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Ethics: Lawyering and Professionalism.

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ESSAYS

ETHICS: LAWYERING AND PROFESSIONALISM*

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I. INTRODUCTION

Comments in the media show the public's current opinion of the legal profession is bad and getting worse. Lawyers have never been universally popular and perhaps if they were, they would not be doing their job. For example, one of a lawyer's professional responsibilities is to represent unpopular clients and causes. Still, even in relatively uncontroversial cases, any time lawyers take strong positions they acquire strong opposition. There are three areas in lawyer self-promotion that have encouraged a declining respect for lawyers: (1) advertisement, (2) personal solicitation, and (3) self-aggrandizement.

Bates v. State Bar of Arizona[1] allowed the public to gain more information about lawyers and legal services available.[2] It also opened the gates for some very questionable advertising campaigns. The quality and taste of some common advertisements are

1. 433 U.S. 350 (1977).
2. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977).

reminiscent of used car slogans and tactics. This has served to distance the once noble practice of law from the "professional" realm.

When airplanes crash, cars collide, or ships sink, the shameless, aggressive solicitation that often occurs is not only offensive to the families of the injured or deceased, it is repulsive to the general public. Personal solicitation is not the only offensive tactic used, and plaintiffs' attorneys are not the only offenders. Some defense firms lavishly entertain potential business and industrial clients, openly soliciting their legal business with assurances of superior lawyer-power and swaggering accounts of "Rambo" defense techniques. There are substantiated accounts of defense firms calling businesses that have been sued in order to solicit defense of the claim as soon as the event appears in the "blue sheet."[3]

Lawyers have the chance to educate the public and to extol the finest virtues of the legal profession every time a journalist or talk show host seeks comment from a lawyer. Each time a lawyer is in the public eye, there is a golden opportunity to display a high standard of competent legal representation. Often that opportunity is squandered, however, by resorting to criticism of the opposing counsel or judge.

In order to understand how negative public perception plagues the legal profession, one must first analyze how lawyers go about doing their job. The work of lawyers may be divided into three parts. First, a lawyer must consider several factors when communicating with a potential client. Second, a lawyer must attend to the creation of the lawyer-client relationship. Third, a lawyer must effectively manage the lawyer-client relationship. Each of these three parts presents unique challenges for lawyers.

Lawyers are regulated in all aspects of the practice of law. Beginning in the early common law and continuing through today, regulations indicate the expectations that society has of lawyers. It is the character of these prohibited acts that explains how the legal profession may be discredited.

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3. *See* Nancy Friedman Atlas et al., *DTPA in the Courts: Two Empirical Studies and a Proposal for Change*, 21 ST. MARY'S L.J. 609, 637-38 (1990) (explaining "Blue Sheets" as weekly reports compiled by a county, which contain summary information about trials conducted in that county, including some case settlements).

II. Legal Considerations When Communicating with a Potential Client

Even at common law, lawyers were prohibited from creating work for themselves. As the common law developed, there was strong public resistance against the sale or assignment of choses in action for the transfer of land acquired by adverse possession.[4] The concepts of barratry, champerty, and maintenance developed as legal recognition of that sentiment.[5] This section focuses on different offenses and issues related to the improper solicitation of potential clients. A review of both the common law and Texas Disciplinary Rules is helpful in evaluating what constitutes improper solicitation.

A. *Common Law*

1. Barratry

At common law, barratry was the indictable "offense of frequently exciting and stirring up suits and quarrels between others" and causing public and private litigation.[6] This included soliciting clients through the use of office assistants or "runners."[7] Common law barratry required a malicious intent to annoy and harass others.[8] Even if the litigation was meritorious, this was not a rec-

4. 10 Am. Jur. *Champerty and Maintenance* § 6 (1937).

5. *Id.* For readers interested in the history of barratry, as well as champerty and maintenance, David L. Evans has reviewed these topics in depth in an excellent article titled *Barratry in the Nineties*. *See* David L. Evans, *Barratry in the Nineties*, *in* State Bar of Texas, General Counsel Oversight Committee (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*).

6. 14 Am. Jur. 2d *Champerty and Maintenance* § 16 (2000); *see* David L. Evans, *Barratry in the Nineties*, *in* State Bar of Texas, General Counsel Oversight Committee (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*).

