JUVENILE ETHICS: A JUDICIAL PERSPECTIVE

Prepared By

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23rd Annual Juvenile Law Conference
Western Park Central Dallas, Texas
February 18-20, 2010

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by
Judge George E. West II

I. INTRODUCTION

Lawyers and Judges owe a duty of scrupulous honesty, forthrightness, and the highest degree of ethical conduct. Inherent in these duties is compliance with both the spirit and the express terms of established rules of conduct and procedure. In the area of juvenile law, these duties are heightened due to the unique nature of the practice. The purpose of this article is to provide a road map for the bench and bar to understand and comply with their ethical duties.

This article is not intended be a complete treatise on legal ethics. Decisions within this jurisdiction and outside of this jurisdiction are included to highlight the possible applications of our ethical rules and canons. Not all ethical rules and canons will be discussed. Generally, those that surround court activities and judicial conduct are included along with some others of special interest. Judges and lawyers should continue to consult with current rules, canons, laws and procedure.

II. GENERAL ETHICS

A. MERITORIOUS CLAIMS AND CONTENTIONS

1. Rule 3.01:

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.

2. Author's Comments on Rule 3.01

This rule prohibits the filing of all pleadings, motions of other papers known by the lawyer to be false in some material manner, or otherwise meritless as a matter of law or fact. *Ibarra v. State*, 782 S.W.2d 234 (Tex. App.CHouston [14th Dist.] 1989, no writ) (Attorney's failure to distinguish prior appeal arising from same facts before same court constituted advanc[ing] a claim that is unwarranted under existing law in violation of former DR 7-102(A)(2) [Note: this conduct would likely violate current Rule 3.01, especially in light of the similarity between Comment 2 thereto and former DR 7-102(A)(2).]). *See also* PEC Op. 405 (1983) (a lawyer who knows certain statements in a pleading are false may not verify the pleadings at the client's request).

A lawyer may also be sanctioned for arguing matters that lack merit. *Bond v. State*, 176 S.W.3d 397 (Tex. App.-Houston [14th Dist.] 2004, no pet.) (Lawyer's argument concerning double jeopardy went beyond the limits of zealous advocacy and lawyer misrepresented facts, distorted the record, and falsely accused the trial court of

unprofessional conduct); s*ee also In re Weiblen*, 439 N.W. 2d 7, 11 (Minn. 1989) (lawyer indefinitely suspended for asserting frivolous claims.)

A violation of Rule 3.01 may also subject the lawyer to immediate sanctions under Texas Rule of Civil Procedure Rule 13. Rule 13 provides in full:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.
>
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

Under Rule 13, the lawyer, a party or both may be sanctioned for filing paperwork that is false, fictitious, or groundless. A lawyer's good faith belief that his conduct was proper will not prevent him from being sanctioned if a reasonable lawyer acting in a reasonable manner would have determined that the conduct was improper. *See* Kilgarlin, Quesada & Russel, *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 Tex. Tech. L. Rev. 881, 884 (1988).

B. MINIMIZING THE BURDENS AND DELAYS OF LITIGATION

1. Rule 3.02:

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.

2. Author's Comments on Rule 3.02

This Rule addresses those situations where a lawyer or the lawyer's client perceive that it is in the best interest of the client to engage in conduct that delays resolution of the

matter or that increases the costs or other burdens of a case. *See* Tex. Rule 3.02 cmt 1. Because such tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are unreasonable are prohibited. *Id*. Dilatory practices indulged in merely for the convenience of the lawyer, brings the administration of justice into disrepute, and normally will be unreasonable within the meaning of this Rule. *See* Tex. Rule 3.02 cmt 3.

However, a lawyer who seeks a delay in order to serve the legitimate interests of the client rather than merely the lawyer's own interests, may justifiably do so except when the clients request is merely to harass or injury another. *See* Tex. Rule 3.02 cmt 4. For example, in order to represent the legitimate interests of the client effectively, a diligent lawyer representing a party named as a defendant in a complex civil or criminal action may need more time to prepare a proper response than allowed by applicable rules of practice or procedure. *See* Tex. Rule 3.02 cmt 4. Similar considerations may pertain in preparing responses to extensive discovery requests. *Id*. Seeking reasonable delays in such circumstances is both the right and the duty of a lawyer. *Id.*

If a lawyer is going to withdraw from representing a client, Rule 3.02 requires it be done in a manner that does not cause undue delay in his case. *See In re Office Products of America, Inc.*, 136 B.R. 675 (Bankr. W.D. Tex. 1992) (Discharged law firm is obligated to cooperate with discharging client in making change of representation as efficient as possible and is, therefore, entitled to recover costs incurred in transferring records, materials, and information relating to case to newly hired law firm.)

Rule 3.02 is one of several interlocking provisions to prohibit a lawyer from dilatory or abusive tactics forbidden by other rules. Such rules include Rule 3.01, taking frivolous position, Rule 3.03, being untruthful or misleading to a tribunal, and Rule 3.04, violating obligations under applicable rules of practice, procedure or evidence.

C. ATTENDANCE AT COURT HEARINGS

1. <u>Attorney Late for Court Setting</u>

An Attorney owes a duty to his client and the Tribunal to timely appear at his client's court settings. Rule 3.04 (d) addresses a lawyer's responsibilities to follow standing or local rules of a tribunal and particular orders of that tribunal. These rules and orders in a given jurisdiction generally require the attorney to make a timely appearance for all settings. Violation of a timeliness rule my lead to sanctions. For example, an attorney was sanctioned by a District Court for being 25 minutes late. *U.S. v. Seltzer* , 227 F.3d 36 (2nd Cir. 2000). The 2nd Circuit held that the District Court has the power to sanction an attorney as officer of court for misconduct unrelated to client representation without a finding of bad faith. *U.S. v. Seltzer* , 227 F.3d 36 (2nd Cir. 2000); *see also Love v. State Bar of Texas*, 982 S.W.2d 939 (Tex. App.-Houston [1st Dist.] 1998, no pet.) (Lawyer violated Rule 3.04(c)(5) by showing up late to court, leaving without meeting with prosecutor as directed by the court, and making anti-Semitic remarks and threats toward the judge).

2. Attorney's Failure to Appear for Court Setting

An attorney is required to appear at all court setting. Under Rule 1.01 (b) a lawyer shall not "neglect matters that are entrusted to him . . . ." A lawyer's appearance in another court may not be sufficient depending on the circumstances. Comment 6 under Rule 1.01 states that the lawyer's workload should be controlled so that each matter can be handled with the requisite competence and diligence. Tex. Rule 1.01 cmt. 6. The lawyer's duty is to pursue each matter with reasonable diligence and promptness, despite opposition, obstruction, or personal inconvenience to the lawyer. *Id.; see e.g. Joyner v. Commission for Lawyer Discipline*, 102 S.W.3d 344 (Tex. App.- Dallas 2003, no pet.) (Attorney's failure to appear at a hearing and to respond to discovery is a violation of Rule 1.01(b); associating other lawyers into a matter without the prior informed consent of the client is a violation of Rule 1.01(a)); *see also Hawkins v. Commission for Lawyer Discipline*, 988 S.W.2d 927 (Tex. App.- El Paso 1999, pet.denied) (Lawyer failed to appear on behalf of the client despite a court order to do so.)

D. CANDOR TOWARDS THE TRIBUNAL

1. Rule 3.03:

(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.

2. Author's Comments on Rule 3.03

a. Candor Towards Tribunal Overview

Generally, Rule 3.03(a)(1) provides that the lawyer should not make a false statement or offer false evidence to a tribunal. *See generally Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694* (Tex.App.-Houston [14th Dist.] 1998, no pet.). In addition, a lawyer should not fail to disclose facts to the tribunal which are necessary to avoid assisting a criminal or fraudulent act, or to prevent the tribunal from making an informed decision in an ex parte proceeding. Tex. Rule 3.03 (a)(2).Last, the lawyer should not fail to disclose controlling authority which is directly adverse to his client's position. Tex. Rule 3.03 (a)(4).

Under 3.03, an advocate is responsible for pleadings and other documents prepared for litigation, but it is usually not required to have personal knowledge of matters asserted therein, provided the assertions were not made personally by the lawyer. Tex. Rule 3.03 cmt. 2. But an assertion purporting to be on the lawyer's own knowledge, such as an affidavit of the lawyer or representation of the fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true based on a reasonably diligent inquiry. *See* Tex. Rule 3.03 cmt 2. Furthermore, although a lawyer is not required to make a disinterested exposition of the law, he or she has a duty to recognize the existence of pertinent legal authority, and disclose it when such authority is controlling and adverse to his case and has not been disclosed by the opposing party. Tex. Rule 3.03 cmt.3. When a lawyer is asked to place into evidence testimony or other evidence that the lawyer knows to be false, the lawyer should first urge the client or other person involved not to offer such evidence. Tex. Rule 3.03 cmt.5. If the request comes from the lawyer's client, the lawyer must not only refuse to offer it but may be justified in seeking to withdraw from the case. Tex. Rule 3.03 cmts 5 and 6. Finally, in ex parte proceeding, the lawyer has the duty to inform the court of all unprivileged facts known to the lawyer, even those facts adverse to the client's position, which the lawyer reasonably believes the tribunal must know in order to make an informed decision. Tex. Rule 3.03 (a)(3). Some Jurisdictions have imposed severe sanctions for violation of this rule. *See Commission on Professional Ethics & Conduct v. Zimmerman,* 354 N.W. 2d 235, 237 (Iowa 1984) (suspending lawyer's license); *In re Schiff*, 542 S.W.2d 771, 775 (Mo. 1976) (sentencing lawyer to 2 year probation).

b. Misrepresentations

Rule 3.03(a)(1) provides that the lawyer should not make a false statement or offer false evidence to a tribunal. *Weiss v. Commission for Lawyer Discipline*, 981 S.W.2d 8 (Tex. App. - San Antonio 1998, no pet.) (Attorney violated Rule 3.03 by falsely claiming before a tribunal that he had not threatened his client with criminal prosecution and that all the language in his television ads had been reviewed by an ethics professor when only the disclaimer had been reviewed). Additionally, a lawyer is not free to perjure himself, offer perjured evidence or misrepresent facts or law. *See e.g. Golden Eagle Distr. Corp.*

v. Burrough Corp. 809 F.2d 584, 589 (9th Cir.1987); *Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694* (Tex.App.-Houston [14th Dist.] 1998, no pet.).

The rule against misrepresentation not only applies to oral statements but also to physical evidence. In *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St. 3d 14, 800 N.E.2d 1117 (2003), a lawyer, in a disciplinary proceeding, took a deposition waved around "suggestively" labeled tapes implying that the tapes contained conversations of the deponent and the lawyer. By suggestively labeling the tapes and referring to them during questioning, the lawyer immediately implied that she had recorded conversations with the legal assistant that could impeach and personally embarrass the legal assistant. The lawyer also intermittently cautioned the legal assistant to answer truthfully or risk perjuring herself. The tapes were blanks. The court found these actions were deceptive. If these actions occurred in Texas as similar finding will probably be made.

A misrepresentation may also be made by an omission. *In the Matter of Jeffers*, 3 Cal. St. Bar Ct. Rptr. 211, 1994 WL 715918 (Cal. State Bar Ct. 1994), the lawyer was directly asked if his client was dead. Instead of telling the court during the settlement discussions that his client is dead, he stated that he could not communicate with his client because his "client's brain was not functioning." Although the lawyer's answer to the judge may have been facially truthful, it was recognized that this was not a defense and that "concealment of material facts is just as misleading as explicit false statement[s]." *Id*, Cal. S.B. Rptr. at 220.

c. Anticipated False Evidence

Rule 3.03 (a)(5) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. This rule applies not only to evidence that has been offered but also to evidence the client wants the lawyer to offer. If a client ask a lawyer to offer testimony or other evidence that the lawyer knows to be false, the lawyer should encourage the client or other person involve to refrain from offering false evidence. The lawyer should also advise the client of the lawyer's responsibility under this rule and refuse to offer the testimony regardless of the client's wishes. *See e.g. People v. Lewis*, 75 Ill. App. 2d 560, 393 N.E.2d 1380, 1384 ((1979) (effective assistance of counsel does not include participation in fraud); *Kirkham v. State*, 632 S.W.2d 682, 684 (Tex. App – Amarillo 1982, no writ) (cannot use perjured or false testimony).

d. Correcting False Statement of Witness

"If a lawyer has discovered 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." Tex. Rule 3.03 (b). "If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts." *Id*. The duty to take remedial steps, if

present, continues until remedial legal measures are no longer reasonably possible. Rule 3.03 (c).

e. Disclosing Criminal or Fraudulent Acts

Rule 3.03 (a)(2) mandates that a lawyer should not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act. *See Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989) (Codefendants giving testimony against other codefendant denied any agreement with State which misled the jury, and prosecutor's failure to clarify relationship between prosecution and testifying codefendants or cure false testimony violated his ethical obligations under Rule 3.04(b)).

f. Disclosure of Relevant Authority

Rule 3.03 (a)(4) require the lawyer 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. On its face the rule requires disclosure only of "direct adverse" authority in the "controlling jurisdiction," however, the Rule may be interpreted broader since similar language in an ABA rule has been given a more expansive reading. Regarding this matter, ABA Formal Opinion 280 stated:

> We would not confine the Opinion to "controlling authorities" – i.e., those decisive of pending cases – but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.
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> . . . .
>
> The test in every case should be: Is the decision which opposing counsel has overlooked one which in court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer[,] who advanced, as law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?"

A "court decision can be 'directly adverse' to a lawyer's position even though the lawyer reasonable believes that the decision i[s] factually distinguishable from the current case, or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case." *HL Farm Corp. v. Self*, 820 S.W.2d 372 (Tex. App.CDallas 1991), *rev'd on other grounds*, 877 S.W.2d 288 (Tex. 1994) (Attorney's failure to call to court's attention decision of another Texas Court of Appeals directly adverse to attorney's client, because attorney thought case was wrongly decided, violated attorney's duty of candor to court under Rule 3.03(a)(4)); *see also* ABA Formal Opinion 84-1505 (in a case of first impression in one jurisdiction, lawyer failed to reveal an appellate decision regarding the same subject matter from another jurisdiction in the same state).

g. Ex Parte Communications

Rule 3.03 (a)(3) provides that in an ex parte proceeding the attorney should not fail 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. In an *ex parte* proceeding, the tribunal cannot rely on the adversary system to uncover the truth or what is just, it is therefore imperative that the lawyer present information necessary for the tribunal's decision. *See gen. Goodsell v. The Mississippi Bar*, 667 So.2d 7 (1996). In *Goodsell v. The Mississippi Bar* the court found that a lawyer violated the ex parte disciplinary rule when he represented to the court that his client signed a motion for temporary restraining order, when in fact, the lawyer had signed the document. *Id.*

E. FAIRNESS IN ADJUDICATORY PROCEEDINGS

1. Rule 3.04:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

2. <u>Author's Comments on Rule 3.04</u>

a. <u>Unlawful Destruction and Concealing of Evidence</u>

Rule 3.04 (a) provides that a lawyer shall not "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." Official comment 2 to Texas Rule 3.04 further observes that "[a]pplicable law in many jurisdictions, including Texas, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen." Tex. Rule 3.04 cmt. 2. However, a lawyer for a client may properly object to the production of documents or other evidence on grounds including relevancy and privilege, as well as attorney-client privilege and the work product doctrine. Neither attorney-client privilege nor work product doctrine cover physical evidence of a crime given to the attorney. For example, in *In re Ryder*, 263 F.Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 713 (4th Cir. 1967), a defense attorney accepted stolen money and a shotgun used in a robbery and deposited it in a safe deposit box. The lawyer knew he possessed fruits and instrumentalities of a crime and he planned to keep them until trial unless the government discovered it. The defense lawyer's actions was considered ethical conduct and the lawyer was suspended for 18 months.

