I. CLIENT-LAWYER RELATIONSHIP

A. Competent and Diligent Representation.

Rule 1.01. The rule is a little more specific than the former DR 6-101.

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or 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 circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail or carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Comment Six gives an elucidation as to what is Competent and Diligent Representation:

6. Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

1. Effective Assistance of Counsel, as set out in the cases.

a. Deceptive Trade Practice Act - Tort Standards.

The Texas Deceptive Trade Practices Act (DTPA) was enacted in 1973 to protect consumers from deceptive and fraudulent business practices. Tex. Bus. & Comm. Code Ann. sec. 17.41 et seq. (1973). The courts may construe "services" and "consumer" to include an attorney who sells legal services to a client. DeBakey v. Staggs, 605 S.W.2d 631 (Tex. Civ. App. Houston 1980), aff'd 612 S.W.2d 924 (Tex. 1981) (attorney failed to timely obtain a name change); Barnard v. Mecom, 650 S.W.2d 123 (Tex. Civ. App. - Corpus Christi 1983, no writ) (attorney retained client's settlement funds). Parker v. Carnahan, 772 S.W.2d 151 (Tex. Civ. App. - Texarkana 1989); Lucas v. Nesbitt, 653 S.W.2d 883 (Tex. Civ. App. - Corpus Christi 1983).

b. Constitutional Standard

The standard for retained and appointed counsel is the same: "Counsel reasonably likely to render and rendering reasonably effective assistance," Hurley v. State, 606 S.W.2d 887 (Tex. Crim. App. 1980); Hernandez v. State, 988 S.W.2d 770. (Tex.Crim. App. 1999) Strickland v. Washington, 462 U.S. 1105 (1984); Butler v. State, 716 S.W.2d 48 (Tx. Crim. App. 1986); Ex parte Roland Cruz, 739 S.W.2d 53 (Tex. Crim. App. 1987).
Cantu v. State 930 S.W.2d 594 (Tex.Crim. App.1996)

c. Test

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) Test for determining effectiveness of counsel is whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result. There is a strong presumption of reasonableness.

Defendant must also show that but for counsel's errors there is a reasonable probability the outcome would have been different.

d. Presumption in Favor of Counsel

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, *supra*; Hill v. Lockhart, 474 U.S. 52 (1984); Butler, *supra*; Ex parte Adams, 707 S.W.2d 646 (Tex. Crim. App. 1986).

e. Caveat for Specialist

It seems logical to assume that a certified specialist will be held to a higher standard, although there are no cases as yet. Such a holding could lead to unanticipated exposure. *See, e.g.*, Griffith vs. Kentucky, 107 S.Ct. 708 (1987), in which the Supreme Court of the United States held that any new constitutional rule of criminal law or procedure announced by the court will automatically be applied retroactively to all convictions on appeal or otherwise not yet final at the time of the Supreme Court decision. Therefore, is a certified criminal law specialist bound to know all criminal law issues pending before the Supreme Court of the United States so as to advise client to appeal in order to preserve the point for possible retroactive application of a favorable United States Supreme Court decision?

f. Additional Burden on Defendant to Show Harm.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error has no effect on the judgment. The defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, *supra*; Hill, *supra*; Butler, *supra*; and Ex parte Adams, *supra*.

(1) A criminal defense attorney's response to a client-defendant's intention to commit perjury, consisting of an attempt to dissuade the defendant from committing perjury and a threat to withdraw from the defendant's representation and disclose his perjury, are not ineffective assistance of counsel according to the two pronged test in Strickland, *supra*. *See also,* Nix v. Whiteside, 475 U.S. 157 (1986).

g. Preparation and Investigation of the Case.

(1) Knowledge of the Law.

As a general proposition, counsel's ignorance of applicable law, either prior appellate decisions or pivotal statutory provisions, will be held ineffective assistance of counsel. For a comprehensive and lucid discussion, *see* Clinton and Wice, Assistance of Counsel in Texas, 12 St. Mary's L. J. 1 (1980).

(2) Time Spent.

It is axiomatic that the brevity of time spent in consultation, without more, does not establish that counsel is ineffective. Jones v. Estelle, 632 F.2d 490, 492 (5th Cir. 1980).