7. *See* Maires's Case, 7 Pa. D. 297, 302-03 (1898) (disbarring an attorney for using runners or office assistants to solicit clients who were involved in personal injury accidents); Annotation, *Offense of Barratry; Criminal Aspects of Champerty and Maintenance*, 139 A.L.R. 629 (1942); David L. Evans, *Barratry the Nineties*, *in* State Bar of Texas, General Counsel Oversight Committee (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*).

8. *See* 14 Am. Jur. 2d *Champerty and Maintenance* § 16 (2000) (quoting People v. Budner, 206 N.E.2d 171, 172 (N.Y. 1965)) (stating that barratry included situations in which the individual acted "with a corrupt or malicious intent to vex and annoy").

ognized common law defense.[9] A single act of barratry was not considered sufficient to support a conviction; indictment required at least three barratrous acts.[10] Barratry was a misdemeanor with the punishment of fine or imprisonment, and, if the defendant was a barrister or solicitor, the court could disbar him.[11]

2. Maintenance

Maintenance involved encouraging an individual to bring a suit or to put forth defenses, which that person "had no right to make," and with the intent of stirring up litigation.[12] It was the officious intermeddling in a lawsuit by a non-party "'by maintaining or assisting either party, with money or otherwise, to prosecute or defend'" the litigation.[13]

3. Champerty

Champerty was the agreement between a champertor—the one who stirred up the litigation—and one of the parties with which he was to share the potential proceeds of the lawsuit.[14] In consideration for these proceeds, the champertor would maintain the litigation at his own expense.[15] While neither champerty nor

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9. *See* State v. Chitty, 13 S.C.L. (1 Bail.) 379, 402 (1830) (Richardson, J., dissenting) (recognizing that a barretor could be found guilty regardless of whether the suit was legal or illegal); Annotation, *Offense of Barratry; Criminal Aspects of Champerty and Maintenance*, 139 A.L.R. 629 (1942) (stating that barratry existed whether the litigation was "just or unjust, [and] well or ill founded"); David L. Evans, *Barratry in the Nineties*, *in* STATE BAR OF TEXAS, GENERAL COUNSEL OVERSIGHT COMMITTEE (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*) (explaining that a meritorious suit was not a defense to the crime of barratry).

10. *See* 14 AM. JUR. 2D *Champerty and Maintenance* § 16 (2000) (citing State v. Noell, 295 S.W. 529, 530 (Mo. Ct. App. 1927)). In *Noell*, the court explained that the common law offense of barratry required at least three instances for an indictment. *Id.*

11. David L. Evans, *Barratry in the Nineties*, *in* STATE BAR OF TEXAS, GENERAL COUNSEL OVERSIGHT COMMITTEE (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*).

12. *Id.*; Schnabel v. Taft Broad. Co., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975).

13. Moffett v. Commerce Trust Co., 283 S.W.2d 591, 596 (Mo. 1955) (quoting 10 AM. JUR. *Champerty and Maintenance* § 1 (1937)).

14. 14 AM. JUR. 2D *Champerty and Maintenance* § 1 (2000); Martin v. Morgan Drive Away, Inc., 665 F.2d 598, 603 (5th Cir. 1982).

15. *Martin*, 665 F.2d at 603.

maintenance has been preserved as an identifiable violation of the law of any state,[16] barratry is still recognized as a crime.[17]

B. *Texas Barratry Law*

Modern regulations continue to reflect the same concerns that lawyers should not be permitted to instigate societal discord.

1. Adoption and Codification

In 1855, Texas adopted the common law of England as controlling unless a specific statute governed particular acts or conduct of persons in the State.[18] Interestingly, Texas courts initially determined that this adoption did not include the common law schemes of barratry, maintenance, and champerty.[19] However, in 1876, the Texas Legislature passed a law prohibiting the crime of barratry,[20] which has since evolved into the modern Texas Penal Code section 38.12.[21]

2. Lawyers' Rules and Definition of the Crime

The rules of ethical deportment for attorneys are contained in the Texas Disciplinary Rules of Professional Conduct ("TDRPC"

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16. 14 AM. JUR. 2D *Champerty and Maintenance* § 1 (2000); David L. Evans, *Barratry in the Nineties*, *in* STATE BAR OF TEXAS, GENERAL COUNSEL OVERSIGHT COMMITTEE (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*).