The work product privilege however will apply to items that are not fruits or instrumentalities of a crime such as photographs the lawyer took at the crime scene. *See People v. Belge*, 83 Misc.2d 186, 372 N.Y.S.2d 798 (1975) (lawyer took photographs of crime scene and deceased victim.).

Unlawful obstruction of another party's access to evidence may also lead to criminal charges. A person commits an offense if he alters, destroys, or conceals any physical evidence with the intent to affect the outcome of an investigation or official proceeding. Tex. Penal Code Art. 37.09; *see also Clark v. State* , 261 S.W.2d 339, cert. den., 346 U.S. 855 (1953) (Giving client advice to throw the gun in the river made the lawyer an accessory to the crime.)

Unlawful obstruction can apply to access to witnesses. Tex. Rule 3.04 (a) and (e). In *Stearnes v Clinton*, 780 S.W.2d 216, (Tex. App. 1989), the Lubbock County District Attorney's Office had a policy that defense counsel needed permission of that office before he can interview a witness. The Court of Appeals recognized that such a local "rule" is tenuous and in actuality is a legal nullity. It further stated "[t]he rule in question is not only in conflict with principles of fair play, but in direct conflict with defense counsel's responsibility to seek out and interview potential witnesses." 780 S.W.2d at 223-24.

b. <u>Falsifying Evidence</u>

Rule 3.04 (b) provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely," or make improper inducements to witnesses. "When an attorney adds or allows false testimony . . . he . . . makes it impossible for the scales [of justice] to balance . . . No breach of ethics, or the law, is more harmful to the administration of justice . . . ." *See Dodd v. Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960); *see also Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989) (Codefendants giving testimony against other codefendant denied any agreement with State, jury was misled, and prosecutor's failure to clarify relationship between prosecution and testifying codefendants or cure false testimony violated his ethical obligations under Rule 3.04(b)).

False statements may not only occur in testimony but in documents filed with the court. For example, in *Tex. Comm. on Professional Ethics*, Op. 473, V. 55 Tex. B.J. 521 (1992) the Commission addressed the issue of what is the duty of appointed counsel to disclose the fraud of an allegedly indigent client? Two facts scenarios were addressed by the court:

> (i) An attorney is appointed to represent the defendant in a criminal case after the defendant has signed a sworn statement under oath that he is indigent and has insufficient funds to hire an attorney. In talking with the defendant, the attorney discovers the defendant is not in fact indigent and could pay for retained counsel. The attorney also learns the defendant was

not indigent when he signed the request for appointed counsel. May the attorney inform the court of this circumstance?

(ii) Same basic fact situation as above, except that the defendant is unemployed at the time counsel is appointed for him, and subsequently during the pendency of the criminal case obtains employment which would enable him to employ retained counsel. May the attorney inform the court of this situation?

The Commission concluded in both cases, Section 3.03(a)(2) of the Texas Rules of Professional Conduct requires a lawyer to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act and Section 1.05(f) requires a lawyer to reveal confidential information when required to do so by Rule 3.03(a)(2).

c. Payment of Witnesses

Rule 3.04 (b) generally prohibits a lawyer from paying, offering to pay, or acquiescing in the offer or payment of compensation to a witness or other entity contingent upon the testimony of the witness or the outcome of the case. The rule permits, however, a lawyer to advance, guarantee, or acquiesce in the payment of expenses reasonably incurred by a witness in attending or testifying; reasonable compensation to a witness for his loss of time in attending or testifying; and a reasonable fee for the professional services of an expert witness. However, a person commits an offense if he offers or confers any benefit on a prospective witness to testify falsely, to withhold testimony, or to elude process. TEX. PENAL CODE ANN. art. 36.05.

d. Improper Trial Tactics

(1) Rule 3.04 (c)

Rule 3.04 (c) prohibits lawyers from engaging in certain prohibited trial tactics. Those tactics include the following:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

The exception to the above prohibitions is found in 3.04 (d). Paragraph (d) provides that a lawyer shall not "knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal 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." Tex. Rule 3.04 (d).

(2) Author's Comments on 3.04 (c)

There are a number of cases that highlight improper trial tactics. If submitted to the grievance committed they may fall under 3.04 (c). Some of the cases are listed below.

i. Habitually Violate Rules: *See Briggs v. State*, __ S.W.2d ____, No. 03-07-00674-CR (Tex. App. – Austin, 2008) (unpublished) (lawyer received copies of various communications from the court of appeals and received notice of the trial court's hearing but failed to appear at the hearing and did not responded to any of the Court's inquiries.)

ii. Reference to Matters Nor Relevant or Admissible: *Gardner v. State*, 730 S.W.2d 675, 698 (Tex.Crim.App.), *cert. denied*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987) (It has been held error to suggest to the jury that they should defer to any other person's assessment of the truthfulness of a witness, no matter how experienced that person may be.)

iii. Attacks Upon Opposing Counsel: *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753 (Tex. App.- Texarkana 1992, writ denied) (Attorney's jury argument that opposing counsel manufactured evidence and was untruthful, where medical record to which opposing counsel referred was in evidence, violated both the Rules of Civil Procedure and Rule 3.04(c)); *see also Amelia's Automotive, Inc. v. Rodriguez*, 921 S.W.2d 767 (Tex. App. – San Antonio 1966, no writ).

iv. Providing Personal Opinion: *Brown v. State*, 921 S.W.2d 227, 231 (Tex.Cr.App.1996) (prosecutor interjected his personal opinion in trial)

e. Disobeying Rules of the Tribunal

Rule 3.04 (d) provides that a lawyer shall not "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." Tex. Rule 3.04 (d); *see also Hawkins v. Commission for Lawyer Discipline*, 988 S.W.2d 927 (Tex. App.CEl Paso 1999, pet.denied) (The language of Rule 3.04 entitling a lawyer to disobey an obligation to the court by doing so openly on an assertion that no valid obligation exists is a general rule that is not applicable when it is contrary to a court's specific order directing the lawyer to continue representing a client under Rule 1.15.)

f. Encouraging Witness to Refrain from Giving Information

Rule 3.04 (e) limits the "circumstances in which a lawyer can request a person other than the client voluntarily to refrain from giving relevant information to another party." Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hous. L.Rev. at 291-92. Under this rule, such conduct is permissible only if the person is a relative, an employee, or other agent of the client and the lawyer reasonably believes the person's interests will not be adversely affected by that course.

E. MAINTAINING IMPARTIALITY OF TRIBUANL

1. Attempts to Influence Judge

Rule 3.05 (a) states that a lawyer shall not "seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure . . . ."3.05 (a). Rule 3.05 (b) prohibits a lawyer, unless otherwise permitted by law and applicable rules of practice or procedure, to communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity. *See e.g. Remington Arms Co. v. Canales*, 837 S.W.2d 624 (Tex. 1992) (Presentation of affidavits in support of privilege claim to court, without also providing copies to opposing counsel, constituted impermissible ex parte communications under Rule 3.05(b)).

2. Attempt to Influence Jury

Rule 3.06 (a) provides that a lawyer shall not "conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror," or "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."3.06 (a).

A lawyer also cannot make comments to a member of that jury that is calculated to influence his actions in future jury service. Tex. Rule 3.06 (d); *See Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998).

If a lawyer find out that someone is attempting to influence a jury he should report the matter to the court. *Mize v. State*, 754 S.W.2d 732 (Tex. App.- Corpus Christi 1988, writ ref'd) (Prosecutor's failure to disclose juror's receipt of threatening phone call violated Rule 3.06(f)); *Plunkett v. State*, 883 S.W.2d 349 (Tex. App.CWaco 1994, writ ref'd) (Attorney was obligated to inform court of the attorney's belief that jury had been compromised by client who the attorney believed had paid jurors to guarantee hung jury).

F. DUTY TO KNOW THE LAW

Under Rule 1.01, "Competent and Diligent Representation," a lawyer shall not accept or continue employment in matter he knows or should know is beyond the lawyer's competence." Competence" is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness tot he responsibilities owed to the client. Tex. Rule 1.01 cmt 1. As a general proposition, counsel's ignorance of applicable law, either prior appellate decisions or pivotal statutory provisions, may be held ineffective assistance of counsel. Counsel failing to be properly prepared can lead to an ineffective finding. *See Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) (Defendant did not get reasonably effective assistance of counsel because counsel was too poorly prepared to advise client to enter a guilty plea, hence plea was not made knowingly and voluntarily); *see also* Clinton and Wice, *Ineffective Assistance of Counsel in Texas* , 12 St. Mary's L. J. 1 (1980).

G. TRIAL PUBLICITY

Rule 3.07 provides that, "[i]n 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." Tex. Rule 3.07 (a). Paragraph (b) of the Rule provides a nonexhaustive list of types of extrajudicial statements likely to violate paragraph (a). Paragraph (c) of Rule illustrates examples of types of statements that ordinarily will not violate paragraph (c) of Texas Rule 3.06 (attempt to influence venireman or juror).Various courts have addressed the issue of trial publicity. In *U.S. ex rel. Bloeth v. Denno*, defense counsel released information to newspapers regarding the horror and brutality of the murders committed by his client in order to encourage a finding of insanity. In discussing this lawyer's unethical strategy, the court stated: "A defendant is entitled to be tried on the evidence and arguments before a jury in open court under the guidance of a judge." *U.S. ex rel. Bloeth v.*

Denno, 313 F.2d 364 (2nd Cir. 1963). *In re Bailey* , 273 A.2d 563 (Mass. 1971), the court found an unethical attempt to try the defendant in the news media where defense counsel (F. Lee Bailey) wrote a letter to the governor (and to 150 members of the legislature) which letter counsel knew would be picked up by the press. The letter charged that the state's case was rigged. Counsel was barred from practice in the state for one year.

Although not all communication with the press will be deemed unethical, great caution should be used before making any comments. *For appropriate comments see e.g. Wilson v. State*, 854 S.W.2d 270 (Tex. App.CAmarillo 1993, pet. Ref'd) (Under Rule 3.07(a), (b)(1), it was permissible for district attorney's office to make statements regarding general background and character of eighteen persons arrested in drug raid; ethics rules do not prohibit district attorneys or police from discussing background events surrounding arrests or commission of crimes; and such general statements, none of which specifically identified defendant, did not prejudice defendant's right to fair trial or violate restrictions on trial publicity).

H. MISCONDUCT

1. Rule 8.04:

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated including but not limited to situations where a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

(12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, serious crime means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

2. Official Comment to Rule 8.04

1. There are four principal sources of professional obligations for lawyers in Texas: these Rules, the State Bar Act, the State Bar Rules, and the Texas Rules of Disciplinary Procedure (TRDP). Rule 1.06(O) of the TRDP contains a partial listing of the grounds for discipline under those Rules.
2. Rule 8.04 provides a comprehensive restatement of all forms of conduct that will subject a lawyer to discipline under either these Rules, the State Bar Act, the TRDP, or the State Bar Rules. In that regard, Rule 8.04(a)(1) is intended to correspond to TRDP Rule 1.06(O)(1); Rules 8.04(a)(2) and 8.04(b) are intended to correspond to the provisions of TRDP Rules 1.06(O)(8) and (9) and Rules 1.06(O) and (U), as well as certain other crimes; and Rules 8.04(a)(7)-(11) are intended to correspond to TRDP 1.06(O)(3)-(7), respectively. Rule 8.04(a)(12) of these Rules corresponds to a prohibition that was contained in the last (unnumbered) paragraph of former Article X, section 7, State Bar Rules.
3. The only provisions of TRDP Rule 1.06(O) not specifically referred to in Rule 8.04 is Rule 1.06(O)(2)s provision for imposing discipline on an attorney in Texas for conduct resulting in that lawyers discipline in another jurisdiction, which is provided for by Rule 8.05 of these Rules.
4. Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally in this state, the distinction has been drawn in terms of serious crimes and other offenses. See former Article X, sections 7(8) and 26 of the State Bar Rules (now repealed). The more recently adopted TRDP distinguishes between intentional crimes, serious crimes, and other offenses. See TRDP Rules 1.06(O) and (U), respectively. These Rules make only those criminal offenses either amounting to serious crimes or having the salient characteristics of such crimes the subject of discipline. See Rules 8.04(a)(2), 8.04(b).
5. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to his fitness for the practice of law, as fitness is defined in these Rules. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer's overall fitness to practice into question.
6. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief, openly asserted, that no valid obligation exists. The provisions of Rule 1.02(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to legal regulation of the practice of law.

7. Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust. See Rules 8.04(a)(2), 8.04(a)(3), 8.04(b).

3. Author's Commentary on Rule 8.04

Rule 8.04 is a catch all provision governing lawyer misconduct. Generally a violation of one of the other rules will also encompass a violation of Rule 8.04. Some of the categories and cases involving Rule 8.04 are listed below.

a. Dishonesty, Fraud, Deceit, Misrepresentation

(1) *Eureste v. Commission for Lawyer Discipline*, 76 S.W.3d 184 (Tex. App. - Houston [14th Dist.] 2002, no pet.) (false billing).
(2) *McIntyre v. Commission for Lawyer Discipline*, 169 S.W.3d 803 (Tex. App. - Dallas 2005, pet.denied) (false pleadings).
(3) *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227 (Tex. App. - Houston [14th Dist.] 2000, no pet.) (false information about another attorney's health to gain employment).
(4) *Searcy v. State Bar of Texas*, 604 S.W.2d 256, 260 (Tex. Civ. App.- San Antonio 1980, writ ref'd, n.r.e.) (materially false statement on loan application).

b. Serious Crimes

(1) *Parker v. State Farm Mutual Automobile Insurance Co.*, 4 S.W.3d 358 (Tex. App. - Houston [1st. Dist.] 1999, no pet.) (forgery).
(2) *State Bar of Texas v. Heard*, 603 S.W.2d 829, 835(Tex. 1980) (mail fraud and conspiracy to commit mail fraud).
(3) *State v. Nelson*, 551 S.W.2d 433, 435 (Tex. Civ. App. - San Antonio 1977, writ ref'd n.r.e.) (conspiracy to bribe a pubic official).

c. Negative Comments Toward Judiciary

(1) *Love v. State Bar of Texas*, 982 S.W.2d 939 (Tex. App. - Houston 1998, no pet.) (anti-Sematic comment to judge who reset lawyers case when the lawyer was two hours late).

III. PROSECUTOR ETHICS

"It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." Texas Code of Criminal Procedure, Art. 2.01.

A. PROSECUTOR'S DUTY TO DISCLOSE

The ABA's Standing Committee on Legal Ethics and Professional Responsibility issued a new opinion which holds that a prosecutor's ethical duty under Model Rule 3.8 is broader in scope than the constitutional requirements under *Brady v. Maryland*. Formal Op. 09-454 (2009).The key difference, according to the Committee, is that Rule 3.8 (d) "requires the disclosure of evidence *or information* favorable to the defense *without regard to the anticipated impact of the evidence or information on the trial's outcome."* (emphasis added). In contrast, the constitutional standard is that the prosecutor need only turn over *material evidence* which means that the trial's outcome would likely had been different had the disclosure been made.

