mislead opposing counsel or another party.[240] Attorneys must carefully guard their own sense of integrity and not knowingly permit their clients to draw them into endorsing or using a falsehood.[241] Rather, attorneys must urge their clients to take the

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4.1 appears to "adopt . . . [the] view that lawyers have a general obligation of honesty in negotiation, but that deceit and misrepresentation are to some degree part of the rules of the game . . . and that [t]he comment to Rule 4.1 . . . makes clear that some false statements are permissible because they do not amount to statements of material fact"). Situational ethics have crept into litigation practices as in many other arenas. Robert L. Nelson, *Uncivil Litigation,* RESEARCHING LAW (American Bar Foundation, Chicago, Ill., Fall 1996), at 1, 7. Professor Nelson observes that many litigators define "their moral obligations almost strictly in terms of the role they play in the adversarial process." *Id.* Few of these attorneys seem willing to engage their clients in a "moral conversation," even when the well-being of society is threatened. *Id.* The effect of "role morality" on the legal profession is an erosion of a lawyer's obligation to exercise moral as well as legal judgment. *Id.* Further, it tends to justify the continued tolerance of incivility in the profession. *Id.*

237. American Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992).

238. *American Airlines*, 968 F.2d at 528.

239. *Cf. In re* Matthews, 154 B.R. 673, 679–80 (Bankr. W.D. Tex. 1993) (stating that while it did not fault attorney's adherence to Rule 4.01 by continuously redrafting documents so that they would not be misleading to court, court felt that there were other, less expensive options available).

240. *See* Bernal v. State, 930 S.W.2d 636, 640–41 (Tex. App.—Corpus Christi 1996, writ ref'd) (finding that attorney complied with Rule 4.01 by truthfully answering client's sister's question as to whether her brother could testify without attorney, since attorney told her he could invoke his Fifth Amendment privilege); *see also* Tex. Comm. on Professional Ethics, Op. 499, 58 TEX. B.J. 178, 179 (1995) (stating that Rule 4.01 would be violated if in-house attorney represented to opposing party and administrative judge that factual basis for jurisdiction existed when attorney knew that such basis did not exist). *But see* Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (ruling that placing material in affidavit that has not previously been discussed with witness and then attempting to persuade witness that it is accurate version of events is not making of false statement in violation of Rule 4.01, if not made in bad faith or with lack of factual basis).

241. *See* Volcanic Gardens Mgmt. Co., Inc. v. Paxson, 847 S.W.2d 343, 347–48 (Tex. App.—El Paso 1993, orig. proceeding) (explaining interaction of Rules 4.01 and 3.03, as well as attorney-client privilege). The *Paxson* court stated:

high road, correct any misleading statements of material fact made to the court or opposing parties, or take other remedial measures.[242] For example, most of us have seen an answer to interrogatories or requests for production that pleads the unreasonable burden of compliance with a request for information. Before an attorney is tempted to let a client evade the proper response, the attorney should consider that this lack of forthrightness can do more harm than would disclosure of the documents.[243]

In *American Bankers Insurance Co. v. Caruth*,[244] the trial court found that American Bankers had misrepresented that the only way to acquire information requested was to manually inspect 30,000 boxes of documents stored in a warehouse.[245] When the plaintiff deposed defendant's computer personnel, it was discovered that the requested information could be generated by American Banker's computer system in about 40 hours.[246] The appellate court affirmed sanctions that struck American Banker's pleadings

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> [U]nder the crime/fraud exception to the lawyer-client privilege, "fraud" would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud. The crime/fraud exception comes into play when a prospective client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.

Id. at 348. *See id.* at 348. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 4.01 cmt. 3 (1990) (stating that "a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud"). However, the failure of a lawyer to disclose such information is not a violation of the rule unless the lawyer intends to mislead by such failure. *Id.*

242. TEX. DISCIPLINARY R. PROF. CONDUCT 4.01 cmt. 4 (1991); *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(d), (e), (f); 3.03(b) (1990) (mandating that: (1) attorney shall attempt to dissuade client from committing crime or fraud, (2) attempt to persuade client to take remedial action when attorney's services have been utilized to perpetuate crime or fraud, and (3) consult with client on limitations on attorney's conduct when client expects attorney action outside realm of representation). The United States Supreme Court has held that in certain circumstances, it is permissible to threaten a client with disclosure of privileged information when the client insists on committing perjury. *See* Nix v. Whiteside, 475 U.S. 157, 171 (1986) (holding that lawyer's statement to client that he would inform court of client's perjury fell "well within accepted standards of professional conduct").