17. *See* TEX. PEN. CODE ANN. § 38.12 (Vernon 1994).

18. *See* Grassmeyer v. Beeson, 13 Tex. 524, 529 (1855) (affirming the adoption of the common law of England); Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 4, 5, *reprinted* in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 176, 177-78 (Austin, Gammel Book Co. 1898) (adopting the English common law).

19. *See* Betinck v. Franklin, 38 Tex. 458, 472-73 (1873) (questioning whether the statutes prohibiting barratry, maintenance, and champerty were ever adopted in England and concluding the common law did not incorporate these offenses); David L. Evans, *Barratry in the Nineties*, *in* STATE BAR OF TEXAS, GENERAL COUNSEL OVERSIGHT COMMITTEE (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*) (pointing out that Texas courts did not consider the common law prohibitions against barratry, champerty, and maintenance as part of the adopted common law).

20. Act approved Aug. 21, 1876, 15th Leg., R.S., ch. 135, § 1, 1876 Tex. Gen. Laws 1, 227, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 835, 1063 (Austin, Gammel Book Co. 1898); David L. Evans, *Barratry in the Nineties*, *in* STATE BAR OF TEXAS, GENERAL COUNSEL OVERSIGHT COMMITTEE (Mar. 1997) (unpublished article on file with the State Bar of Texas and author) (on file with the *St. Mary's Law Journal*).

21. *See* TEX. PEN. CODE ANN. § 38.12 (Vernon 1994) (defining the crime of barratry).

or the "Rules"), which were adopted by the Texas Supreme Court.[22] The Rules specifically address the crime of barratry and similar offenses.

Barratry is both a "serious crime" and an "intentional crime" as those terms are defined in the TDRPC and the Texas Penal Code.[23] A lawyer who pleads guilty or nolo contendere to the crime of barratry is subject to compulsory discipline that would result in either suspension of his law license coextensive with criminal probation or outright disbarment.[24] Absent a criminal conviction, a lawyer can be disciplined through the grievance process for committing barratry, based upon a preponderance of the evidence standard, resulting in sanctions up to and including disbarment.[25]

Rule 7.03(a) prohibits the soliciting of cases from "strangers," either in person or by telephone "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[26] Rule 7.03(b) prohibits a lawyer from soliciting employment through the use of third persons, or runners.[27] Rule 8.04 is the "catch-all" provision, which specifically prohibits barratry.[28] It defines barratry as a "serious crime" that includes "any attempt, conspiracy, or solicitation of another to commit" a crime under this provision.[29]

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22. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01-9.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9). The Texas Supreme Court has the constitutional and statutory responsibility within the State for the promulgation and administration of these rules as well as for the discipline of lawyers who violate them. The State Bar along with the supreme court supervise attorney conduct through the following: (1) the Texas Lawyer's Creed—A Mandate for Professionalism, (2) the Texas Disciplinary Rules of Professional Conduct, (3) the Texas Rules of Disciplinary Procedure ("TRDP"), (4) the Board of Disciplinary Appeals, and (5) the Commission for Lawyer Discipline.

23. *Id.*; *see* TEX. PEN. CODE ANN.§ 38.12 (Vernon 1994) (stating that a person who commits barratry must "inten[d] to obtain an economic benefit").

24. TEX. R. DISCIPLINARY P. 8.05, 8.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 1998).

25. *See* TEX. GOV'T CODE ANN. § 82.062 (Vernon 1998) (indicating that a lawyer who commits barratry may be suspended from the practice of law or have his license revoked).

26. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.03(a).

27. *Id.* 7.03(b).

28. *Id.* 8.04(a)(9).

29. *Id.* 8.04(b).