The ABA opinion is important for Texas prosecutors because Texas Rule 3.09 (d) with respect to a prosecutor duty to disclose is similar to the Model Rule 3.8 (d) duty to disclose. The ABA opinion may serve as the basis for construing the Texas Rule. It is also important for the prosecutor to review the ABA's "Special Responsibilities of a Prosecutor" Rule 3.8 and its annotation since a number of its provisions are similar to the Texas "Special Responsibilities of a Prosecutor" Rule3.09.

B. ABA'S FORMAL OPINION ON DISCLOSURE (09-454, JULY 8, 2009):

1. Summary

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "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, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

2. Duty to Disclose

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.{1} Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . 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." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,{2} which held that criminal defendants have a due process right to receive favorable information from the prosecution.{3} This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.{4} Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.{5} Finally, although courts sometimes sanction prosecutors for violating disclosure obligations,{6} disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

> A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

3. The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.{7}In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.{8} The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."{9} Similarly, Comment [1] to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland,*{10} the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.{11} This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.{12}

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize

that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"{13} and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."{14} A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d){15} establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.{16} The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.{17}

In particular, Rule 3.8(d) is more demanding than the constitutional case law,{18} in that it requires the disclosure of evidence or information favorable to the defense{19} without regard to the anticipated impact of the evidence or information on a trial's outcome.{20} The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.{21}

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.{22} Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence{23} or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

4. <u>The Knowledge Requirement</u>

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."{24} Although "a lawyer cannot ignore the obvious,"{25} Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires prosecutors to disclose *known* evidence and information that is favorable to the accused,{26} it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstance[s], or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.{27}

5. <u>The Requirement of Timely Disclosure</u>

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.{28} Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such

evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.{29} Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case,{30} timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.{31} Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.{32}

6. <u>Defendant's Acceptance of Prosecutor's Nondisclosure</u>

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.{33} For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client{34} or another.{35} Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,{36} with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.{37}

7. The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.{38}

8. The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.{39} Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,{40} and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.{41} To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.{42}

Footnotes for ABA Opinion 09-454

[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

[4] *See* Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

[5] *See, e.g.*, Mastracchio v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close to violating [Rule 3.8]").

[6] *See, e.g., In re* Jordan, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [9] ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

[7] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, United States v. Bagley, 473 U.S. 667, 674-75 (1985).

[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.. . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the

question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); s*ee also* United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

[9] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

[10] Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

[11] ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

[12] *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id*. at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id*.

[13] Rule 3.8, cmt. [1].

[14] *Id*.

[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR.,

& W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id*. at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

[18] *See, e.g.*, United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

[19] Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

[20] Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g.*, U.S. v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

[21] *Cf.* Cone v. Bell, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

[23] For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

[24] Rule 1.0(f).

[25] Rule 1.13, cmt. [3], *cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

[27] Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

[28] *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

[29] *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

[30] In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. *See* N.C. GEN. STAT. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO.MASON L. REV. 257 (2008).

[31] *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

[32] Rule 3.8, Comment [3].

[33] It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

[34] *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

[35] *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

[36] *See* Rules 1.2(a) and 1.4(b).

[37] The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

[38] The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

[41] Rule 5.1(c). *See, e.g.*, *In re* Myers, 584 S.E.2d 357, 360 (S.C. 2003).

[42] In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

C. ABA 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

1. Rule 3.8

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

2. <u>Official Comment to Rule 3.8</u>

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some

procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor’s jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction,

paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

3. ABA's Annotation on Rule 3.8

Subsection (a): Prosecutorial Discretion in Bringing Charges

Subject to both constitutional and ethical constraints, as long as "the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *United States v. Armstrong*, 517 U.S. 456 (1996). The constitutional constraints—the guarantees of due process and equal protection—turn, in part, on a prosecutor's intent. *Id.* (evidence of "discriminatory intent" necessary for claim of unconstitutional, selective prosecution).

Rule 3.8(a)'s prohibition on bringing charges unsupported by probable cause uses the same threshold of intent. *See In re Lucareli*, 611 N.W.2d 754 (Wis. 2000) (prosecutor in sexual assault case filed criminal charge against defense counsel for publicly disclosing victim's confidential patient records, apparently forgetting that judge hearing assault case had ruled that records were not confidential; disciplinary proceeding against prosecutor for violating Rule 3.8(a) dismissed; "knows" in Rule 3.8(a) does not mean "should know"); *see also* ABA Standards for Criminal Justice, Standard 3-3.9(b) (3d ed. 1993) (citing seven "illustrative" factors prosecutors may consider in deciding which charges to bring); N.D. Ethics Op. 95-2 (1995) (city lawyer directed by city council to dismiss criminal case voluntarily, to save city cost of paying for court-appointed counsel, must still exercise his own prosecutorial discretion in determining whether to proceed, but among factors he may consider are city's best interests, which could include time and expense of trial). *See generally* Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 Fordham Urb. L.J. 513 (1993); Griffin, *The Prudent Prosecutor*, 14 Geo. J. Legal Ethics 259 (2001); Little, *Proportionality as an*

Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723 (1999); Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 Stan. L. Rev. 205 (1999).

When prosecutorial discretion is knowingly exercised beyond the bounds of the statute or policy whence it derives, it is a proper subject of discipline. *See Iowa Supreme Court Disciplinary Bd. v. Howe*, 706 N.W.2d 360 (Iowa 2005) (city prosecutor's agreements for several charged offenders to plead down to violation of traffic statute he knew to be obsolete violated Code requirement, DR 7-103(A), that charges be supported by probable cause).

Subsections (b) and (c): Right to Counsel; Seeking Waivers

Although subsection (b), like subsection (c), describes the duties of a prosecutor toward "the accused," the Rule may apply before any criminal charges are filed. *See United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000) (rejecting argument that Rule 3.8(b) is worded to secure only Sixth Amendment right to counsel, rather than broader, earlier-attaching Fifth Amendment right to counsel); *cf. United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (rejecting same argument in connection with no-contact rule of DR 7-104(A)(1)).

Because the obligations in subsections (b) and (c) derive from the constitutional right of a criminal defendant to be represented by counsel, they may have consequences related to criminal procedure as well as lawyer discipline. *See In re Swarts*, 30 P.3d 1011 (Kan. 2001) (prosecutor disciplined for conducting interview of accused before counsel appointed without first advising him of right to counsel; statements given by accused to prosecutor were later suppressed); *State v. Brooks*, 838 So. 2d 778 (La. 2003) (reversing the quashing of dilatory prosecution, in partial reliance on Rule 3.8; prosecution delayed because defense lawyer disappeared and prosecutors obliged under Rule 3.8(b) to give accused opportunity to obtain new counsel).

RELEASE-DISMISSAL AGREEMENTS

A prosecutor's agreement to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the arrest is called a release-dismissal agreement. As a matter of federal common law, release-dismissal agreements are valid and enforceable if they are voluntary, if there is no evidence of prosecutorial misconduct, and if enforcement would not adversely affect the public interest. *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding waiver of civil rights claim in connection with release of criminal prosecution; dissent argues such agreements dilute obligation under Rule 3.8(a) to prosecute only those charges supported by probable cause); *Burke v. Johnson*, 167 F.3d 276 (6th Cir. 1999); *Livingstone v. N. Belle Vernon Borough*, 12 F.3d 1205 (3d Cir. 1993). Authority is split, however, regarding whether and when release-dismissal agreements are ethically permissible. *Compare, e.g.*, Conn. Ethics Op. 00-24 (2000) (if prosecutor knows or should know arrest made without probable cause, or if prosecutor proceeding "primarily" to seek civil release, prosecutor may not condition disposition upon either acknowledgment of probable cause or release of civil claims), *with* Ind. Ethics Op. 2-2005 (2005) (release-dismissal agreements always unethical, in part because they "can lead to a violation of Rule 3.8(a)"). *See generally* Bartholomy, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 331 (1993); Hyatt, *Release-Dismissal Agreement Validity—From Per Se Invalidity to Conditional Validity, and Now Turning Back to Per Se Invalidity*, 39 Vill. L. Rev. 1135

(1994) (collecting cases); Zacharias, *Justice in Plea Bargaining*, 39 Wm. & Mary L. Rev. 1121 (1998).

Subsection (d): Duty to Disclose Exculpatory Evidence

The Constitution requires prosecutors to provide the defense with any favorable evidence that is material to guilt or punishment, or to impeachment. *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution did not disclose accomplice's confession to homicide for which defendant convicted); *United States v. Bagley*, 473 U.S. 667 (1985) (government's contracts with principal witnesses were material and should have been disclosed to defendant under *Brady*). Favorable evidence is deemed material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667 (1985).

The ethics obligation uses a different standard: subsection (d) requires disclosure if the information "tends to negate the guilt of the accused or mitigates the offense."

In its systematic review of the Model Rules, the Ethics 2000 Commission "decided against attempting to explicate the relationship between [Rule 3.8(d)] and the prosecutor's constitutional obligations under *Brady* and its progeny." Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 Geo. J. Legal Ethics 441 (2002). The Ethics 2000 Commission did delete a confusing Comment about disclosure obligations in grand jury proceedings, and decided against otherwise separately addressing grand jury practices. *Id*.

The prosecutor's constitutional obligation has a materiality threshold; the ethics rules have an intent requirement but no materiality test. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (noting that *Brady* "requires less of the prosecution" than Rule 3.8(d) or the ABA Standards for Criminal Justice); *see also Mastracchio v. Vose*, No. CA 98-372T, 2000 WL 303307 (D.R.I. Nov. 20, 2000) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close to violating [Rule 3.8]"); *accord In re Jordan*, 913 So. 2d 775 (La. 2005) (suspending prosecutor for failing to disclose lone murder witness's statement that "it was dark" at time of murder; even if statement could only be used to impeach, prosecutor still required to disclose); S.C. Ethics Op. 03-11 (2003) (prosecutor who discovers that police officer failed to tell truth in internal police investigation obliged to so inform "each and every criminal defendant in cases in which that officer will be a witness during trial"); Joy & McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 16 Crim. Just., Fall 2001, at 41.

However, in *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc), a case of first impression, the Colorado Supreme Court expressly imported into Rule 3.8(d) the materiality standard used in its criminal procedure rules, which in turn codified *Bagley*. Noting that it was "disinclined to impose inconsistent obligations upon prosecutors," the court held that Rule 3.8(d) applies only if there is "outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused." Interpreting the timeliness requirement for the first time, the court then ruled that "when a prosecutor becomes aware of exculpatory evidence before any critical stage of the proceeding, she must disclose that evidence before the proceeding takes place." But although the prosecutor had not disclosed the exculpatory evidence until after the preliminary hearing, the court reversed the finding that she violated Rule 3.8(d). Noting that the analogous provision in the ABA Standards for Criminal Justice had been amended specifically to

include an intent requirement, the court declared that it chose "to read [Rule 3.8(d)] itself as including the mens rea of intent." *See generally* Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 Fordham L. Rev. 1205 (2000); Rosen, *Disciplinary Sanctions against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987); Weeks, *No Wrong without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833 (1997); Wilkinson, Brady *and Ethics: A Prosecutor's Evidentiary Duties to the Defense under the Due Process Clause and Their Relation to the State Bar Rules*, 61 Tex. B.J. 435 (1998); Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. Rev. 275 (2004).

Subsection (e): Lawyer Subpoenas

Rule 3.8 no longer requires judicial approval or an opportunity for hearing before a prosecutor is allowed to subpoena a defense lawyer about current or past clients. That controversial requirement, adopted as Rule 3.8(f)(2) in 1990, was rescinded by the ABA in 1995 on the theory that it belonged in a rule of criminal procedure rather than in an ethics code. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 511–12 (2006); *see Baylson v. Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992) (invalidating rule as exceeding a court's local rulemaking authority); *accord Stern v. U.S. District Court*, 214 F.3d 4 (1st Cir. 2000) (judicial approval requirement in district court's Rule 3.8 added "novel procedural step" that was beyond court's rulemaking authority, and took rule out of "ethical standard" scope of McDade Amendment). *But see United States v. Colo. Supreme Court*, 189 F.3d 1281 (10th Cir. 1999) (McDade Amendment's reference to "ethical rules" broad enough to encompass Rule 3.8's hearing and approval requirements and to impose them upon federal prosecutors).

Subsection (e)—renumbered in 2002 from subsection (f)—retains the other restrictions from former subsection (f) regarding issuing subpoenas to defense counsel. *See* Model Rule 3.8, cmt. [4] (issuance should be limited to "those situations in which there is a genuine need to intrude into the client-lawyer relationship"). As might be expected, however, subpoenas of defense counsel are litigated in criminal cases under the rules of criminal procedure, rather than in disciplinary proceedings. *See generally Impounded*, 241 F.3d 308 (3d Cir. 2001) (analyzing crime-fraud exception to attorney-client privilege in context of grand jury subpoenas of defense counsel); Bowman, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" against Prosecutors to Control the Law of the State*, 9 Geo. J. Legal Ethics 665 (1996); Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 Fordham L. Rev. 723 (1999) (Rule 3.8's only effort to address the important investigatory role modern prosecutors play is its limitation upon prosecutorial discretion to issue grand jury subpoenas, a protection that might be motivated by "something other than high-minded objectivity"); Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783 (1988); Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev. 917 (1992).

Subsection (f): Out-of-Court Statements

Subsection (f) prohibits a prosecutor from making extrajudicial comments that "have a substantial likelihood of heightening public condemnation of the accused," except for certain "legitimate" statements necessary to inform the public of the proceedings.

The Rule goes on to require the prosecutor to exercise "reasonable care" to prevent anyone "assisting or associated with" the prosecutor from making any statements the prosecutor could not make under Rule 3.8 or Rule 3.6, the trial publicity rule. (Rule 3.6(a) bars comments about pending litigation if they will have "a substantial likelihood of materially prejudicing an adjudicative proceeding.") *See, e.g.*, *Lawyer Disciplinary Bd. v. Sims*, 574 S.E.2d 795 (W. Va. 2002) (both Rules invoked). *Compare Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548 (Md. 2003) (disciplining lawyer under Rule 3.6), *with In re Gansler*, 889 A.2d 285 (D.C. 2005) (reciprocally disciplining same lawyer for same conduct under Rule 3.8).

Until the 2002 amendments, the Model Rules imposed these obligations separately; the direct prohibition was in former Rule 3.8(g) and the "reasonable care" requirement was in former Rule 3.8(e). In 2002, the obligations were consolidated into renumbered Rule 3.8(f), and a new paragraph [6] of the Comment was added to explain how the "reasonable care" requirement applies to people who are not under the prosecutor's direct supervision. The obligation is satisfied, according to the new Comment, if the prosecutor issues "the appropriate cautions" to those "assisting or associated with" the prosecutor. Model Rule 3.8, cmt. [6]. The new Comment was not intended to make any substantive change. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 514 (2006).

In *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001), ten state prosecutors sought to enjoin enforcement of these obligations (designated as subsections (c) and (d) in the version of Rule 3.8 at issue in the case). They argued that under the First Amendment, they could not be subjected to discipline for statements by people they did not control. The court, however, looking to the then-proposed Comment [6], found that the rules were "fairly susceptible to an interpretation that would render them constitutional," and dismissed the action for lack of a justifiable case or controversy. *See generally* Mason, Comment, *Policing the Police: How Far Must a Prosecutor Go to Keep Officers Quiet?*, 26 S. Ill. U. L.J. 317 (2002).