(3) Duty to Investigate.

"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. 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). Failure to obtain DNA test results - counsel ineffective. Wisconsin v. Hicks - 549 N.W.2d 435 (Wis., June 25, 1996)

(4) Examples.

i. Reliance upon discussions with prosecutor, without more, is inadequate. Ex parte Raborn, 658 S.W.2d 602 (Tx. Crim. App. 1983). Butler vs. State, 716 S.W.2d 48 (Tex. Crim. App. 1986). Defense counsel must investigate law and facts and cannot rely on discussions with district attorney.

ii. If an appointed attorney requires the assistance of expert witnesses to prepare a defense which is strongly indicated under the facts, and government resources are available to pay for the expertise then it is a denial of effective assistance of counsel not to seek the expert assistance. *See* United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976), where the court stated: "When an insanity defense is appropriate and the defendant lacks the funds to secure private psychiatric assistance, it is the duty of his attorney to seek such assistance through 18 U.S.C. 3006A(3). "Where trial counsel fails to request the appointment of a psychiatrist at state expense, especially the appointment of a psychiatrist at state expense, especially when evidence of guilt is virtually uncontested and the only defense issue for development is the sanity of the accused at the time of the offense, trial counsel has been ineffective. Ex parte Duffy, 607 S.W2d 507, 520 (Tex. Crim. App. en banc 1980). It is not clear whether this would be considered ineffective in light of the court of criminal appeals decision in Hernandez v. State, 988 S.W.2d 770 (Tex.Crim.App. 1999)

iii. Appeal - Ex parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990). There is some authority that failure to file a PDR is ineffective assistance on appeal. Colorado v. Valdez, 789 P.2d 406 (Colo. 1990).

iv. Failure to pay Bar dues results in attorney suspension, trial counsel is not per se ineffective. Reese v. Peters, 926 F.2d 668 (7th Cir. 1991); Minnesota v. Smith, 464 N.W.2d 730 (Minn. App. 1991). However, see People v. Tin Trung Ngo, 44 Cal. Rptr. 2d 319 Calif. Ct.App. 6th Dist. 1995) - failure of attorney to maintain minimum CLE hours.

v. Representation by an attorney suspended by the State Bar is not per se ineffective. Cantu v. State, 930 S.W.2d 594, (Tex. Crim. App. 1996) (Baird, J. and Mansfield, J., concurring)

h. Duty to Communicate Plea Offers.

Failure to communicate a plea offer is ineffective counsel, per se, if defendant ultimately receives a higher sentence. Ex parte Wilson, 724 S.W.2d 72 (Tex. Crim. App. 1987).

i. Sleeping In and Out of Court

Sleeping through the client's capital murder trial is ineffective. McFarland v. Texas, 928 S.W.2d 482(Tex.Crim.App. 1996) Burdine v. Johnson 262 F.3d 336 (5th Cir. 2001)However, sleeping with client's wife without a show of prejudice is not. Hernandez v. State, 750 So.2d 50 (Fla. Dist Ct. App. 1999)

j. Staying for Trial

Counsel's two day absence from client's multi-defendant conspiracy to possess marijuana and cocaine with an intent to distribute and conspiracy to launder money was presumptively prejudicial U.S. v. Russell, 205 F.3d 768 (5th Cir 2000).

k. Advising Immigrant Clients

Although Texas has yet to address this directly. Trial counsel's failure to advise his immigrant client about the almost certain deportation as a result of plea was ineffective. People v. Sandoval, 86 Cal.Rptr.2d 431 (Cal. Ct. App. 1999)

l. Being on Time

An attorney was sanctioned by the District Court for being 25 minutes late. 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)

m. No mitigating evidence.

Counsel's choice to not present any evidence during the punishment hearing or make a closing argument did not constitute ineffective assistance of counsel. Counsel made the decision to present mitigating evidence during the guilt innocence phase and felt that a closing argument was not needed and would prevent a compelling rebuttal by the government. 2002 U.S. Lexis 4020; 05/28/02

B. Scope and Objectives of Representation.

1. What are the Bounds of the Law?

Rule 1.02. Widens the scope from DR7-101:

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions:

(1) concerning the objective and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;

(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Comment Seven - Criminal, Fraudulent and Prohibited Transactions:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means

by which a crime or fraud might be committed with impunity.