III. CREATION OF THE LAWYER-CLIENT RELATIONSHIP

A. *Written Agreements Not Required*

A written agreement is not required to create a lawyer-client relationship.[30] The existence of such a relationship does not depend upon whether the client paid a fee[31] and may exist even if the lawyer does not think it does. The issue turns on whether the client reasonably perceives there to be a relationship.[32] While the client bears the burden of establishing the existence of the relationship,[33] both Texas and federal courts have held that a specific duty to inform a person that he is *not* a client arises if a lawyer becomes aware that his conduct would lead a reasonable person to believe he was being represented.[34]

B. *Time for Written Agreements*

Written agreements for employment of counsel should be signed by the attorney and the client at the commencement of the relationship in order to avoid any unreasonable expectations. Letters of engagement are appropriate, and often are more acceptable to a client, and a jury, than a formal contract. The letter should clearly set out the lawyer's obligations, provide for payment of the expenses and the fee, provide for the "survival" of the relationship in the event of death or disability of either party, and explain the circumstances under which the lawyer may withdraw from the relationship. As a precautionary measure, the lawyer should send out

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30. *See* Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990) (asserting that an attorney-client relationship may be an express or implied contract between the parties).

31. *See id.* (citing State v. Lemmon, 603 S.W.2d 313, 318 (Tex. App.—Beaumont 1980, no writ) and Prigmore v. Hardware Mut. Ins. Co., 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ)).

32. *See* Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) (explaining that an objective standard is applied to the parties' actions to determine if there is an attorney-client agreement).

33. Sutton v. Estate of McCormick, 47 S.W.3d 179, 181 (Tex. App.—Corpus Christi 2001, no pet.); Yaklin v. Glusing, Sharpe & Krueger, 875 S.W.2d 380, 383 (Tex. App.—Corpus Christi 1994, no writ).

34. *See, e.g.*, Randolph v. Resolution Trust Corp., 995 F.2d 611, 615 (5th Cir. 1993) (stating the prevailing Texas case law that an attorney may be negligent for failing to "advise a party that he is not representing that party, when circumstances lead the party to believe that the attorney is representing him"); Kotzur v. Kelly, 791 S.W.2d 254, 258 (Tex. App—Corpus Christi 1990, no writ); Parker v. Carnahan 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied).

a "non-engagement" letter if the question of employment needs to be dispelled.

C. *Contingent Fee Cases*

In all contingent fee cases, Rule 1.04(d) requires written representation contracts.[35] Additionally, any time a "lawyer has not regularly represented the client, the basis or rate of the fee [must] be [explained] to the client, preferably in writing, before or within a reasonable time after" representation has commenced.[36] The contract should be short, direct, and should clearly express the intent of the parties. In *Levine v. Bayne, Snell & Krause, Ltd.*,[37] the Texas Supreme Court stated:

> Because the lawyer is better able than the client to predict and provide for fee arrangements based on recoveries diverging from the traditional payment actually received, the burden should fall on the lawyer to express in a contract with the client whether the contingent fee will be calculated on non-cash benefits as well as money damages. To place this burden upon attorneys is justified not only by the attorney's sophistication, but also by the relationship of trust between attorney and client.[38]

The court underscored the significance of this fiduciary duty by holding that ambiguous contingent fee terms would be construed as referring to the client's net, not gross, recovery.[39]

D. *Multiple Clients*

Representation of multiple clients is laden with the potential for hard feelings and conflicts of interest. Before undertaking representation, a lawyer should analyze whether the interests of the clients are adverse to each other as described in Rule 1.06(b)[40] such that consent from each client must be obtained before the repre-

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35. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (establishing that a contingent fee arrangement "shall be in writing and shall state the method by which the fee is to be determined").

36. *Id.* 1.04(c).

37. 40 S.W.3d 92 (Tex. 2001).

38. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001).

39. *Id.* at 96.

40. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b).

sentation is undertaken in accordance with Rule 1.06(c).[41] Of course, if the adverse interests do not become apparent until after the representation has commenced, the lawyer may have a duty to withdraw from representation.[42]

E. *Non-legal Staff*

Non-legal staff, under circumstances where authority is apparent or ratification occurs, may create an attorney-client relationship.[43] In addition, they may create circumstances where the lawyer and firm are disqualified to continue the attorney-client relationship.[44]

F. *Clear Communication*

Failure to clearly communicate that a lawyer is declining to take a case may result in the filing of a grievance or claim.[45] Thus, a lawyer's safest procedure is to clearly state, in writing, to the individual seeking to retain the lawyer that:

1. He is not accepting employment for the case in which he was consulted;
2. The person should consult another lawyer for an additional opinion if the person desires to pursue the claim;
3. There is a limited period of time in which claims may be pursued; and
4. If an additional opinion is going to be sought, that it be done without delay.