D. SPECIAL RESPONSIBILITIES OF A PROSECUTOR UNDER TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

1. Rule 3.09

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.

2. Official Comment to Rule 3.09

Source and Scope of Obligations

1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspects right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pre-trial, trial, or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendants guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutors obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Sub-paragraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

3. Comparison to Model Rule 3.8

Texas Rule 3.09, "Special Responsibilities of a Prosecutor," is similar but not identical to Model Rule 3.8 of the same name. Paragraphs (a) through (c) of the Texas Rule 3.09 and Model Rule 3.8 are similar in general focus but not identical in their language. Paragraphs (d) and (e) of the Texas Rule are essentially identical in substance to paragraphs (d) and (e) of the Model Rule. Paragraphs (f) and (g) of the Model Rule are not explicitly paralleled in Texas Rule 3.09, though the general subject matter of Model Rule 3.8(g) -- extrajudicial statements -- is touched upon by paragraph (c) of Texas Rule 3.09.

4. Author's Commentary on Texas Rule 3.09

a. General Duty of a Prosecutor

The fundamental duty of a prosecutor underlying Rule 3.09 may be found in *Berger v. United States*, 295 U.S. 78 (1935) and Texas Code of Criminal Procedure Art. 2.01. In Berger the Supreme Court stated:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from

improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Texas Code of Criminal Procedure Art. 2.01 highlights a similar lofty duty of a prosecutor by stating:

"It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done."

Both the *Berger* decision and Article 2.01 establish that a prosecutor is not a mere advocate, but one who is entrusted with the duty to act in the highest ethical manner possible. Texas Rule 3.09, "Special Responsibilities of a Prosecutor," reinforces this particular concept. *See also* Corrigan, *On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537 (1986) (stating the best shield against injustice in the criminal justice system centers around the integrity of the prosecutor.)

b. Prohibited Prosecutions

Prosecutors are granted broad discretions as to whether and when to bring charges or accusations. *Kaisner v. State*, 772 S.W.2d 528, 529 n.1 (Tex. App. – Beaumont 1989). However, when no probable cause exist, a prosecutor may not institute or continue to prosecute charges. *Sorola v. State*, 769 S.W.2d 920, 932 (Tex. Crim. App. 1989). Additionally, a prosecutor may not put unfounded allegations in a charging instrument in the hope that a plentitude of accusations will make the defendant look like a criminal. *See Lehman v. State*, 729 S.W.2d 82, 85 n.2 (Tex. Crim. App. 1990).

The prohibition against prosecutors filing charges not supported by probable cause has been followed in other jurisdictions. For example in *Iowa Supreme Court Attorney Disciplinary Board v. Howe*, 706 N.W.2d 360 (Iowa 2005), the court disciplined a part-time state prosecutor who the disciplinary board charged with violating the Iowa Code of Professional Responsibility for Lawyers by filing charges in more than 170 misdemeanor cases that were not supported by probable cause. The board concluded that "[f]iling charges that are blatantly bogus – even when defendants are will to plead guilty to them – does not promote confidence in the integrity of the judicial process." 706 N.W.2d at 371.

c. Improper Interrogation of Accused

(1) Unrepresented Accused

Rule 3.9 (b) requires the prosecutor to 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 obtain counsel and the procedure for obtaining counsel, and he has been given reasonable opportunity to obtain counsel. Hence a prosecutor is prohibited from participating in or otherwise contributing to the violation of an accused right to counsel under the fifth and sixth amendments of the U.S. Constitution and Texas Constitution art. I, § 10.

(2) Abuse of Unrepresented Accused

Rule 3.09 (c) mandates that a prosecutor should not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights. This rule focuses on the prosecutor's conduct and words directed towards an accused that ask the person to waive important rights. If the accused voluntarily waives such right in open court, the Rule is not implicated. Tex. Rule 3.09 (c) cmt. 4. The Rule is also not implicated if the accused appears pro se. *Id*. Finally, the Rule does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

For additional commentary involving waiver of pretrial rights see Simons, *Rescinding a Waiver of a Constitutional Right*, 68 Geo. L.J. 919 (1980) (expanding the reliance theory drawing a distinction between negotiated and non-negotiated waivers) and Dix, *Waiver an as Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, 1979 Ariz. St. L.J. 67 (basing the validity of waivers on factors that the defendant made a free choice.)

Prosecutors should also be aware of Tex. Code Crim. Proc. Art. 1.051(e), (f), (f-1), & (f-2) [Right to Representation by Counsel].

(3) False Statement to Unrepresented Accused

A prosecutor should not make an inaccurate or misleading statement of fact or law to an unrepresented accused. Tex. Rule 4.01; *see also United States v. Duvall*, 537 F.2d 15, 24-25 (2d Cir.) (prosecutor sanctioned for telling uncounselled defendant that he could be sentenced to 100 years in prison in order to make defendant cooperate, even though prosecutor knew no judge would impose such a sentence), *cert. denied*, 426 U.S. 950 (1976)

d. Duty to Disclose

The prosecutor's duty to disclose has been discuss in great detail in the ABA's formal opinion 09-454 and ABA's Annotation 3.8 Section (d) above. However, at least a couple of additional comment are needed; namely, (1) an ethical prosecutor should resolve doubts in favor of disclosure, *See e.g. United States v. Agurs*, 427 U.S. 97, 108 ("the prudent prosecutor will resolve doubtful questions in favor of disclosure), and (2) a prosecutor must disclose he has a special relationship with a witness. *Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989) (Codefendants giving testimony against other codefendant denied any agreement with State, jury was misled, and prosecutor's failure to clarify relationship between prosecution and testifying codefendants or cure false testimony violated his ethical obligations under Rule 3.03(b)).

e. Statements by Person's Under Prosecutor's Employment or Control

Rule 3.09 (e) requires prosecutors to 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. Rule 3.07 prohibits an attorney from making statements "that a reasonable person would expect to be disseminated by means of public communications" that he should know will have a substantial likelihood of prejudicing a proceeding.

f. Not Appearing as Witness

Rule 3.08 prohibits an attorney, or another attorney in the same firm, from acting as an advocate and a witness in the same adjudicatory hearing. The rule treats the actual attorney and his/her associates as one. Prosecutors should therefore avoid blurring the line between advocate and witness. *Brown v. State,* 921 S.W.2d 227, 231 (Tex.Cr.App.1996). This includes arguing ones personal opinion. *Id.*

If the D.A. may be called as a material witness in a criminal case or juvenile case the D.A. should recuse himself and seek the appointment of a special prosecutor. S*ee* Ethics Committee Opinion 454 (if D.A. was to be called as a material witness then a special prosecutor should be appointed.); *see also State ex rel. Hilbig v. McDonald,* 877 S.W.2d 469,472 (Tex. App.-San Antonio 1994) (prosecutor should recuse himself if going to be an interested witness).

If a prosecutor does testify as a fact witness, he cannot resume his role as an advocate without running afoul of the disciplinary rule. *Gonzalez v. State,* 117 S.W.3d 831 (Tex. Crim. App.2003).

g. Making Statements to the Jury and Questioning Jury Verdict

Rule 3.06 (d) provides that "[a]fter 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. Tex. Rule 3.06(d). Thus, one can argue that a prosecutor should be prohibited from making statements to the jury regarding the erroneousness jury's verdict and evidence prosecutor was prohibited from bringing out. Such statements can easily be construed as either an attempt to embarrass the jury or an attempt to influence a juror's actions in future jury service. *Id.*

Prosecutors must also be careful about post verdict questioning of jurors. The courts have recognized the need "to protect [judicial] processes from prejudicial outside interferences, "and "the jurors' interest in privacy and the public's interest in well-administered justice," *Haeberle v. Texas International Airlines,* 739 F.2d 1019, 1022 (5th Cir. 1984).

Courts have used the similar reasoning to uphold restrictions on post-verdict questioning of jurors against a variety of constitutional challenges by criminal defendants and civil litigants. In *Tanner v. United States,* 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court rejected a Sixth Amendment challenge to Federal Rule of Evidence 606(b), which bars discharged jurors from testifying about most forms of jury misconduct. The Court concluded that the government's interest in preserving "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople," *id.* at 120--21, 107 S.Ct. 2739, outweighed the possible infringement of defendants' Sixth Amendment rights. *See also Soliz v. Saenz,* 779 S.W.2d 929, 934--35 (Tex.App.-- Corpus Christi 1989, writ denied) (holding that Texas Rule of Civil Evidence 606(b) did not deprive civil litigants of due process or trial by jury, but protected "purity and efficiency" of jury system as required by TEX. CONST. art. I, § 15).

h. Other Ethical Guidelines for Prosecutors

Ethics rules for prosecutors are also codified in the National District Attorneys Association Prosecution Standards (2d ed. 1991), and The Prosecution Function in the ABA Standards for Criminal Justice (3d ed. 1993). *See also ABA/BNA Lawyers' Manual on Professional Conduct*, "Trial Conduct: Prosecutors," pp. 61:601 *et seq.* Prosecutors might also consider reading Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* 50 Tex. L. Rev. 629, 673 (1972) (categorizing various types of prosecutorial misconduct and asserting that prosecutors who engage in trial misconduct should be subject to the same discipline as that imposed on defense counsel). *Consider also* Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 971 (1984) (listing examples of prosecutorial misconduct) and Bennett L. Gershman, PROSECUTORIAL MISCONDUCT § 3:24 (2D. ED.) (Updated August 2004).

IV. DEFENSE ETHICS

A. FREQUENT COMPLAINTS BY CLIENTS ABOUT ATTORNEYS

1. In General:

a. Rude or intimidating behavior

b. Name-calling and threats

c. Use of profanity

d. Hanging up on a client

e. Pressuring client

f. Withdrawing or threatening to withdraw at critical time

g. All communications through paralegal or other staff

h. Not notifying client when attorney leaves law firm

i. Sexual advances

j. Not licensed in Texas, Attorney disappeared

k. Lying to client

m. Substance abuse
n. Abusive litigation tactics
o. Missing appointments or canceling appointments with clients
p. Grammatical and spelling errors in documents

2. <u>Confidences</u>:

a. Disclosing client confidences to opponent
b. Talking about client's case with third parties

3. <u>Neglect & Competence</u>:

a. Not completing case by filing final orders, decrees, etc.
b. Not appearing in court or being late to hearings
c. Not prepared at hearings
d. Missing filing deadlines
e. Failing to put on evidence at hearings
f. Failing to supervise work of subordinates
g. Failing to research legal issues
h. Failing to include causes of action in petition
i. Failing to file suit within statute of limitations
j. Filing wrong orders
k. Not having file at meetings with client
l. Not providing copies of documents on an on-going basis
m. Not returning phone calls
n. Failing to keep client informed of hearings and case deadlines
o. Failing to explain litigation, legal strategies and issues, etc.
p. Failing to schedule depositions or hearing in a timely manner
q. Failing to correct substantive errors in orders, decrees, or pleadings

4. <u>Safeguarding Client Property</u>:

a. Not returning original documents or files to client
b. Losing file or documents
c. Not returning unused retainer

[Source: TCLEP, Texas Center for Legal Ethics and Professionalism]

B. OBTAINING THE CLIENT

1. In Person Contact

a. Handing Out Cards in the Courthouse.

A lawyer should not solicit employment in the courthouse by handing out his/her cards or otherwise. Rule 7.03 provides "[a] lawyer shall not by in-person or telephone contact seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or non-client who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

b. Contact with Person Represented by Attorney.

A lawyer should not contact a person who is represented by another lawyer. Rule 4.02(a) states "[i]n representing a client, a lawyer shall not communicate . . . about the subject of the representation with a person. . .the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the lawyer or is authorized by law to do so."

2. Causing Another to Contact Prospective Client Represented by Attorney

A lawyer should not cause another to contact a person represented by another attorney. Rule 4.02(a) states "[i]n representing a client, a lawyer shall not . . . cause or encourage another to communicate about the subject of the representation with a person. . .the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the lawyer or is authorized by law to do so." See *also Vickery v. Commission for Lawyer Discipline*, [005 S.W.3d 241] No. 14-97-00586-CV. Court of Appeals of Texas, Houston (14th Dist.). August 19, 1999. Rehearing Overruled Nov. 18, 1999.

3. False and Misleading Information - Qualifications of Attorney and Results

a. Definition of false or misleading communication.

A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;

(4) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(5) designates one or more specific areas of practice in an advertisement in the public media or in a written solicitation unless the advertising lawyer is competent to handle legal matters in each such area of practice. Rule 7.02 (a)

b. Inflating Trial Experience

Inflation of an attorney's trial experience violates Rule 7.02 (a). This rule states "[a] lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm." *See In re Zuniga*, 332 B.R. 760 (Bankr. S.D. Tex. 2005) (Lawyers made false and misleading statements on their Web sites concerning their qualifications and one attorney' use of the words "we" and "our" on his firm's Web site was confusing and misleading where the lawyer was a sole practitioner); *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227 (Tex. App.CHouston [14th Dist.] 2000, no pet.) (Attorney made a false and misleading communication about the qualifications of another attorney by telling that attorney's clients that she was seriously ill and would not be able to fulfill her duties in representing them when that attorney was never seriously ill nor otherwise physically or mentally unable to perform her duties to her clients). s*ee also Tex. Comm. on Professional Ethics*. Op 522, V. 60 Tex. B.J. 970 (1977).

c. Inflation of Win/Loss Record

An attorney who tries to impress a prospective client with a false win/loss record will be in violation of rule 7.02. Also an attorney who provides false or misleading information about the firm or a member of the firm will also violate Rule 7.02. *See e.g. Curtis v. Commission for Lawyer Discipline,* 20 S.W.3d 227(Tex.App. - Houston [14th Dist.] 2000).

d. Lawyer in Good with the Judge

A statement by an attorney to a prospective client that he or she has some special familiarity or relationship the Judge for the purpose of implying the attorney will get favorable results would be a false or misleading communication in violation of Rule 7.02 (a)(2). Rule 7.02 (a)(2) states "[a] communication is false or misleading if it . . . is likely to create an unjustified expectation about results the lawyer can achieve . . ."

C. CONFLICTS OF INTEREST

Rule 1.06 (a) states that a lawyer shall not represent opposing parties to the same litigation. In other situations, with noted exceptions, a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which

that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or laws firm's own interests.

Rule 1.06 also recognizes that such conflicts can be caused by a lawyer's obligations to another client, other third persons, or the lawyer's own interests.

Rule 1.06 is a general rule governing conflicts. Former client conflicts of interest are treated in Texas Rule 1.09, and prohibited transactions are covered in Texas Rule 1.06. Texas Rule 1.07 covers conflicts issues in intermediation.

Example of conflict cases are: *Vaughan v. Walther*, 875 S.W.2d 690 (Tex. 1994) (finding that client waived objection to conflict by failing to seek disqualification until day of final hearing***);*** *Conoco, Inc. v. Baskin***,** 803 S.W.2d 416 (Tex. App.—El Paso 1991, orig. proceeding) (focusing largely on consent/waiver issues).

D. FEES

1. <u>Excessive Fees</u>

A lawyer cannot not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable. Tex. Rule 1.04 (a). Factors that may be considered in determining the reasonableness of a fee include, but are not limited to the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. Rule 1.04 (b).