Comment Eight:

When a client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may not reveal the client's wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client's unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. *See* Rule 1.15(a)(1).

2. Some Case Law Examples:

a. 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 (hereinafter cited as PEN. C.).

b. 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. PEN. C. Art. 37.09.

c. Giving client advice to throw the gun in the river held to make a lawyer an accessory to the crime. Clark v. State, 261 S.W.2d 339, cert. den., 346 U.S. 855 (1953).

d. This rule broadens substantially the attorney's obligation to reveal what would otherwise be privileged information. Issue now is whether lawyer civilly liable to damaged third party who could have been warned by lawyer of client's fraudulent conduct. *See* Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976).

C. Rule 1.03 Communication with the Client.

A new rule in the State Bar Code which requires interaction:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment Two expands on the rule:

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.

D. Fees in General.

Rule 1.04 Fees

(a) A lawyer shall 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.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, 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.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deduced from the recovery, and whether such expenses are to be deduced before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer;

(ii) made with a forwarding lawyer; or

(iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation;

(2) the client is advised of, and does not object to, the participation of all the lawyers involved; and

(3) the aggregate fee does not violate paragraph (a),

(g) Paragraph (f) of this Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement

1. Unconscionability of Fees.

Obviously contingent fees and fee-splitting are the more important areas of coverage, but the vague definition of "unconscionable fee" is covered again in **Comment Seven**:

Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved.

a. Other Sources:

Note that the Code of Professional Responsibility does not list the client's ability to pay as a factor in determining what is a reasonable 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." *See* 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.

b. Burden of Proof:

Burden of proving that the fee is reasonable is on the attorney. Nolan v. Foreman, 665 F.2d 738 (5th Cir. 1982).

2. Fees Paid to Court-Appointed Attorneys Under Art. 26.05.

a. 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). 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).

b. In setting a "reasonable" fee under art. 26.05, the court may take into consideration time spent on legal research and investigation outside of the courtroom. Attorney General Op. H-909 (Dec. Dec. 14, 1976). In Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982), the court held that it is a violation of an attorney's Fourteenth Amendment due process rights to require said attorney to pay expenses incurred in indigent defense and that the said payment constitutes a "taking" of the attorney's property without just compensation.

c. Even in Texas, the client's consent is required before a referral fee can be made. Old Rule, DR 2-107(A) (1) expressly required the client's consent. *See also*, Fleming v. Campbell, 537 S.W.2d 118 (Tex. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.), holding that a referral fee contract was void and unenforceable because client had not been informed and had not consented.

3. Cash Fees.

Cash fees in advance must be deposited into trust account. All fees paid in advance are not yet earned by definition. Consequently, unless a lawyer had collected some kind of non-refundable retainer, any and all advance fees must be deposited into a trust account and withdrawn periodically as earned. Until earned, said advance fees belong to the client, and hence must be placed in a trust account. Texas State Bar Op. No. 391 (Feb. 1978; April 1978). Furthermore, an attorney may not keep the money in the trust account at interest and retain the interest himself. Texas State Bar Op. No. 404 (June 30, 1982). Note rule of criminal conduct on cash fees in excess of $10,000. (IRS form §8300).

Consequences of failure to report.

DeGuerin v. U.S., 214 F. Supp. 2d 726; 2002 U.S. Dist. LEXIS 15992; 2002-2 U.S. Tax Case. (CCH) P50,606; 90 A.F.T.R.2d (RIA) 5866 (S.D. Tex. 2002) Attorney must reveal the names of cash paying clients or pay the IRS. In a case involving the requirement to file a Form 8300 for all cash transactions greater than 10,000, the Court ruled that unless the attorneys can show that the names of the clients are protected confidential communications, they will be subject to IRS penalties.

4. Third Party Payment of Fees

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. Rule 1.08(e).

E. Confidentiality.

One of the major rules of the State Bar is Rule 1.05:

(a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) 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.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To 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.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

1. Communication Between Attorney and Client.

a. Definitions of Privileged Communication.