IV. MANAGING THE LAWYER-CLIENT RELATIONSHIP

The following sections outline ways in which lawyers should manage their relationships with clients to avoid unnecessary potential conflicts and difficulties.

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41. *Id.* 1.06(c).

42. *Id.* 1.15(a)(1).

43. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3(b), (c)(1) (2000).

44. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 308-09 (2d ed. 1997).

45. *See* Randolph v. Resolution Trust Corp., 995 F.2d 611, 615 (5th Cir. 1993) (citing Kotzur v. Kelly, 791 S.W.2d 254, 258 (Tex. App.—Corpus Christi 1990, no writ)); Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied).

A. *Initial Interview*

The initial interview sets the tone for the entire relationship. After the formality of "greetings," a lawyer should LISTEN to the client. He should not interrupt, and should ask questions only after the client has "vented" the concerns that brought him to the lawyer's office in the first place. Then, either the lawyer or his paralegal should complete a form of initial information or debrief the client specifically on the facts needed to commence the representation.

B. *The Johnny Cash Rule and Communication: "[K]eep [your] eyes wide open all the time"*[46]

A lawyer should always be alert for both time requirements and any indications of dissatisfaction or concern on the part of the client. Secretaries and paralegals sometimes pick up disenchantment on the part of the client before the attorney perceives it. Next, a lawyer should communicate with his client. It is of utmost importance to send clients copies of all pleadings, briefs, correspondence, and other important documents, except, perhaps, settlement negotiations. This policy saves phone calls and lets the client know what is being done on the case.

C. *Client's Property*

Rule 1.14 mandates that: "[a] lawyer shall hold funds and other property *belonging in whole or in part* to clients or third persons . . . separate [and apart] from the lawyer's own property."[47] Therefore, a lawyer should identify, keep separate, and safeguard the client's property.

D. *Maintain Client's Confidences*

Regardless of a lawyer's feelings about the client or the client's case, or his staff's interest in it, a lawyer is mandated not to "[r]eveal confidential information of a client or a former client."[48]

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46. JOHNNY CASH, *I Walk the Line* (Sun Records 1956).

47. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14(a), *reprinted in* TEX. GOV'T CODE ANN., tit.2, subtitl. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9) (emphasis added).

48. *Id.* 1.05(b)(1).

The staff should be continually reminded that casual comments and references to cases in the office sometimes reveal to others information that should remain "in the office." Law clerks are particularly vulnerable to the temptation to refer to real life cases and people's problems because of their enthusiasm for the actual contact with real clients and their eagerness to share stories with fellow students.

E. *Avoid Conflicts of Interest*

Avoiding conflicts of interest sounds so simple. Every lawyer knows that he should avoid conflicts of interest. However, sometimes "it creeps up" on a lawyer, or he does not see it until it has him trapped.[49] Even a lawyer's public service as a government official can create a conflict of interest.[50]

F. *Withdrawal*

If a lawyer MUST withdraw from a case, he should do so properly and promptly. Rule 1.15 clearly sets out the proper procedure for withdrawing from employment,[51] as does Texas Rule of Civil Procedure ("TRCP") 10.[52]

G. *Unpaid Fees*

Although a temptation, a lawyer should NEVER sue a client for failure to pay a fee. The O'Hair Rule[53] applies—there is a proper way to handle this situation. The lawyer should either collect the

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49. *See generally In re* Legal Econometrics, Inc., 191 B.R. 331 (Bankr. N.D. Tex. 1995).

50. *See* Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 908 (Tex. App.—Dallas 2001, pet. denied) (recognizing that a lawyer who holds public office has a duty of loyalty and a duty to prevent conflicts "between [his] personal or civic interest and the interests of a client").

51. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(d) (mandating that a lawyer who terminates representation of a client must give the client reasonable notice of the termination, surrender any property and documents belonging to the client, and refund any unearned payments that have been advanced to the client).