Texas Rules, rule 1.04 cmt. 1, provides additional clarification about excessive fees:

> A lawyer in good conscience should not charge or collect more than a reasonable fee, although he may charge less or no fee at all. The

> determination of the reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of "reasonableness" is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason, paragraph (a) adopts, for disciplinary purposes only, a clearer standard: The lawyer is subject to discipline for an illegal fee or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee but in a way to eliminate factual disputes as to the fee's reasonableness. The Rule's "unconscionable" standard, however, does not preclude use of "reasonableness" standard of paragraph (b) in other settings.

Texas Rules, Rule 1.04 cmt. 1

2. <u>Client's Ability to Pay</u>

The Code of Professional Responsibility does not list the client's ability to pay as a factor in determining what is an excessive fee, however, ABA Defense Function, sec. 3.3(a) states that in " . . . determining the amount of the fee in a criminal case it is proper to consider . . . the capacity of the client to pay the fee." *Compare Kershner v. State Bar of Texas*, 879 S.W.2d 343 (Tex. App.–Houston [14th Dist.] 1994) (holding that a $2500 fee for three to five hours of legal work is clearly excessive.)

3. <u>Collecting Appointed Fee and Private Fee</u>

An attorney appointed to defend an indigent defendant in a criminal case may accept partial fee from the family, as well as fee from the court, as long as full disclosure is made. Texas Bar Ethics Op. No. 348 (Oct. 1969). Though permitted in this particular opinion, great care should be used before engaging in such conduct. The appearance of impropriety runs high in such an endeavor and may in certain circumstance violate the rules of professional conduct. For a full discussion of the issue of collecting fees in a court appointed case, *see* Comment, Court-Appointed Attorney: Unauthorized Solicitation of Fees from Indigent Client, The Journal of the Legal Profession 171 (1982).

4. <u>Third Party Payment of Fees</u>

The payment of a fee by a third party is not *per se* prohibited, as long as no potential for conflict arises between the interests of the client and the party who is paying the fee. *See Wood v. Georgia* , 540 U.S. 261 (1981). In addition, the Texas Disciplinary Rules of Professional Conduct require that the client must consent after consultation; there must be no interference with the lawyer's independence of professional judgment; and information relating to the representation of the client must remain confidential. Tex. Rule 1.08(e).

5. <u>Turning Over Client's Hot Check to D.A.</u>

An attorney turning over the client's hot check to the District Attorney's Office for criminal prosecution does not constitute unethical conduct unless it is done solely for the purpose of obtaining an advantage in a civil matter. Tex. Comm. on Professional Ethics, Op. 457, V. 51 Tex. B.J. 808 (1988). The opinion advises that caution would have to be exercised by the attorney, in the way in which he worded his letter to the prospective defendant in compliance with the requirements of the District Attorney's Office. If the letter to the client who had issued the hot check was informative only, as opposed to demanding and threatening, and only advised that it was being turned over to the District Attorney's Office for prosecution and advised of the fact that the District Attorney's rules required notice to the prospective defendant in order that he could pay the same if he desired to do so, and thereby avoid prosecution, the action would not be considered unethical.

F. COMPETENCE TO HANDLE JUVENILE CASES

A lawyer should not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence. Tex. Rule 1.01 (a); *See Hawkins v. The Commission For Lawyer Discipline*,988 S.W.2d 927 (Tex. App.1999). Thus, due to the specialized nature of juvenile law, a lawyer should not seek or obtain employment in a juvenile case unless he is competent to do so. "Competence" is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client. Tex. Rule 1.01 cmt. 1.

Rule 1.01(a) provides two exceptions for when an otherwise incompetent lawyer may handle a juvenile case, that is when: (1) another lawyer who is competent to handle the matter is, with the *prior informed consent* of the client, associated in the matter or the advice; or (2) assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstance. Tex. Rule 1.01 (1) & (2).

Relevant factors affecting the issue of competence include: the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study that the lawyer will be able to give the matter, and whether it is feasible to either refer to matter to, or associate, a lawyer of established competence in the field in question. Tex. Rule 1.01 cmt.2. Although expertise in a specific area of law may be useful in some circumstances, the appropriate proficiency level in many instances is that of a general practitioner. Tex. Rule 1.01 comt. 2. A newly admitted lawyer can be as competent in some matters as a practitioner with years of experience. *Id.* However, juvenile law requires an expertise in specific areas of law. A juvenile attorney must understand juvenile law, civil law, criminal law, child development and other issues, rules and laws applicable to juvenile practice.

G. APPOINTMENT BY THE COURT

A lawyer cannot not seek to avoid appointment by a court to represent a person except for good cause. Tex. Rule 6.01. In other words, the attorney may not simply decide that he or she is not competent to handle the appointed matter and decline or refuse the representation without the court's permission. *See e.g. Hawkins v. The Commission For Lawyer Discipline*, 988 S.W.2d 927 (Tex. App.1999).

In *Hawkins*, a Midland County Court At Law Judge appointed Attorney Hawkins to represent an indigent client who was charged with possession of marihuana of less than 2 ounces. The Client was infected with the HIV virus and claimed that his illness required him to use marijuana in order to digest food. The Client had never previously been arrested. Hawkins filed a "Motion for Appointment of an Effective and Competent Attorney," contending that he was not competent to practice criminal law and therefore could not represent the client without violating Rules 1.01 and 6.01 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.01 states in relevant part "[a] lawyer shall not accept . . . employment in a legal matter which he knows or should know is beyond the lawyer's competence . . . ." Rule 6.01 in relevant part states "[a] A lawyer should not seek to avoid appointment by a court to represent a person except for good cause, such as . . . representing the client would result in violation of law or rules of professional conduct."

Despite his contentions of incompetence, Hawkins filed motions for speedy trial, jury trial, and to suppress evidence. Hawkins also filed a request for a court reporter and statement of facts, a motion for production of evidence for examination, and a motion for appointment of experts. Hawkins also attended a docket call on behalf of his client and he appeared for a scheduled trial date, which was continued.

Although he had claimed to be incompetent in his motion for appointment of competent counsel, Hawkins filed a "Motion for Payment of Fees to Charity in Lieu of Payment to . . . Hawkins." In this motion, Hawkins noted that he had been required "to be in contact with [the Client] and risk exposure to the HIV virus and death" and to "expend a great deal of time and effort to provide emergency representation" to the Client, which, Hawkins maintained, caused "great inconvenience to [Mr.] Hawkins and his other clients...." Hawkins requested that $2,000 be paid to the Permian Basin Aids Coalition in honor of the Client as payment for Hawkins' "emergency" representation of the Client which was, in Hawkins' own words, "above and beyond the call of duty for an attorney and member of the bar of the State of Texas."

The County Attorney offered the Client a plea agreement, which included payment of a fine. Hawkins sent a copy of the written offer to the Client, but refused to discuss the merits of the offer with him or advise him whether to accept the

agreement. In response to the plea offer, Hawkins filed a second motion for appointment of effective counsel along with a brief outlining his incompetence to assist the Client with the plea negotiations. The Judge held a hearing on the second motion. Evidence at the hearing established that Hawkins had served as an Assistant State's Attorney in North Dakota where he had also handled some criminal defense matters such as guilty pleas, traffic tickets, and game violations. He had handled appointed criminal matters in the Midland district courts along with co-counsel. The Judge found Hawkins competent to represent the Client and issued an order requiring him to continue representing the Client as appointed counsel.

Upon receiving court's order Hawkins sent a letter to the client, contrary to the court order, advising the client he did not represent him. Hawkins even wrote the court that he did not represent the Client. A new attorney was appointed and the case resolved with a plea.

The Commission for Lawyer Discipline initiated a disciplinary preceding against Hawkins which was eventually tried in district court. The trial court found that Hawkins violated Texas Rules of Disciplinary Professional Conduct. Hawkins appealed.

On appeal Hawkins contended that Rule 1.01 required him to decline representation. Rule 1.01 provides "[a] lawyer shall not accept . . . employment in a legal matter which he knows or should know is beyond the lawyer's competence . . . . " Hawkins maintained that Rule 1.01(a) required him to decline to represent the Client despite his appointment and despite Judge's order to continue the representation because the Rule places the determination of competence solely on the attorney. Accordingly, Hawkins argued, he had to defy the appointment and Judge's order or be in violation of the Rules. Hawkins further argued that Rule 3.04(d) further supports his actions. Rule 3.04(d) states that an attorney may not "[K]nowingly 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."

Since Hawkins professed to have held a good faith belief that he could not represent the Client pursuant to Rule 1.01(a), he urged that no valid obligation for him to do so existed and he was forced to openly refuse to follow Judge's order.

The El Paso Court of Appeal, found that Hawkins failed to recognized other provisions the weighed against his interpretation of the rules, in particular, Rule 6.01. Rule 6.01 in relevant part states "[a] A lawyer should not seek to avoid appointment by a court to represent a person except for good cause, such as . . . representing the client would result in violation of law or rules of professional conduct." The Court of Appeals recognized that Rule 6.01 "Accepting Appointments by a Tribunal" is a more specific provision than the general terms of

Rule 1.01(a) “employment in legal matters.” Since a specific statutory provision ordinarily controls over a general one, the Court of Appeal found that when an attorney obtains a representation by appointment, the attorney may not merely decline the representation as provided under the more general Rule 1.01(a), but must "seek to avoid" the appointment only for good cause pursuant to Rule 6.01. The Court found the phrase "seek to avoid appointment by a tribunal" implies a showing to the tribunal of good cause. In other words, the attorney may not simply decide that he or she is not competent to handle the appointed matter and decline or refuse the representation without the court's permission.

Particularly interesting and helpful was the Courts review of the comments by Professors Sutton and Schwerk's on the operation of Rule 6.01 in appointment situations:

> Though generally a lawyer may freely reject any person's offer of professional employment, a different standard applies when that offer emanates from a court.
>
> ...
>
> [A] lawyer may decline a representation that could not possibly be handled by the lawyer in a competent manner due to the matter's complexity, a representation wherein the lawyer is unfamiliar with the subject matter of the case, and where the lawyer has insufficient time to acquire the requisite degree of competence. Nevertheless, lawyers can abuse this exception by utilizing it when they presently lack the legal background and training necessary to competently handle a matter but they know they could remedy those defects through reasonable efforts. The ability to attain a law degree and a law license betokens a considerable ability to grasp legal issues. Thus, courts may expect that lawyers will make a good faith effort to utilize those abilities to acquire the requisite degree of competence before they invoke this exception, just as they would if they were approached about taking on an unfamiliar type of matter that they nonetheless believed would be rewarding.

Robert P. Schwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct,* 27A Hous. L. REV. 398--400 (1990).

A key lesson to be learned in the *Hawkins* case is that *once attorney has been appointed by the court, the attorney cannot unilaterally decide not to represent the client*.

H. COMMUNICATIONS WITH CLIENT

1. <u>In General</u>

Rule 1.03 (a) states a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Rule 1.03 (b) states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision. Comment 2, Rule 1.03, provides:

> Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 2.; *See also Eureste v. Commission for Lawyer Discipline*, 76 S.W.3d 184 (Tex. App. - Houston [14th Dist.] 2002, no pet.) (Lawyer's obligations to keep the client informed and provide sufficient information for the client to make informed decisions are not met if the quality of the communications between a lawyer and his client are insufficient to keep the client informed about the status of the case and what the lawyer is doing); *Ex parte Alaniz*, 583 S.W.2d 380, 384 (Tex. Crim. App. 1979) (Under DR 7-101(A)(1) & (3),there can be no strategic or technical benefit from attorney's withholding exculpatory evidence from client).

2. <u>Plea Bargains</u>

a. <u>Duty to Convey Offer</u>

In reference to a criminal case, defense attorney must convey any offer made by the prosecutor to the client. *Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000); *Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987); *Atkins v. State*, 26 S.W.3d 580 (Tex. App. — Beaumont 2000, pet. ref'd). But see *Harvey v. State*, 97 S.W.3d 162 (Tex. App. — Houston [14th Dist.] 2002, pet. ref'd) (no tentative agreement reached); *Hernandez v. State*, 28 S.W.3d 660 (Tex. App. — Corpus Christi 2000, pet. ref'd) (no duty to convey passing offer by prosecutor that was not firm). Failure to do so has been held to be ineffective assistance of counsel. *Ex Parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987). The lawyer is allowed to withhold information if believes the clients would react imprudently or if the client is under a disability. Blackwell, *Ethics In Client Relations*, Chap. 33, Advanced Criminal Law 2009. The duty is an affirmative obligation and it not dependent on a

client's request for information. *Id*. It must only be reasonable and failing to advise a client of an adverse development in a case would be a violation. *Id.*

The same duties with regards to an offer that apply in a criminal case apply in a juvenile case. A juvenile respondent is entitled to effective assistance of counsel. *In re K.L.O.,* 27 S.W.3d 340 (Tex. App. – Dallas 2000, review denied) (Ineffectiveness in juvenile cases is determined by the same standards employed in criminal cases.)

b. Duty to Explain Offer

The juvenile attorney must fully explain any offer to the client. See e.g. *State v. Williams,* 83 S.W.3d 371 (Tex. App. — Corpus Christi 2002, no pet.) (duty to explain plea offer). This is particularly true due to the child's age and intellect.

c. Duty to Inform of Deadlines

The juvenile attorney has a duty to inform the client of any deadlines imposed by the prosecution in accepting a plea offer. *Turner v. State,* 49 S.W.3d 461 (Tex. App. — Fort Worth 2001), pet. dism'd, improv. granted, 118 S.W.3d 772 (Tex. Crim. App. 2003).

d. Duty to Convey Clients Acceptance or Rejection

A juvenile attorney had to duty to convey to the prosecutor his client's acceptance or rejection of a plea offer. *Randle v. State,* 847 S.W.2d 576 (Tex. Crim. App. 1993); *Guidry v. State,* 177 S.W.3d 90 (Tex. App. — Houston [1st Dist.] 2004) (requiring hearing on motion for new trial as to whether defense attorney communicated acceptance of offer to prosecutor).

3. Returning Phone Calls or Reply to Correspondence

Failing to return phone calls or reply to correspondence is one of the most frequent grievances made against an attorney. The applicable rule to address this issue is Rule 1.03. Rule 1.03 (a) states a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Most of the decisions in Texas involve failure to return a phone call along with other matters neglected. However, specific guidance may be gleamed from examining how other jurisdictions address this matter.

In North Carolina a lawyer may be disciplined for failing to return telephone calls or correspondence. *See, e.g., In re Matson,* 334 S.C. 94, 512 S.E.2d 115 (1999) (attorney disciplined for failure to return phone calls and respond to inquiries about client's case and for departing from South Carolina without informing client of her relocation); *In re Larkin,* 320 S.C. 512, 466 S.E.2d 355

(1996) (failure to return calls over two-month period or to advise client of court date); *consider also In re Chastain*, 316 S.C. 438, 450 S.E.2d 578 (1994).

In Oregon, although there is a duty to return phone calls, such a duty to communicate does not require that lawyers respond to every single phone call from a client. *In re Walker*, 293 Or 297, 647 P.2d 468 (1982) (lawyer not communicating with client as often as client requested did not violate disciplinary rules where lawyer kept client adequately informed of progress of client's matters; client made numerous phone calls to lawyer, sometimes three times a day, to check status of two cases and lawyer told client he would contact him when he had something to tell him). Similarly, in D.C., lawyers are not required to immediate response to every call or request by a client. *See e.g.*, *In re Schoenemann*, 777 A.2d 259 (D.C. 2001) (failing to return client's telephone calls for three weeks did not violate Rule 1.4 where client admitted she and lawyer spoke monthly and lawyer regularly informed her of his efforts to reopen her civil rights case; lawyer need not communicate as often as client would like; monthly contact not unreasonable given the circumstances).