243. Robert L. Nelson, *Uncivil Litigation,* RESEARCHING LAW (American Bar Foundation, Chicago, Ill., Fall 1996) at 1, 8 (noting that such "misbehavior" is not only ethical issue but can also harm clients).

244. 786 S.W.2d 427 (Tex. App.—Dallas 1990, no writ).

245. *Caruth*, 786 S.W.2d at 429.

246. *Id.*

and conclusively deemed all allegations in the plaintiff's pleadings to be true as a result of this misrepresentation and other failures to comply with discovery requests.[247]

B. *Rule 4.02: Communication with One Represented by Counsel*

> *(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.*
> *(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.*
> *(c) For the purpose of this rule, "organization or entity of government" includes:*
> > *(1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or*
> > *(2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.*
> *(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.*[248]

This is a good rule to review whenever one of the parties to the litigation is a corporation or governmental entity, and it is unclear where the line should be drawn in contacting employees of that party.[249] First of all, the rule is not implicated unless the context of

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247. *Id.* at 436.

248. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02 (1990).

249. *See* Lee v. Fenwick, 907 S.W.2d 88, 90 (Tex. App.—Eastland 1995, writ denied) (holding that where statute providing for prejudgment interest required proof that defendant received written notice, written notice to defendant's attorney does not satisfy statu-

the contact is related to the subject of the litigation.[250] The size of the opposing entity is a factor affecting the lawyer's conduct.[251] If the corporate or governmental agency is relatively small, then any contact with one of its employees may violate the rule.[252] On the other hand, if the opposing organization is a large one, then, as a general rule, an attorney is prohibited from contacting anyone at the managerial level and anyone else whose responsibilities or alleged conduct may ultimately cause the entity to be held vicariously liable.[253] The entity's counsel is considered to represent those persons as well.[254] To contact any of them without the prior consent of opposing counsel constitutes a violation of the rule.

If any of those managers or employees has a personal legal advisor, then that is the person the attorney should contact first. However, the attorney does not need a prior blessing from the entity's lawyer to contact such a person, nor does the attorney need that approval to contact a former employee.[255] The attorney may even contact a current employee without permission, provided that person's conduct is not a matter at issue in the case.[256] An attorney does have a duty, however, to make full disclosure to that current employee of the attorney's connection to the lawsuit and to notify the employee of the purpose of the interview.

In Opinion No. 474, the Professional Ethics Committee addressed this issue regarding a suit involving a municipality.[257] In this opinion, a hypothetical situation was presented wherein a plaintiff sued a municipality, which was represented by the city at-

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tory requirement, and rejecting argument that Rule 4.02 would have prohibited direct contact giving defendant notice).

250. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02 cmt. 2 (1990).

251. *Cf.* Upjohn Co. v. United States, 101 S. Ct. 677, 683–84 (1981) (observing that in corporate context, it is frequently employees at lower levels who possess information needed by corporation's lawyers, and attorney's advice will often be of greater significance to lower-echelon employees).

252. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02 cmt. 4 (1990).

253. *Id.*

254. *Id.*

255. *Id.*; *see In re* Medrano, 956 F.2d 101, 103 (5th Cir. 1992) (establishing that Rule 4.02(d) permits otherwise prohibited communication if initiated by client; however, that communication must not have been caused or encouraged by attorney not representing that individual client).

256. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02 cmt. 4 (1990).

257. Tex. Comm. on Professional Ethics, Op. 474, 55 TEX. B.J. 882, 882 (1992).

torney.[258] The City made a settlement offer, which was refused by the plaintiff as inadequate.[259] Without the city attorney's knowledge, the plaintiff's attorney contacted an individual member of the city counsel to "express his disapproval of the City's settlement offer."[260] The plaintiff's counsel contended that Rule 4.02 did not apply when the client is a municipality.[261] The Ethics Committee stated that Rule 4.02(a) and (c) "prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation."[262] The rule is equally applicable to cases involving municipalities as parties, and a city counsel member is properly considered a party "with managerial responsibility on behalf of the organization."[263]