52. *See* TEX. R. CIV. P. 10 (outlining the proper procedure for an attorney who wishes to withdraw from representation). TRCP 10 states that a withdrawing attorney must notify his former client of any settings or deadlines of which the client is unaware. *Id.* The notice must be made either in person or by both first class and certified mail. *Id.*

53. Madeline Murray O'Hair, the famous litigation-prone atheist, once shared with the author that she had received a great deal of free legal representation from lawyers who waited too long to set and collect a fee.

fee as due, or think long and hard before pursuing payment. However, the Nancy Reagan Rule should prevail: "Just say no."

H. *Exit Interview*

The exit interview is important to the client. The relationship should not be just about money or solving a legal problem. A personal "good-bye" is the open door to a referral in the future.

I. *Other Areas of Liability*

The privity requirement means that only a client can sue a lawyer for certain legal malpractice claims.[54] However, claims by third parties based on deception rather than negligence require careful analysis. An attorney engaged in unconscionable actions through active misrepresentation may be found liable under the Deceptive Trade Practices Act ("DTPA").[55] Under the DTPA, only a consumer may bring suit.[56] However, the consumer may simply be a beneficiary of the purchased services rather than the client.[57] Thus, a non-client who is a beneficiary of the lawyer's services could bring suit under the DTPA.[58] Also, negligent misrepresentation by a lawyer to a third party, when the lawyer is aware of the third party's reasonable reliance on the misrepresentation, can result in a cause of action not barred by the privity requirement.[59]

Another hot spot of potential liability is illegal eavesdropping. Civil liability attaches to a person who unlawfully intercepts, discloses, or uses wire, oral, or electronic communication.[60] A lawyer

54. *See* Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996) (discussing that an attorney has a common law duty of care to his client and not to outside third parties). The court explained that this privity barrier against third party claims protects attorneys from unlimited liability. *Id.*

55. Latham v. Castillo, 972 S.W.2d 66, 68 (Tex. 1998); TEX. BUS. & COM. CODE ANN. §§ 17.45, 17.50(a)(3) (Vernon Supp. 2002).

56. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 2002).

57. *See* Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997) (following the court's prior decision in *Kennedy v. Sale*, 89 S.W.2d 890 (Tex. 1985), in which it held that a consumer may bring a DTPA action if he is an actual purchaser *or* beneficiary of goods or services).

58. *Id.*

59. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling, Interests, 991 S.W.2d 787, 792 (Tex. 1999) (distinguishing the privity requirement in a negligent misrepresentation action, which does not require privity between parties, and a legal malpractice action, which does require privity between parties).

60. TEX. PEN. CODE ANN. § 16.02(b) (Vernon Supp. 2002); *id.* § 16.05(b-e).

involved in the execution of such interceptions may face charges of criminal conspiracy.[61] In addition to criminal penalties and civil liability to the adverse party, lawyers may then be subject to legal malpractice claims by their clients, since illegal eavesdropping can quickly turn a valid claim into a "bad facts" case. A good rule of thumb is don't record and don't reveal.

V. If a Client Has Complaints

When a client expresses a complaint or concern to the lawyer or his staff, the lawyer should listen to the client's concern, respond to that concern immediately, and ask the client for suggestions of an appropriate remedy. If an agreement cannot be reached, the lawyer should suggest mediation or arbitration immediately. However, a lawyer should consider other factors and ramifications, and act accordingly, when a client has filed a formal grievance or complaint.

A. *Formal Grievances*

When a client files a formal grievance, the accused lawyer should immediately consult a lawyer who is experienced in defending this type of case. Due process in a grievance proceeding is very different from that with which most practicing lawyers are accustomed. The lawyer may not receive copies of material accumulated by the District Grievance Committee and cross-examination of the witnesses is not allowed. A lawyer may not even be allowed to confront the witnesses.

After consultation with a lawyer, the accused should promptly respond to the complaint—in writing, completely and succinctly. In addition, a lawyer should be professional and courteous at all times by appearing at the hearing promptly and avoiding any appearance of frustration with the "system" or the people involved. At the hearing, the lawyer should not argue with the client, the witnesses, or any member of the panel.