4. <u>Lying to Client</u>

A lawyer should not lie to his client. Rule 8.04 (a)(3) states a "lawyer shall not . . .engage in conduct involving dishonesty, deceit, or misrepresentation." Rule 8.04(a)(3). Several courts have addressed the issue of lying to a client. *See Underwood v. Mississippi Bar*, 618 So. 2d 64 (Miss. 1993) (one-year suspension for dishonesty and fraud; lying to client); *Cuyahoga County Bar Ass'n v. Rockman*, No. 01-1203, Supreme Court of Ohio, December 19, 2001 (lawyer disciplined for lying to client about status of the suit); *State Bar Ass'n v. Cantagallo*, 6 Ohio St.3d 10, 451 N.E.2d 224 (1983) (lawyer sanctioned for lying to client about dates funds were received in payment of judgment).

I. DUTY TO INVESTIGATE

A defense attorney cannot rely solely on the facts as represented by the prosecutor, but has a duty to make an independent investigation of the facts of the case. *Charles v. State*, unpublished, No. 14-01-01248 – CR, 2003 WL 21 511268 (Tex. App. – Houston [14th Dist] 2003); *Melton v. State*, 987 S.W.2d 72 (Tex. App. — Dallas 1998, no pet.). Although the defense attorney must become familiar with the facts surrounding the offense charged, the defense attorney does not have an obligation to conduct as extensive an investigation of the facts as is required before proceeding to trial. *Toupal v. State*, 926 S.W.2d 606 (Tex. App. — Texarkana 1996, no pet.); *see also Eddie v. State*, 100 S.W.3d 437 (Tex. App. — Texarkana 2003, pet. ref'd) (applying same lessened duty to investigate to plea of true to motion to adjudicate or revoke).Under some circumstances, the defense attorney may have an obligation to seek the assistance of an expert in advising the defendant before a guilty plea. See, e.g., *Ex parte Briggs*, 187 S.W.3d 458 (Tex.

Crim. App. 2005) (ineffective assistance for defense attorney to fail to consider options for obtaining medical expert for opinion on cause of death).

If an attorney fails to properly investigate a case he may be found to have engaged in ineffective assistance of counsel. “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments . . . and when a defendant has given counsel reason to believe that pursuing certain investigation would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. "*Strickland v. Washington*, 462 U.S.1105 (1984), *Burger v. Kemp*, 483 U.S. 776 (1987).

J. CONFIDENTIALITY

A lawyer has a general duty to preserve the confidentiality of confidential information provided by a client. This duty, and some exceptions to that duty, are set forth in Rue 1.05, "Confidentiality of Information." Rule 1.05 generally provides that a lawyer shall not knowingly reveal confidential information of a client or former client to a person that the client has instructed as not to receive the information; or anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's firm. Under the rule, confidential information includes both "privileged" and "unprivileged" client information. Privileged information means information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence.

Rule 1.05 address prohibitions on a lawyer's "use" of confidential client information. Generally speaking, Texas Rule 1.05(b) provides in pertinent part that a lawyer shall not knowingly: use confidential information of a client to the disadvantage of the client unless the client consents after consultation; or use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known; or use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation. Tex. Rule 1.05 (b). *See Pollard v. Merkel*, 114 S.W.3d 695 (Tex. App.CDallas 2003, pet. denied) (A lawyer shall not knowingly reveal confidential information of a former client to anyone else and shall not knowingly use confidential information of a former client to the disadvantage of the former client after the representation is concluded); *Cruz v. State*, 586 S.W.2d 861, 865 (Tex. Crim. App. 1979) (Statement signed by defendant was inadmissible because, by giving statement to police, attorney violated DR 4-101 prohibiting the divulging of confidential information obtained from a client). However, a lawyer may reveal confidential information to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used. *Perez v. State*, 129 S.W.3d 282 (Tex. App. Corpus Christi 2004, no pet.) (Lawyer may disclose client’s confidential information “[t]o the extent revelation reasonably appears necessary to

rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used").

V. JUDICIAL ETHICS

"Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law." Preamble, Code of Judicial Conduct.

All judges should adhere to "judicial ethics." Judicial ethics are those basic standards which should govern the conduct of judges; those standards consist of general ethical standards and codified rules of conduct

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Judges are not only responsible for their conduct but also the conduct of staff, court officials and others subject to the court's control. The purpose of this section is to provide guidance to assist judges in establishing and maintaining high ethical standards of judicial conduct, personal conduct, and conduct of persons subject to the judge's control, including lawyers.

A. CANON 1: UPHOLDING THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

1. Canon 1

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

2. Decisions and Opinions

a. Collection of Fees: A County Court at Law Judge may not participate in the collection of court fees and other fees owed to the County Clerk's Office by writing letters to or personally contacting persons who owe the fee. Opinion No. 105 (1987). Opinion No. 105 states:

> A judge should uphold the integrity and independence of the judiciary (Canon 1), and should avoid impropriety and the appearance of impropriety in all his activities (Canon 2). The collecting of the past due debts of the County by a judge constitutes the practice of law. A judge should not practice law (Canon 5F*) [*now Canon 4G]

and should not have ex parte communications concerning the merits of impending litigation. (Canon 3A(5)** [**now Canon3B(8)].

The collection of past due debts of a county is the duty of an authorized agency, i.e. County Attorney, District Attorney, or retained private practicing attorney.

b. Discussion with Commissioners: A judge should not discuss with County Commissioners previous decisions in cases in which the County was a party. Opinion No. 133 (1990). [Violation of Canon 1 and other Canons]

***c. Negative Comments about Other Judges*:** A judge may violate Canon 1 and 2 if he or she makes threatening or disparaging remarks about other judges. *See e.g. In re Diaz*, 908 So. 2d 334, 337-38 (Fla. 2005) ("cannon [1 and 2] broadly prohibit conduct unbecoming a judicial officer [and] can be construed to prohibit judges from making threatening or disparaging remarks about other judges or parties in the manner involved herein")

A judge may also violate Canons 2A and 3B if he makes negative comments about a judge or judicial body. For example, a district judge during a capital murder trial, when shown an opinion in a previous capital murder case that appeared to be relevant, commented that the judge who wrote it was an idiot and complained that the liberals on the Court of Criminal Appeals now expected him to tell jurors that they could disregard the law in judging the defendant. CJC No. 4772, 4880, and 4986, Public Reprimand (03/01/93).

d. Failure to Recuse: A judge should recuse himself if he has a close relationship with one of the parties. *In re Cooks*, 694 So. 2d 892 (La. 1997) (judge's failure to recuse herself in spite of close personal relationship with party was a clear violation of Canon 1 and 2.)

B. CANON 2: AVOIDANCE OF IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

1. Canon 2

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

2. Applicable Decisions and Opinions

a. Avoid Appearance of Impropriety:

A judge must avoid impropriety and the appearance of impropriety. *In re K.E.M.*, 89 S.W.3d 814, 819-20 (Tex. App. – Corpus 2002, no pet.); *In re E.A.P.*, 2009 WL 618462, at *2 (Tex.App. – San Antonio 2009, no pet.) The prohibition against impropriety and appearance of impropriety applies to both the professional and personal conduct of a judge. *In re Lowery*, 999 S.W.2d 639, 657 (Tex. Rev. Trib.1998, no. appeal; *In re Williams*, 701 A.2d 825, 832 (Del. 1997).

b. Failure to Promote Public Confidence:

General Rule: A judge at all times should promote confidence in the integrity and impartiality of the judiciary. Canon 2A; *In re Fowler*, 593 So.2d 1043(Fla. 1992) (judge furnished false information to police officer); *Office of Disc. Counsel v. Gallagher*, 82 Ohio St.3d 51, 693 N.E.2d 1078 (1998) (judge pled guilty to distributing cocaine); *In re Harris*, 713 So.2d 1138 (La.1996) (judge developed intimate relationship with convicted felon whom she sentenced in her court).

Personal Property: The judge accepted personal property from a criminal defendant in lieu of payment of court costs. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] *Private Warning and Order of Education of Justice of the Peace (11/15/99)*

The judge confiscated a defendant's shotgun as surety for payment of a $300.00 fine. The judge's action was without legal authority. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] *Private Admonition and Order of Additional Education of a Justice of the Peace (11/09/01)*

Removal of Earring: The judge improperly ordered a young man to remove his earring or leave the premises of the courthouse. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of Justice of the Peace (12/27/99)*

Participation in Negotiations: The judge permitted the court staff to telephone a traffic defendant to attempt to persuade the defendant to waive the right to a trial. In a separate case, the judge negotiated a plea bargain agreement and the "instanter" payment of the fine and costs imposed on a traffic defendant. [Violation of Canons 2A and 6C(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of Justice of the Peace (12/27/99)*

Disclosure of Relationships: The judge failed to comply with well-established procedures requiring full disclosure of a relationship that might warrant his recusal, which effectively prevented the litigants from making an informed decision about

whether the judge was capable of fairly and impartially deciding a custody case. [Violation of Canons 2A, 2B, and 3B(1) of the Texas Code of Judicial Conduct.] *Private Warning of a County Court at Law Judge* (08/15/08)

CLE: The judge failed to obtain the mandatory judicial education hours during fiscal year 1999. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Warning of a Municipal Judge (08/16/00)*

DWI: The judge, whose court has jurisdiction over alcohol-related offenses, pled guilty to the charge of driving while intoxicated. [Violation of Canons 2A and 4A(1) of the Texas Code of Judicial Conduct.] *Private Reprimand of a County Judge (01/25/00)*

c. Using Prestige of Office:

Appearing in Advertisement: The judge appeared in his judicial robe in an advertisement for a community college. His appearance was inconsistent with the proper performance of his duties and cast discredit upon the judiciary. [Violation of Canon 2B of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a District Court Judge (04/24/01)*

The judge appeared in his judicial robe in an advertisement for a theological seminary. [Violation of Canon 2B of the Texas Code of Judicial Conduct.] *Private Warning of a County Court at Law Judge (02/28/03)*

Personal Relationships: The judge allowed an attorney with whom he had a close relationship to continue to appear before him, even after another judge had found grounds to order that he be recused from a case because of the relationship. .[Violation of Canon 2B, Texas Code of Judicial Conduct] *Private Admonition of a District Judge (04/27/04).*

Pressuring Court Staff: The judge placed undue pressure on his court staff in requesting that they commit their personal time to assist him with his re-election campaign.[Violation of Canon 2B, Texas Code of Judicial Conduct] *Private Admonition of a District Judge (04/27/04).*

Endorsement of Another: The judge displayed a bumper sticker or sign endorsing his son's candidacy for public office on a vehicle which the judge owned and operated. The judge's conduct was found to have constituted a public endorsement of another candidate for public office. The judge was also found to have lent the prestige of his judicial office to advance the private interests of his son. [Violation of Canons 2B and 5(2) of the Texas Code of Judicial Conduct.] *Private Warning of a Justice of the Peace (01/19/05).*

Business Cards: A judge cannot give to unrepresented criminal defendants business cards of a Lawyer's Association. Opinion No. 174 (1974), Canon 2B.

Use of Title for Favors: Judge tried to dissuade arresting officer and his supervisor from arresting judge for DWI. CJC No. 01-0224 – DI, Public Admonishment (04/12/01).

Judge who was stopped for erratic driving and later failed a field sobriety test, "identified himself to the officer as being a judge and repeatedly referred to his official position in an effort to dissuade the officer from arresting him," violated Canon 2B. CJC No. 07-0501-JP, Public Admonishment (04/07/08).

***d. Comply with Law*:**

The judge held a hearing when no case was pending in his court. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge (08/16/00)*

***e. Attendance at Holiday Party*:** "A Judge and may attend a holiday or seasonally law firm party if it is open to people other than the judge and his staff." O.P 194 (1996). "The judge should act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should not convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 2(A) and (B)." *Id.*

"The answers above apply equally to the judge's staff, court officials and others subject to the judge's direction and control. Canon 3C(2) provides a judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge. See Canon 3B(2) Code of Judicial Conduct, September 1, 1974, through December 31, 1993, and Opinions 110, 112 and 140 applying Code to court personnel." *Id*.

f. Court Coordinator Collecting Fees as a Notary. Opinion No 197 (1966): A coordinator, who has qualified as a notary at her own expense, cannot charge a notary fee during working hours in the judge's office. Such is a violation of Canon 2, Section B.

g. Designation of Safety Driving Course. Opinion No. 118 (1988): A judge should not designate a specific driving course a defendant should attend if there is more than one agency offering the course. Canon 2B prohibits a judge from lending the prestige of his or her office to advance the private interest of others.

h. Appointment of CASA Volunteer. Opinion No. 264 (2000): A judge should not appoint a person within the third degree of consanguinity as a CASA volunteer in a contested case in the judge's court. Canon 2 requires a judge to avoid impropriety and the appearance of impropriety in all the judge's activities.

f. False Information to Commission. A judge should not file false information with the Commission or request another to do so. *In re Lowery* 999 S.W.2d 639, 656 (Tex. Rev. Trib. 1998, no appeal) (requesting that a fellow jurist file a false report with the

Commission is an act of dishonesty that evidences willful conduct that fails to promote confidence in the integrity of the judiciary, in violation of Canon 2A).

g. Favoritism in Appointments. A judge should be cautious about showing favoritism in appointments. Such action may be viewed as a violation of Canon 2A in not promoting confidence in the impartiality of the judiciary. CJC No. 12204, Public Admonishment (10/22/99) (judge repeatedly appointed his lawyer's son to represent criminal defendants and others who appeared before the court); CJC No. 9550, Public Reprimand (12/15/99) (judge appointed his long time friend and former bailiff as a member and foreman of the grand jury).

A judge also may not require that lawyers who practice in his court be a member of a particular bar association. CJC Nos. 00-0024 and 00-0150 – DI, Public Admonition (01/14/00).

Judge violated Canon 2B by making numerous appointments to a friend and business partner he owed money. CJC Nos. 05-0847-CC & 06-0164-CC, Public Reprimand (08/13/06).

h. Smoking in County Building. A judge is subject to public reprimand for smoking in a county building which bans smoking. CJC No.12078, Public Admonishment (08/26/99).

i. Using County Funds for Personal Use. A judge should not use county funds for personal use, CJC Nos. 02-0788, 02-0789 – JP and 02- 1068 – JP, Public Reprimand (06/27/03), nor approve personal travel for himself as a government expense. CJC no. 05-0815 – RT, Public Admonition (06/15/06).

j. Assisting in Investigations. A judge should not assist in law enforcement investigations. By doing so he lends prestige of his office to the investigation and implies that law enforcement officers are in a special position to influence the judge. CJC Nos. 8790, 8791, and 9208, Public Warning (01/24/97).