The privilege applies only when the person claiming the privilege has as a client consulted an attorney for the purpose of securing a legal opinion or services and not for the purpose of committing a crime or tort and in connection with that consultation has communicated information which was intended to be kept confidential. McCormick, EVIDENCE, Sec. 91 pp. 187-88 (Cleary ed. 1972).

Examples:

(1) The attorney-client privilege prohibits the disclosure of the substance of communications made in confidence by a client to his attorney for the purpose of obtaining legal advice. United States v. Pipkins, 528 F.2d 559 (5th Cir. 1974).

(2) The obligation of a lawyer to preserve the confidence and secrets of his client continues after the termination of his employment. Thus, a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.

b. Tests of Confidentiality.

(1) Evidentiary Test.

(a) Federal.

"A communication is protected by the attorney-client privilege -- and we hold today it is protected from government intrusion under the Sixth Amendment -- if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential. Thus, disclosure made in the presence of third parties may not be intended or reasonably expected to remain confidential. United States v. Melvin, 650 F.2d 641 (5th Cir. 1981).

(b) State.

Rule 503(b) Lawyer-Client Privilege, Tex. Rules of Criminal Evidence Effective 9/1/86: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional level services to the client and made: (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and his lawyers's representative, (3) by him or his representative or his lawyer or representative of the

lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the clients or between the client and a representative of the client or (5) among lawyers and their representatives representing the same client. A client has a privilege to prevent the lawyer or the lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship."

See Pittsburgh Corning Corporation v. Caldwell, 861 S.W.2d 423 (Tex. App.–Houston[14th Dist.] 1993), which holds that once it is established that a document contains confidential communication, attorney-client privilege extends to the entire document. Except in the rarest of circumstances, documents falling within the attorney-client privilege are not discoverable, even when interwoven with factual information.

Work product doctrine extends to statements made by the client to government agents while the attorney is present. Doe v United States, 282 F.3d 156 (2nd Cir. 2002) Attorney subpoenaed to testify before grand jury regarding statements made by former client to IRS. The court of appeals discussed the scope of the work product privilege and held that if the attorney's testimony was being sought to gather evidence for an existing case it was protected. However, if statements made by the client were false and the IRS were seeking new charges for making false statements, the attorney's testimony may not be protected.

c. Agents of Attorney.

(1) In appropriate circumstances the privilege may bar disclosures made by a client to non-lawyer who had been employed as agents of an accused.

(a) Secretaries, file clerks, telephone operators and messengers. United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961); 8 Wigmore, Evidence, Sec. 2301.

(b) Law student, paralegal or investigator. Dabney v. Investment Corp. of America, 82 F.R.D. 464 (E.D. Penn. 1979).

(c) Accountants. United States v. Kovel, *supra*. *See also*, Parker v. Carnahan, 772 S.W.2d 151 (Tex. App.–Texarkana 1989).

(d) Interpreters. United States v. Kovel, *supra*.

(e) Psychiatrist. United States v. Alverez, 519 F.2d 1036 (3d Cir. 1975). In a Texas case of first impression, Ballew v. State, 640 S.W.2d 237 (Tex. Crim. App. 1982), the Texas Court of Criminal Appeals held that although the attorney-client privilege extends to psychiatrists employed by the defense, said privilege is waived if the psychiatrists employed by the defense takes the stand and the notes made by the psychiatrist may become admissible as a part of the "recollection refreshed" rule. *See* concurring opinion by Judge Clinton in Ballew v. State, 640 S.W.2d 237, 244 (Tex. Crim. App. 1982). Subsequently, in Burnett v. State, 642 S.W.2d 765 (Ct. Crim. App. 1982) (en banc), the Court of Criminal Appeals unequivocally held that a recording of a conversation with the defendant made by a hypnotist employed by defense counsel was protected by the attorney-client privilege from discovery by the State.

(f) Polygraph Operator. Brown v. Trigg 791 F.2d 598 (7th Cir. 1986)

(2) Not all Disclosures to Third Persons Result in Waiver.

(a) Federal.

The rule of waiver does not apply if the third persons are associates or clerical staff of the attorney. Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949) *cert. denied*, 338 U.S. 860 (1949).