B. *Legal Malpractice Claims*

When a client files a legal malpractice notice or claim, the lawyer should immediately notify his liability insurance carrier in writing,

61. *Id.* § 15.02.

and send the company a copy of the complaint. Some insurance companies will assign defense counsel and do not allow the lawyer to confer in the selection. Others will give the lawyer the opportunity to select among those lawyers who are on their "approved" list. If the defendant-lawyer has any reservations or if the claim has the potential of exceeding liability limits, he should retain his own personal defense counsel. Finally, a defendant-lawyer should follow the advice of his assigned or retained lawyer. Lawyers, in general, have an overpowering urge to micro-manage; however, this is not the time.

VI. THE LAWYER AS A LITIGANT

Cases in which the lawyer is the respondent in a grievance prosecution or defendant in a civil case exemplify why every lawyer should make it a primary goal to avoid becoming the subject of a client complaint. The economic consequences are too costly, the personal angst too dreadful, and the professional scars too enduring. Paul M. Koning, in his article, *Save Yourself Some Grief During a Grievance Hearing*, outlines sound suggestions and practical approaches to responding to complaints about professional conduct.[62] When a claim of misconduct arises, whether in the grievance system or as an allegation of legal malpractice, it should be resolved as quickly and amicably as discretion and good judgment allow. Lawyers should be present in the courtroom as advocates, not as litigants.

VII. LAWYERS' OBLIGATIONS

A. *To Clients*

The Texas Rules of Disciplinary Procedure is a comprehensive digest of the formal rules governing the lawyer-client relationship.[63] *The Texas Lawyer's Creed—A Mandate for Professionalism*

62. *See generally* Paul M. Koning, *Save Yourself Some Grief During a Grievance Hearing; Be On Time, Be Prepared and Check Your Attitude at the Door*, TEX. LAW., JULY 24, 2000, at 28, WL 7/24/2000 TEXLAW 28.

63. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01-9.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

(the "Creed") also sets out specific rules for relationships between lawyers and clients.[64]

B. *To the Courts*

The Texas Rules of Civil Procedure detail how a lawyer is required to deal with the filing of claims, the preparation of claims, and the handling of litigation and appeals. In addition, the Creed also includes duties between lawyers and judges.[65] These duties are designed to enforce the respect and dignity due to all participants in court proceedings.[66]

C. *To Opposing Counsel*

The Texas Supreme Court and the Texas Court of Criminal Appeals adopted the Creed by joint order on November 7, 1989.[67] The Creed is an attempt to reduce abusive tactics in litigation and promote civility and professionalism.[68] By promoting civility and courtesy in litigation, the Creed seeks to increase the efficiency of the justice system without compromising the duties a lawyer owes a client.

D. *To the Public*

Although the TDRPC, TRDP, TRCP, and the Creed all deal with the lawyer's relationship with and obligations to the public, they do not capture the essence of what the public wants, or what the public feels it is entitled to, from the legal profession. Caustic criticism and open resentment are readily expressed privately in lawyer jokes and publicly by talk show hosts and corporate executives. A Michigan lawyer, Wolfgang Hoppe, expressed some of these complaints:

> We no longer are the trusted confidants, the respected counselors, the guardians of values going beyond the immediate concerns of the client. We are no longer "professionals." We sell legal wares of the

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64. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, *in* TEXAS RULES OF COURT 569, 570 (West 2001) (adopted 1989).

65. *Id.* at 571.

66. *Id.*

67. *Id.* at 569.

68. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 237 (1991).

> best possible quality for the price. We keep a well-run shop. We compete with other shopkeepers. We invite potential customers to shift their business from other shops to ours—at least until they are lured away by even more enticing or cheaper wares in yet another shop.[69]

VIII. CONCLUSION

Public perception is a major issue that confronts the legal community. Texas has taken steps towards creating a structure that encourages lawyers to maintain a civil, professional, and courteous environment. It is up to all lawyers to breathe life into that mandate for professionalism, the Texas Lawyer's Creed, and to prevent the legal profession's further decline in the public eye. The place to start is with law schools, which teach students to think and act as lawyers. But, lawyers already practicing can make an immediate and profound change in the perception of lawyers by recognizing that the image of lawyers is based on what people see them do.

69. Wolfgang Hoppe, *Professionalism—Can We Return to the Future?*, 68 MICH. B.J. 846, 848 (1989).