A judge cannot conduct his own investigation of a person's criminal history. In *Arambula v. State*, 1999 WL 76432 (Tex. App.- Austin 1999, no writ) (not designated for publication), a judge, because of the deficiencies in a presentence report, requested his bailiff to do a computer search of the defendant's record. "By ordering the bailiff to investigate [defendant's] criminal history, rather than simply accepting the PSI prepared by the probation officer, the trial judge injected himself into the proceedings before him, casting doubt on his impartiality and risking the appearance of bias against the defense. More significantly, he opened himself up to question of whether the extraneous offenses he discovered were impermissibly considered when he sentenced [defendant]." 1999 WL 76432, at *3.

k. Judge's Right to Free Speech. "[B]ased on current case law in Texas and the Fifth Circuit, a judge's legitimate free speech activities do not constitute a violation of the

Texas Code of Judicial Conduct. However, judges are not permitted to use the trappings and symbols of the office, such as robes, official court letterhead or email, and taxpayer-funded time and facilities to collect an audience and amplify their message." Public Statement No. PS-2008-1, available at http://www.scjc.state.tx.us.

l. Staff Influencing Judges Conduct. A judge should not allow his staff to improperly influence and conduct. In CJC Nos. 01-0536-JP and 01-0891-JP, Public Admonition (06/05/02), the judge's staff felt free to share with the judge the staff member's negative opinion about an individual who appeared before the court. As a result the judge treated the individual inappropriately. By allowing his staff to improperly influence his conduct and judgment the judge violated Canon 2B.

m. Referral for Pro Bono Representation. A judge may not refer a criminal defendant to a private lawyer, even if the representation would be pro bono. Such action would suggest the judge's support for that lawyer over other lawyers and firms. Opinion No. 289 (2004). However, a judge is not prohibited from referring persons in need of legal assistance to departments, agencies, organizations or law school clinics which provide pro bono legal services, lawyer referral services, or lists of attorneys willing to assist the public in various areas of legal expertise. *Id.*

C. CANON 3: PERFORMING THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

1. Canon 3

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.
(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.
(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.
(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.
(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.
(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

2. Decisions and Opinions

a. Patient, Dignified, and Courteous Conduct

General rule: A judge should be patient, dignified, and courteous. *In re Inquiry re Judges 194 & 204*, 347 N.C. 382, 493 S.E.2d 434 (1997) (judge admitted to making statements that could be considered as less than patient, dignified, and courteous to attorneys, witnesses, litigants, and court personnel, in violation of Canon 1,2, and 3).

Prosecutor: The judge did not act in a "patient, dignified and courteous" manner when dealing with a prosecutor in an official capacity. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition of Justice of the Peace (04/26/00)*

Parents: The judge used demeaning, profane, and unprofessional language to parents who were before the judge's court in custody cases. [Violation of Canons 2B, 3B(3) and 3B(4) of the Texas Code of Judicial Conduct.] *Private Reprimand of an Associate Judge (04/26/00)*

Litigant: Following the jury's deliberation and verdict, the judge made negative comments to jurors about a litigant's attorney's integrity and professionalism, and comments about the litigant that indicated the judge would not be fair and impartial concerning the litigant's case in the future. (The judge had continuing jurisdiction over the litigant's case.) [Violation of Canon 3B(10) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge (02/10/00)*

Following a hearing in a hotly contested custody dispute, the judge observed a meeting between the *pro se* litigant and opposing counsel and approached them to foster a settlement discussion between the two. During the discussion, the judge engaged the litigant in a confrontational conversation that escalated to the point that the judge threatened to shoot the man if he ever saw him near the judge's home. The judge's statements to the litigant were found to lack patience, dignity and courtesy. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge (01/19/05).*

The judge made impatient and discourteous comments to a defendant, the defendant's attorney, and a prosecutor when they appeared in court regarding the defendant's probation revocation, and did so in a manner that did not reflect the appropriate temperament or demeanor expected of a judicial officer. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition of a County Court at Law Judge.* (10/31/06).

Because of prior dealings with a member of a local defense firm, the judge criticized an attorney from that firm who had asked for a continuance in his client's traffic case, questioning his professionalism, integrity and decency. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition of a Justice of the Peace.* (12/18/08)

Defendant: The judge acted without patience, dignity, or courtesy when the judge verbally attacked and humiliated a defendant. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge (03/22/01)*

During a hearing involving a juvenile defendant charged with a traffic offense, the judge made inappropriately sarcastic comments to the defendant. The judge then followed the juvenile defendant and the defendant's parents to the parking lot where the judge and the

juvenile's parents had a verbal confrontation. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition of a Justice of the Peace (01/16/02)*

Witness: The judge used the phrase "oral sex," once before the jury and once outside the presence of the jury. The judge admonished a witness not to "snort." [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a District Court Judge (05/02/01)*

Staff: The judge was rude, undignified and discourteous toward court staff, which is inconsistent with the proper performance of the judge's duties. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a Former Municipal Judge (08/20/01)*

Clerk: The judge rudely admonished a court clerk in open court and directed a profanity in Spanish toward the court clerk embarrassing her in open court. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a Former Municipal Judge (08/20/01)*

Security: The judge failed to be patient, dignified and courteous in his dealings with courthouse security personnel. Additionally, the judge went beyond his authority in threatening to hold security personnel (not in his courtroom) in direct contempt for interfering with his court. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a County Court at Law Judge (05/30/01)*

Juror: The judge, while interviewing prospective jurors, exhibited a lack of patience, dignity and respect toward one of the prospective jurors when she ordered the bailiff to forcibly remove the prospective juror's tearful 4-year-old child from the courtroom. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct]. *Private Order of Additional Education of a Justice of the Peace (06/21/02)*

Court Reporter: The judge made an insensitive comment to a court reporter with whom he had dealings in an official capacity, which lacked the appropriate dignity expected of a judicial official. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition of a Senior Judge (12/17/02)*

Law Enforcement: The judge berated a law enforcement officer with whom the judge dealt in an official capacity and threatened her with contempt. The judge's actions lacked the appropriate patience, dignity and courtesy expected of a judicial official. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Admonition and Order of Additional Education of a Justice of the Peace (06/27/03)*

County Employee: The judge made inappropriate comments toward a county employee who worked under his direct supervision causing that employee to file a sexual harassment claim against the judge. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a County Judge (10/21/03)*

Public Meeting: The judge lost his temper and used intemperate language while attending a public meeting in his official capacity. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article 5, Section 1-a(6)A of the Texas Constitution.] *Private Admonition of a District Judge (04/08/04)*

Defense Counsel: While presiding over a felony jury trial, the judge directed profanity at the defense attorney in a conversation before the bench. The judge's statement to the lawyer during these proceedings was found to lack patience, dignity and courtesy. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Warning of a Senior Judge (01/19/05)*.

Students: The judge used "vulgar and profane language" in front of students, their parents, school personnel and court officials while presiding over truancy matters. The Commission concluded that the judge's "tough love" lecture to students appearing before her in criminal proceedings lacked the patience, dignity and courtesy required of a judicial officer. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Reprimand of a Justice of the Peace* (06/08/05).

Constable: The judge chastised and directed profanity toward a constable on two separate occasions – one relating to service of process on a small claims defendant and one relating to service of an arrest warrant. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] *Private Warning of a Justice of the Peace.* (12/02/08)

Females: Judge violated Canon 3B by referring to female District Attorneys in his court as "babes." *In re Barr*, 13 S.W.3d 525, 552 (Tex. Rev. Trib. 1998, no appeal.)

Jury: Judge told jurors the had delivered the worst verdict he had heard in eight-and-a half years. *Ludwick v. DeBerry*, 959 S.W.2d 265 (Tex. App. – Houston [14th Dist.] 1997, no writ.)

b. Competence in the Law

Canon 3B requires a judge to be competent in the law. Ignorance of the law is no excuse. *Missippi Comm'n on Jud. Perf. v. Dodds*, 680 So.2d 180, 191 (Miss. 1996)

The judge erred in holding a defendant in direct contempt for failure to comply with her order. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Education of a County Judge (05/25/01)*

The judge did not comply with the relevant provisions of the Texas Code of Criminal Procedure and the Texas Transportation Code in the handling of a criminal case. Furthermore, the filing of a criminal complaint is a public record, therefore refusing to provide a copy to any citizen, including the defendant, is a violation of the law. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge (04/24/01)*

The judge confiscated a defendant's shotgun as surety for payment of a $300.00 fine. The judge's action was without legal authority. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] *Private Admonition and Order of Additional Education of a Justice of the Peace (11/09/01)*

The judge required at least fifteen defendants to post cash only bonds between August 31, 2000 and May 14, 2001. Attorney General Opinion No. JM-363, affirming prior case law, points out that a court is not vested with the discretion to require a cash or surety bond to the exclusion of the other. The judge misinterpreted the law to read that he could require a cash bond only. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Justice of the Peace (05/09/02)*

In adjudicating a truancy matter, the judge improperly applied certain provisions of both the Texas Education Code and the Texas Code of Criminal Procedure, while failing to comply with other applicable or mandatory provisions of those statutes. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Warning and Order of Additional Education of a Justice of the Peace (10/29/02)*

The judge's actions in exercising his contempt authority, and his procedures involving a minor charged with a criminal offense, demonstrated a lack of professional legal competence. [Violation of Canon 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Justice of the Peace (02/14/03)*

Based on a complaint filed by his clerk, the judge issued an arrest warrant without analyzing the complaint to determine if probable cause existed. The Commission concluded from the judge's conduct that he failed to comply with the law and failed to maintain professional competence in the law. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Admonition of a Justice of the Peace (12/21/04).*

The judge failed to comply with the law and failed to maintain professional competence in the law when he granted deferred adjudication to commercial drivers license holders under Article 42.12 of the Texas Code of Criminal Procedure. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Warning and Order of Additional Education of a Municipal Judge* (03/23/06).

The judge failed to follow the law and failed to maintain professional competence in the law when, during the magistration process, he dismissed pending traffic citations against a defendant based on his own personal opinion that it was impossible for the defendant's vehicle to travel at the speed alleged by the arresting officer. Likewise, the judge failed to follow the law and failed to maintain professional competence in the law when he credited the defendant with time served on the charges without first accepting the defendant's plea of guilty or no contest on any of the charges. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Warning and Order of Additional Education of a Justice of the Peace* (04/06/06).

The judge demonstrated a lack of professional competence in the law when he failed to announce his ruling in open court, as required by Rule 557 of the Texas Rules of Civil Procedure. [Violation of 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Justice of the Peace.* (06/15/06).

The judge demonstrated a lack of professional competence in the law when, after sentencing a student for the offense of failure to attend school, he ordered successive "compliance hearings" over an eleven (11) month period for alleged "violations of probation" by the student. Further, the judge erred in requiring the parents to attend school with the defendant as a condition of probation. [Violation of Canon 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Justice of the Peace.* (10/31/06).

The judge failed to comply with the law and maintain professional competence in the law when she telephone the jail to set a bond for a defendant, who was then allowed to be released without first having to appear before a magistrate, as required by law. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Warning and Order of Additional Education of a Justice of the Peace.* (03/23/07)

The judge failed to provide a citizen reasonable access to inquest records as required by law. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Justice of the Peace* (09/22/08).

c. Bias Conduct

The judge made a gratuitous and inappropriate comment to an African-American court employee about the Ku Klux Klan, a comment that could reasonably be construed as manifesting racial bias. [Violation of Canons 3B(4) and 3B(6) of the Texas Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge (8/21/00)*

The judge failed to maintain control over a case and the litigants and exhibited bias and prejudice against a litigant. [Violation of Canon 3B(5) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Court Judge (05/25/01)*

The judge ordered a criminal defendant to remain incarcerated without bond prior to his trial after *sua sponte* finding that his surety bond was insufficient. The judge further engaged in conduct that caused at least two jurors to believe that she had a disqualifying bias or prejudice against the criminal defendant and his attorney. [Violations of Canons 2A, 3B(2), and 3B(5) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge.* (01/14/08)

A judge in responding why he gave light sentences to a defendant for murdering two men stated "[t]hes two guys that got killed wouldn't have been killed if they hadn't been

cruising the streets picking up teenage boys." The judge violated Canon 3A(8) and 2A. *In re Hampton*, 775 S.W.2d 629 (Tex.1989).

A judge cannot be bias in favor of the prosecution. Canon 3B(5); CJC No. 01-0442-DI, Public Warning (12/17/01).

d. Litigant's Right to be Heard

The judge denied the attorneys in a civil matter the right to be heard because he responded orally to a jury's question concerning the court's charge without the attorneys' knowledge or presence. [Violation of Rule 286, Texas Rules of Civil Procedure and Canon 3B(8) of the Code of Judicial Conduct.] *Private Admonition of a District Court Judge (09/19/00)*

e. Ex Parte Communication

A judge should not engage in ex parte communication or allow others to do so. *Erskine v. Baker*, 22 S.W.3d 537, 539 (Tex. App. – El Paso 2000, pet. Denied) (the judge violated Canon 3 by engaging in ex parte communications between the judge and counsel for one of the parties and also separately meeting one of the witnesses after the witness testified.)

The judge met privately in chambers with a party's attorney and, based upon that meeting, announced a decision in the case. [Violation of Canon 3B(8) of the Texas Code of Judicial Conduct.] *Private Admonition of a County Court at Law Judge (08/16/00)*

In one case, the judge permitted a litigant's attorney to engage in improper *ex parte* communications with the court and court staff and, in a separate case, failed to comply with the law when he granted that same attorney *ex parte* "emergency" relief in the absence of sworn pleadings or affidavits in support of the request. [Violation of Canons 2A and 3B(8) of the Texas Code of Judicial Conduct.] *Private Admonition of a Probate Judge* (08/29/08).

A judge may not engage in ex parte communication with an appellate judge regarding an appeal from the trial judge's court. Canon 3B(8) requires that a judge perform his or her duties impartially and require that every person who is legally interested in a proceeding the right to be heard. Consultation between judges is permitted in Canon 3 regarding law and its application where neither judge has an interest in the out-come of the litigation being discussed. Ethics Opinion 263.

A judge may conduct an ex parte hearing with appointed defense counsel representing an indigent client on the subject of hiring an expert to assist indigent criminal defendants, assuming the judge reasonably believed that it was expressly authorized by law. It is the judge's reasonable belief that allows his conduct to fall within the exception provided by Canon 3B(8)(e). Opinion 183 (1995).

If a judge receive a written communication from a litigant that is designed to communicate privately with the judge about a pending case, the judge my comply with Canon 3B(8) by doing the following: 1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file. 2) Send a copy of the letter to all opposing counsel and pro se litigants. 3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge's letter to all opposing counsel and pro se litigants, stating that the letter was an improper ex parte communication, that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants. Opinion No. 154 (1993).

f. Appoint of Counsel

A judge is prohibited from appointing a lawyer to represent an indigent defendant if the lawyer from his former law firm. See Canon 3C (4); Opinion No. 83 (1986).

g. Initiate Disciplinary Action Against Lawyers

A judge subject to the Judicial Code of Conduct has an obligation to initiate disciplinary measures against a lawyer when he becomes aware that such lawyer has been guilty of unprofessional conduct or has presented false information to the court. See Canon 3D(2); Opinion No. 45 (1979).

h. Failure to Promptly Dispose of Matters

In re Rose, 144 S.W.3d 661 (Tex. Rev. Trib. 2004), the Commission found the unprocessed citations and the failure of the judge to promptly dispose of matters before him comprised "willful conduct that violated the Code of Judicial Conduct, Canon 3B(1) and "incompetence in performing the duties of office," in violation of Article 5, Section 1-a(6)A of the Texas Constitution. 144 S.W.3d at 700.

i. Judge Contacting D.A. Regarding Conduct of Assistant District Attorney.