The rule of waiver does not apply in the case of communications made in the presence of potential co-defendants, co-defendants or their counsel in discussions of "team strategy." Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965); In re LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

The rule of waiver does not apply if the privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of communication. Hodges, Grant & Kaufman v. U.S. Government, Dept. of Treasury, I.R.S., 768 F.2d 719 (5th Cir. 1985).

(b) Texas:

The privilege does not apply to information that the client intends his attorney to impart to others. United States v. Pipkins, *supra*, at 563.

Disclosure of privileged materials by a defendant's lawyer "standing alone" is not dispositive of the issue of waiver and it does not create a "presumptive" waiver Carmona v. State, 941 S.W.2d 949 (Tex. Cr. App. 1997)

(3) Email Communications with Clients

ABA Committee on Ethics and Professional Responsibility

Formal Opinion 99-413

Protecting the Confidentiality of Unencrypted E-Mail

A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.

The Committee addresses in this opinion the obligations of lawyers under the Model Rules of Professional Conduct (1998) when using unencrypted electronic mail to communicate with clients or others about client matters. The Committee (1) analyzes the general standards that lawyers must follow under the Model Rules in protecting "confidential client information" n1 from inadvertent disclosure; (2) compares the risk of interception of unencrypted e-mail with the risk of interception of other forms of communication; and (3) reviews the various forms of e-mail transmission, the associated risks of unauthorized disclosure, and the laws affecting unauthorized interception and disclosure of electronic communications.

Possible statutory protection for intercepted email communications.

18 U.S.C.A. §§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter [18 UCS §§§§ 2510 et seq.] shall lose its privileged character.

Some type of notice of privilege on email communications, possibly a footer is recommended.

A sample:

INFORMATION CONTAINED IN THIS TRANSMISSION AND ALL ATTACHMENTS ARE INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE AND MAY CONTAIN LEGALLY PRIVILEGED AND/OR CONFIDENTIAL INFORMATION. IF THE READER OF THIS MESSAGE IS NOT THE

INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE PERMANENTLY DELETE THIS MESSAGE AND IMMEDIATELY NOTIFY US BY TELEPHONE.

(4) Matters that Attorney May Reveal.

(a) Communications made by client in presence of third parties. United States v. Blackburn, 446 F.2d 1089 (5th Cir. 1971).

(b) Identity of the client is not normally within the privilege. Frank v. Tomlinson, 351 F.2d 384 (5th Cir. 1965); In re Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 204 (5th Cir. 1981). Attorney identification of corporation later implicated in drug smuggling activities was not privileged information; there is no connection shown between attorney's establishment of corporation for unnamed client and that client's involvement, if any, in subsequent criminal activities).

Exceptions: Client's identity may be within the privilege when revelation of the name will implicate the client in the criminal offense concerning which the client sought the attorney's legal advice. United States v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977). *See also,* Matter of Fine, *supra* at 204

(c) Fact that client visited with attorney at a certain location at a certain time, e.g., State can force attorney to testify that client was in town on the day of the crime. Brasfield v. State, 600 S.W.2d 288 (Tex. Crim. App. 1980).

(d) Attorney may be questioned as to their client's whereabouts and whether they have had contact with them. Matter of Grand Jury Subpoenas Served Upon Filed, 408 F. Supp. 1169 (S.D.N.Y. 1976).

(e) Attorneys may be questioned regarding physical characteristics of the client, such as complexion, demeanor, dress, (intoxication?). United States v. Kendrick, 408 F. Supp 1169 (S.D.NY. 1976).

Exception: In Texas the attorney-client privilege prevents an attorney from testifying as to his impressions of his client's mental capacity. *See* Pollard v. El Paso Nat'l Bank, 343 S.W.2d 909, 913 (Tex. Civ. App. 1961); Gulf Production Co. v. Colquitt, 25 S.W.2d 989 (Tex. Civ. App. 1930).

(f) As a general rule matters involving receipt of fees from a client are not privileged. United States v. Haddad, 527 F.2d 537 (6th Cir. 1975), cert. den., 425 U.S. 974 (1976). In re Grand Jury Subpoena, 926 F.2d 1423 (5th Cir. 1991) the court held that an attorney could be required to disclose the identity of a client who had paid legal fees for three drug smugglers, where the payment of the fees appeared to be part of a continuing drug smuggling conspiracy. In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976), the court held that the payment of a fee is not a privileged communication since money itself is "nontestimonial."