A more complex situation involving municipalities was addressed in Ethics Opinion No. 492.[264] The question presented was whether Rule 4.02 applies to an attorney who represents a union member in "resolving grievances or other concerns arising out of municipal employment, or who negotiates on policy matters, where there is neither litigation in process nor contemplated."[265] The union had nonattorney advocates on its staff who represented city employees in their presentation of grievances and assisted the employees in the nonjudicial resolution of workplace problems.[266] The union also employed attorneys who did work similar to that done by the nonattorney advocates, mainly in attempting to resolve workplace issues in a nonjudicial setting.[267]

The city attorney informed the union's attorney that "he or she may not communicate with, nor cause another to communicate with, any city employee who has 'managerial responsibility which relates to the subject of the representation.'"[268] In reliance on

258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. Tex. Comm. on Professional Ethics, Op. 474, 55 TEX. B.J. 882, 882 (1992).
263. *Id.*
264. Tex. Comm. on Professional Ethics, Op. 492, 57 TEX. B.J. 621 (1994).
265. *Id.* at 621.
266. *Id.*
267. *Id.*
268. *Id.*

Rule 4.02, the city attorney also prohibited the union attorney from communicating, whether directly or indirectly, with any employee of the city "'whose act or omission make the [C]ity liable for such act or omission' without the consent of the city attorney."[269]

The Ethics Committee concluded that the city employee has an absolute right to be represented by the representative of the employee's choice, including an attorney, at any stage of the grievance process. "Outside the communications made as part of the grievance procedure, the attorney is subject to the constraints imposed by [Rule 4.02]."[270] The rule applies to all licensed and practicing attorneys in Texas.[271] The rule prohibits certain communications without the opposing attorney's consent unless authorized by law.[272] The attorney is required to obtain consent from the other attorney prior to contacting any city employee with managerial responsibility "relating to the subject matter of the representation or with those persons presently employed by the city whose act or omission in connection with the subject of the representation may make the city vicariously liable for such act or omission."[273]

If the opposing party has a lawyer, the attorney may not orchestrate contact between that party and a client or representative without the other lawyer's consent.[274] An attorney is under no duty to discourage the contact, but may not orchestrate it.[275] Regarding experts, however, the rule prohibits an attorney from contacting the opposing counsel's expert witness without that lawyer's consent.[276] An exception to the expert witness situation arises when the witness is a law enforcement officer or other person who has an obligation to the public at large.[277] The rule also does not prevent another lawyer from issuing a "second opinion" in a matter to one who is currently represented.[278]

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269. Tex. Comm. on Professional Ethics, Op. 492, 57 TEX. B.J. 621, 621 (1994).
270. *Id.* at 622.
271. *Id.*
272. *Id.*
273. *Id.*
274. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02 cmt. 1 (1990).
275. *Id.* at cmt. 2. Consent may be express or implied. *Id.*
276. *Id.* at cmt. 3; *see* Horner v. Rowan Cos., Inc., 153 F.R.D. 597, 599 (S.D. Tex. 1994) (recognizing defense counsel's ex parte contacts with plaintiff's treating physician as improper and possibly sanctionable conduct).
277. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02 cmt. 3 (1990).
278. *Id.* at cmt. 2.

C. *Rule 4.03: Dealing with Unrepresented Persons*

> *In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.*[279]

Attorneys must disclose their interests in the matters they discuss with any unrepresented persons. Attorneys must resist the temptation to give advice in this situation. A person who is unsophisticated in dealing with legal issues may not understand that a lawyer has certain loyalties or has certain interests as an authority on the law.[280] The only advice a lawyer should give to an unrepresented party while representing a client is for the unrepresented party to obtain independent counsel.[281] If a party misunderstands the attorney's role or perspective, the attorney has an absolute duty to correct that misunderstanding.[282] Prosecutors also have additional duties with respect to the mandates of this rule.[283]

D. *Rule 4.04: Respect for the 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.*

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279. TEX. DISCIPLINARY R. PROF. CONDUCT 4.03 (1990).

280. *Id.* at cmt. 1; *see* Edward A. Carr & Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street,* 36 S. TEX. L. REV. 859, 870–71 (1995) (describing impact of professional responsibility rules regulating litigator's interaction with unrepresented persons).

281. TEX. DISCIPLINARY R. PROF. CONDUCT 4.03 cmt. 1 (1990).

282. *See* Tex. Comm. on Professional Ethics, p. 461, 52 TEX. B.J. 52 (1989) (concluding that attorney must make full disclosure of any connection with litigation and purpose of communication).

283. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.09 (1990); Armstrong v. State, 897 S.W.2d 361, 365–66 (Tex. Crim. App. 1995) (asserting that prosecutorial pursuit of justice necessarily includes preclusion of efforts to obtain from unrepresented person waiver of significant rights during adversarial proceedings); Green v. State, 872 S.W.2d 717, 720–21 (Tex. Crim. App. 1994) (illustrating that presence of accused's counsel during pretrial proceedings ensures fairness when accused faces intricacies of law and advocacy skills of prosecutor); *see also* Section II(I) of this Article (reviewing Rule 3.09).

(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.[284]

All attorneys must avoid damaging the civil and criminal justice systems by creating the impression that they can manipulate it for personal gain.[285] Attorneys must not attempt to coerce testimony by implying that they can use the system to personal advantage.[286] This would be an abuse that diminishes public confidence in our profession and in the basic fairness of the system we all rely upon.[287] However, this rule does not restrict an attorney from meticulously cross-examining or interviewing a witness where the attorney doubts the accuracy or truthfulness of the testimony.[288]

IV. CONCLUSION

In a recent law journal article, one commentator lamented the inadequate remedies provided by rules of legal ethics and penal

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284. TEX. DISCIPLINARY R. PROF. CONDUCT 4.04 (1990).

285. *Id.* at cmt. 2.

286. *Id.* at cmt. 3; *see* Bernal v. State, 930 S.W.2d 636, 640–41 (Tex. App.—Corpus Christi 1996, writ ref'd) (stating that counsel who urged witnesses to testify in favor of his client but also mentioned their Fifth Amendment right against incrimination did not violate Rule 4.04(a); such action was merely anticipation of witness' attorney's own advice and defusing of such advise).

287. TEX. DISCIPLINARY R. PROF. CONDUCT 4.04 cmts. 2–3 (1990). *See* State *ex rel.* Hill v. Pirtle, 887 S.W.2d 921, 944–45 & n.16 (Tex. Crim. App.—1994, no pet. h.) (en banc) (Baird, J., dissenting) (noting that Rule 4.04 applies specifically to prosecutors who participate in criminal actions when result is to gain advantage in civil matter). Justice Baird went on to cite Ethics Opinion No. 332 for the proposition that

> [i]t is improper for a public prosecutor . . . to represent any party in a civil matter arising out of an occurrence which is also the subject of criminal investigation or prosecution within the jurisdiction of such public prosecutor except in rare instances where his duties as prosecutor have been fully performed before actual or contemplated connection with the civil matter and where the civil matter and where also no advantage has been obtained through the public office.

Id. at 944 n.16.

288. *See* Resolution Trust Corp. v. Bright, 6 F.3d 336, 342 (5th Cir. 1993) (deciding that "attorneys' sometimes laborious interviews with [witness] were conducted with the goal of eliciting an accurate and favorable affidavit from a key witness in the underlying case," which did not violate Rule 4.04(a)).

codes in the face of which attorneys or parties destroy or frustrate legitimate discovery.[289] The authors of this Article urge the reader that our first remedy is to review the professional rules of conduct and reassess the practices we have developed over the years. As members of the legal profession, we start the reclamation of dignity in the profession by reviewing the policies and practices in our own firms, courtrooms, and classrooms.[290] Moreover, our overriding duty to the profession requires us to take our relationship with bench and bar to a far nobler level. We must go above and beyond the minimum requirements mandated by the Texas Rules of Disciplinary Professional Conduct when dealing with evidentiary problems specifically, and in the practice of law as a whole. Ultimately, our clients and the public are better served when we do.

289. *See* Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles,* 26 ST. MARY'S L.J. 351, 355 (1995) (discussing destruction or spoilation of evidence in civil litigation and proposing ways to combat such practice).

290. Robert L. Nelson, *Uncivil Litigation,* RESEARCHING LAW (American Bar Foundation, Chicago, Ill., Fall 1996) at 1, 7 (observing that there is perception by lawyers that overly aggressive or unethical conduct is more likely to occur outside their own firm). Professor Nelson argues that so long as attorneys deny the possibility that questionable conduct exists in their own firms, "they are unlikely to look for problems and unlikely to devise systems to monitor and discourage problematic behavior." *Id.*