A judge may, *under limited circumstances*, contact the district attorney to advise him of the failure of the assistant district attorney to properly prepare or handle the court proceedings. Ethics Opinion 285 (2001). "Canon 3B(8) provides that a judge shall not initiate or permit ex parte communications concerning the merits of a pending or impending judicial proceeding. Conversation between the Judge and the District Attorney is permitted if it is confined to conduct of the assistant district attorney. If the conversation involves specifics of a case it may only be done after the case is final." *Id.*

j. Permitting Bailiffs to Read Magazines in Court.

A judge should not allow bailiffs to read magazines during official proceedings. CJC No. 00-0257, Public Reprimand (06/28/00) (judge violated 3B(3) and 3B(4) when during a

capital murder trial involving a firearm, the judge disassemble and reassemble two Colt Model 1873 single action revolvers on the bench and, later during proceeding, permitted the bailiffs to read magazines.)

k. Retaliatory Actions

A judge should not retaliate against persons who oppose him. In CJC Nos. 1642, 1700, 2156 and 2635, Public Reprimand (04/13/88), a judge "frequently displayed an explosive and injudicious temperament and [had] taken reprisals against lawyers who opposed him politically" and "carried out a retaliatory course of action against an attorney who practiced in his court as a result of a complaint the attorney filed . . . with the State Commission on Judicial Conduct," violated Canon 3B(4).

l. Lecturing Counsel and Parties

A judge should not lecture counsel or parties in a manner that would violate 3B(4). CJC No. 00-0359-DI, Public Reprimand (09/19/00) (judge subject attorneys to interrogation about their professional ethics); see CJC No. 8945, Public Admonition (04/28/97) and CJC No. 08-0474-JP, Public Admonition (12/18/08) regarding inappropriate comments to parties.

m. Inappropriate Touching

A judge should not touch any person inappropriately. Canon 3B(4); CJC No. 76, Public Warning and Order of Additional Education (04/26/00) (judge hugged and kissed his legal assistant as the judge was leaving for vacation); CJC No. 07-0716-DI, Public Warning and Order of Additional Education (05/04/08) (judge slapped buttocks of female attorney at party was sanctioned under constitutional provision).

n. Abstaining from Commenting on Pending Cases

A judge should refrain from comment on pending or impending proceedings. Canon 3B(10); *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).

D. OTHER CANON DECISIONS

1. Extra Judicial Activity, Casting Doubt on Impartiality: The judge acted imprudently when following a citizen to a parking lot and then making the comment that the judge would remember how the citizen drove that morning in the event she appeared in the judge's court. Such a statement indicated the judge would be unable or unwilling to remain impartial and unbiased in a case in his court involving the citizen. [Violation of Canon 4A(1) of the Code of Judicial Conduct.] *Private Order of Additional Education of a Municipal Court Judge (10/28/00)*

2. <u>Gifts or Favors:</u>

Favors for Judge. The judge received free use of a limousine on two occasions from parties or persons whose interests frequently came before him. [Violation of Canon 4D(4)(c) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge* (08/30/05).

Acceptance by Court Staff of Favors. Opinion No. 140 (1991): A district judge may not allow a court administrator to participate in a group weekend trip that is sponsored, organized, and paid for by an attorney who practices before the judge. **"**Canon 5C(4)(c)[now 4D(4)(c)] provides that a judge should not accept favors from a person whose interests have come or are likely to come before the judge. Canon 3B(2) [now 3C(2)] provides that a judge should require the judge's staff to observe the standards of the Code of Judicial Conduct." Id.

Acceptance of Holiday Gifts by Judge and Staff. Opinion No. 194 (1996):
"A judge may only accept a gift from a friend for a special occasion and then only if the gift is fairly commensurate with the occasion and the relationship. Canon 4D(4)(b). A Judge may accept any other gift only if the donor is not a party or person whose interests have come or are likely to come before the judge. Canon 4D(4)(c). Opinion No. 44." *Id*. A holiday or seasonal gift from a lawyer or law firm where a lawyer is not a friend is prohibited. "A judge should not convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 2B. Opinion No. 3." *Id.*

Free Passes. Opinion No. 44 (1979): A judge may accept free passed to movies, football games, college plays, etc. from an entity whose interest has not come and is not likely to come before the judge, and if it is clearly understood by all parties that such is not an effort to curry favor. However any gift having a value in aggregate of more than $100 must be reported under the provisions of Canon 4D(4)(c).

3. <u>Soliciting Funds</u>. The judge was quoted in a local newspaper regarding his efforts to raise money through a high school booster club. [Violation of Canon 4C(2) of the Texas Code of Judicial Conduct.] *Private Admonition of a District Judge* (09/15/05).

4. <u>Participation in Plan to Encourage Jurors to Donate Jury Pay.</u> Opinion No 147 (1992): A judge should not participate in a plan to advise jurors that they may make a voluntary donation of their jury pay to any cause. Canon 4C(2) and 4B(2).

5. <u>Hearing Assigned Matters.</u> The judge abdicated official judicial duties by relinquishing control of the court's criminal docket to the county attorney, whose office was unable to handle the volume of work due to staff shortages. In doing so, the judge failed to ensure that the criminal cases filed were set for hearings and trials in a timely manner, which jeopardized the due process rights of defendants and left the public's interests likewise unprotected. [Violation of Canons 3B(1) and 3B(8) of the Texas Code of Criminal Procedure, Article V, Section 1-a(6)A of the Texas Constitution, and Section

33.001(b)(1) of the Texas Government Code.] *Private Warning and Order of Additional Education of a County Judge.* (04/07/08)

6. Recusal. The judge failed to comply with well-established procedures requiring full disclosure of a relationship that might warrant his recusal, which effectively prevented the litigants from making an informed decision about whether the judge was capable of fairly and impartially deciding a custody case. [Violation of Canons 2A, 2B, and 3B(1) of the Texas Code of Judicial Conduct.] *Private Warning of a County Court at Law Judge* (08/15/08*).*

7. Letter of Appreciation to Jurors. A judge may write letters of appreciation to persons who have served as jurors in his or her court. However, the judge should avoid the appearance of impropriety in selecting the content of the letter. Opinion No. 69 (1983). The judge should also mail the letter immediately after the services has been rendered on a routine basis. *Id.*; Canon 3B(4) and Canon 5.

8. Letter to Collect Court Fees: In Opinion No. 126, the Committee was presented with the following question:

> If a parent incurs fees charged by a Juvenile Board's Court Services Department for receiving and disbursing child support or for social studies, and if the applicable statute provides that payment of such fees may be enforced in district court, may a District Judge sign a letter to such parent, or authorize a letter from the court to such parent, to collect such fees?

The Committee concluded that a judge should not personally participate in attempting to collect such fees. Also, "[i]f a judge may be required to preside at a hearing concerning the payment of fees, a judge should not write a letter for the purpose of collecting those fees." *Id.*; Canon 3B(8).

The Committee was also of the opinion that such letters should not appear from the "court", that is, from the judicial entity of which the judge is the principle officer. *Id.*

9. **Requiring Donations to Specific Charity**. A trial judge should not require a defendant to donate to a particular charity. Ethics Opinion 241 (1999). Ethics Opinion 241 is set out below:

> **FACTS:** A trial judge requires defendants in certain cases to donate items (such as toys, clothing, diapers, and food) to specific charities or crime victim groups as a condition of community supervision. She also orders such charitable donations pursuant to plea bargains in which the defendant has agreed to make such donations, and grants dismissals when she knows the state has required the defendant to make donations as a condition of the dismissal. The charities vary each month.

QUESTION: Does the Code of Judicial Conduct permit a judge to order such charitable donations, on her own volition or as part of a plea bargain, or to grant a motion to dismiss knowing that the state has required the defendant to make a charitable donation?

ANSWER: The Code of Criminal Procedure and the case law govern the trial court's discretion to impose conditions of community supervision. See, e.g., Article 42.12, §§ 11(a) & (b), and annotations. These statutes are interpreted by the courts and not by the ethics committee. The committee answers questions of ethics and not questions of law. See Opinions 79 & 175.

The judge must not only act within the legal limits set by statutes and case law but also within the ethical standards set by the code of judicial conduct, which restrict a judges freedom to single out certain charities and private organizations for court-ordered benefits. Canon 2B forbids judges to lend the prestige of their judicial office to advance the private interests of others. In an analogous situation, the committee has ruled in Opinion 118 that under Canon 2B when a defendant has elected to take a driver safety course in lieu of other penalty, the trial judge may not designate a specific agency if there is more than one qualified agency to choose from. Judicial power should not be used to force litigants to provide gifts or services to specified charities, or to other organizations; judges should not be choosing among competing charities.

A judge may also be reprimanded if the opportunity to contribute to a charity includes several charities, one to which the judge has a close connection. *See Private Reprimand of a County Court at Law Judge.* (02/04/08) (The judge found an out of town attorney in constructive contempt of court without affording him certain due process rights. In lieu of serving time in jail, the attorney was offered the opportunity to donate large sums of money to several charitable organizations, one to which the judge had a close connection. [Violations of Canons 2A, 2B, 3B(2) and 4C(2) of the Texas Code of Judicial Conduct.])

10. Sleeping in the Courtroom. A judge was sanctioned for sleeping during official proceeding and on the bench *between* trial and jury trials. CJC No. 01-0652-JP, Public Admonishment (03/01/02).

11. Instructing Staff and Court Officials. Judges are responsible for insuring that staff and court official observe code provisions. Opinion No. 234 (1998); Opinion No. 106 (1987). A judge must also insure that court personnel subject to the judge's direction and control comply with the Canons, which includes attorneys. Canon 3B(8); Opinion No. 106 (1987).

12. Facebook Friends. A Florida Judicial Ethics Advisory Committee, in Opinion 2009-20 (November 17, 2009), decided that a judge should not add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend" on their pages, to the extent that such identification is

available for any other person to view. The Committee concluded that this practice would violate their Canon 2B.

Florida Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." [substantially similar to the Texas Canon 2B]

In order to fall within the prohibition of Canon 2B, the Committee believed that three elements must be present in a social networking site. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes violates Canon 2B because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.

The Committee also reasoned "[w]hile judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge's conduct are inherent in the office."

E. ARTICLE V, TEXAS CONSTITUTION DECISIONS

1. Section 1-a (6)(A)

Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. Any person holding an office specified in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an

opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge.

2. Decisions and Opinions

a. Failure to Perform Official Duties. The judge was willful in his conduct and inconsistent with his duties when he was unavailable to perform magistrate's duties and failed to advise his office of where or whether he could be found or contacted. He did not at any time contact his office to advise it of his illness and availability. [Violation of Article V, Section 1-a(6)A of the Texas Constitution.] *Private Admonition of a Justice of the Peace (06/28/00)*

b. Holding Jewelry for Defendant's Return with Attorney. The judge confiscated a defendant's jewelry and retained possession of it to insure the defendant returned with an attorney. [Violation of Article V, Section 1-a(6)A of the Texas Constitution.] *Private Admonition of a County Court at Law Judge (09/19/00)*

c. Failure to Supervise. The judge failed to properly supervise a clerk under her direction over a five-year period; relied upon the clerk to receive, record, deposit and report funds received by the court; made no effort to learn the use of computerized information system used by the court, allowed clerk access to signature stamp bearing the judge's name, and relied on the advice given by the clerk. The clerk's actions resulted in the clerk being indicted for theft and tempering with or fabricating evidence and tampering with governmental records. [Violation of Article V, Section 1-a(6)A of the Texas Constitution.] *Private Order of Additional Education of a Justice of the Peace (02/02/00*

d. Use of Alcohol. The judge consumed an excessive amount of alcohol while attending a social gathering of a local bar association and, during that gathering, urinated into a garbage receptacle located in an open area, which was in sight of guests. [Violation of Article V, Section 1-a (6)A of the Texas Constitution.] *Private Reprimand of a County Court at Law Judge (12/17/99)*

The judge acted imprudently when he consumed alcoholic beverages at a public event and placed himself in a position where it appeared to law enforcement officers and others that he was publicly intoxicated. [Violation of Article V, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a County Court at Law Judge (12/19/00)*

As a result of the judge's off-the-bench conduct in connection with his consumption of alcoholic beverages and his inability to remain sober for any extended length of time, and following the judge's successful participation in the Commission's *Amicus Curiae* program, the Commission accepted the recommendation from the *Amicus* Board that the

judge remain monitored by *Amicus* for another year. [Violation of Article 5, Section 1-a(6)A of the Texas Constitution.]
Private Order of Additional Education of a Justice of the Peace (06/21/02)

The judge's arrest for suspicion of driving while intoxicated became publicly known in his community. Although no criminal charges were ever filed against him in connection with this incident, the judge admitted that he was in possession of an open container of beer at the time of his arrest. [Violation of Article V, Section 1-a(6)A of the Texas Constitution.] *Private Admonition of a Justice of the Peace (01/02/04)*

e. Display of Weapon. The judge, while traveling on a state highway at nighttime with his family, chased, stopped, and arrested another motorist based on his perception that the motorist had committed a traffic offense, and therefore presented a danger to other motorists. During the incident, the judge displayed a handgun for which he did not have a license to possess. [Violation of Article 5, Section 1-a(6)A of the Texas Constitution.] *Private Warning of a Justice of the Peace, (8/25/03)*

VI. CONCLUSION

Both the bench and the bar carry the responsibility of demonstrating high ethical standards. And just as a number of things in life, a reminder often helps the willing as well as the reluctant. For Respondent Attorneys, the field of juvenile law is fraught will numerous potential pitfalls if you are not prepared in the areas of law, ethics, and juvenile polices and practices. For the Prosecutors, you must be particular aware of your duty to disclose and restrictions on voicing personal opinions during the course of a trial. For Judges, we must be mindful that our ethical responsibilities apply to our pubic and private lives. We should demonstrate high ethical standards and encourage others do likewise. In conclusion, justice is served when it is done in an ethical manner. Thus, we should all strive for "ethical justice."

Author's Note:

The Texas Disciplinary Rules of Professional Conduct may be found Article X, Section 9 of the State Bar Rules, which is located in the Texas Government Code Tit.2, subtit. G, app. A. The Texas Rules of Disciplinary Procedure can also be found in Texas Government Code tit.2, subtit. G, app. A-1. Both set of rules are available on www.txethics.org and www.texasbar.com.

The Supreme Court of Texas began the public comment process for proposed changes to the Texas Disciplinary Rules of Professional Conduct. Some important changes are being proposed. Details are in the November 2009 *Texas Bar Journal.* The proposed changes may also be found at www.texasbar.com.

The Judicial Canons may be found in the Government Code tit.2, subtit. G, app. B. The canons and opinions may also be found at http://www.courts.state.tx.us/ and http://www.law.cornell.edu/ethics/**texas**.html.

Annotations to the rules and canon are available in such places as Westlaw (TX-Rules), Lexis (TX-Codes).

Additional Resources:

Texas Lawyers Professional Ethics, 4th Ed. [Austin, Tex: Texas Young Lawyers]

Handbook of Texas Lawyer and Judicial Ethics. (WestGroup, 2002)

Internet Resources:

American Legal Ethics Library, http://www.law.cornell.edu/ethics

Texas Center for Legal Ethics and Professionalism, http://www.txethics.org

ABA Center for Professional Responsibility, http://www.abanet.org/cpr/home.html