(g) The Fifth Circuit has held that work papers and tax records used by an attorney to prepare his client's tax returns are part of an accounting service and therefore do not come within the attorney-client privilege. United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981), *cert. denied,* 454 U.S. 862 (1981). *See also*, United States v. Cote, 456 F.2d 142 (8th Cir. 1972).

(h) Texas Family Code Duty to Report:

Texas Family Code § 261.101.

(a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this Subchapter.

(b) If a professional has cause to believe that a child

has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

(c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

(1) as provided by Section 261.201; or

(2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

§§ 261.202. Privileged Communication

In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client.

d. Other Considerations.

(1) It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files, and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his client may be preserved. *See generally*, Former EC 4-5 and Former EC 4-6:

(2) . . . a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Former EC 4-5.

(3) "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." Former EC 4-6.

(5) FISA and Privileged Communications

28 C.F.R. §§501 permits the monitoring of attorney-client communications for inmates who are subject to special administrative measures based on a determination that unrestricted communication could result in death or serious bodily harm to others. The October 2001 amendment extended to this group of inmates only if the attorney general makes an *additional* finding that reasonable suspicion exists that a particular inmate may use communications with attorneys to further or facilitate acts of terrorism.

The procedure are as follows:

> First, unless officials have obtained a prior court order permitting surreptitious monitoring, the government must notify the prisoner and his or her attorney of monitoring;
>
> Second, no privileged information will be retained by those monitoring the

> conversations(the only information retained will be unprivileged information that refers to threats);
>
> Third, the regulation appears to dictate that there be no connection between the monitoring team and any ongoing prosecution involving the prisoner;
>
> Fourth, absent an imminent emergency, the government will have to seek court approval before any information from monitored conversations is used for any purpose; and
>
> Fifth, no information that is protected by the attorney-client privilege may be used for prosecution.

The alarming portion of the regulations is 28 C.F.R. §§ 501.3(d)(2) which allows monitoring of attorney-client communications without notice upon the issuance of an ex parte court order.

The NACDL has issued a formal opinion in which it takes the position that attorneys are ethically obligated to request notice of monitoring. The text of that opinion is as follows:

Formal Opinion 02-01: Monitoring of attorney-client communications

The opinion notes that the issue of official monitoring of attorney-client conversations is not new, whether during visits or telephone calls; hence there is no dearth of legal and ethical authority on the problem. The problem of monitored telephones in police stations, jails and prisons is well-known. The issue came to public notoriety, however, in late 2001 with publication of the Attorney General's regulations governing monitoring of attorney-client communications of detainees suspected of terrorism offenses. 66 Fed.Reg. 55062 (Oct. 31, 2002); 28 C.F.R. §§ 501.3(d). The adoption of the regulations, which purport to provide advance notice of warrantless electronic monitoring and a "privilege team" to ensure that valid attorney-client communications are not misused by investigators, has also raised concerns about how to deal with secret court-ordered Title III and Federal Intelligence Surveillance Act (FISA) surveillance of such communications. Many members recall that when the proposed regulations were published for public comment in the Federal Register Oct. 31, 2001, it was audaciously announced that the regulations were already in effect. The Justice Department, however, did allow for a 60-day public comment period. NACDL immediately appointed an ad hoc committee to draft its response, which is posted on NACDL's Web site www.nacdl.org under the Defending Attorney-Client Privilege tab of the "News and Issues" section. In drafting Opinion 02-01, the Ethics Advisory Committee endorsed and reaffirmed the ad hoc committee report.

It is the view of NACDL that such monitoring infringes defendants' First and Fourth Amendment rights, and probably most importantly, the Sixth Amendment rights to effective assistance of counsel and a fair trial. Moreover, lawyers, and criminal defense lawyers in particular, have the among the highest duties of loyalty and confidentiality to their clients of any profession.

Recommendations

In general, the opinion advises, when an attorney has a reasonable suspicion that his or her communications with clients in custody are being monitored by government officials, it is NACDL's position that the attorney must take affirmative action to safeguard confidential communications, because once the attorney or the client learns of the monitoring, the relationship is chilled and the Sixth Amendment is violated. "Accordingly, the criminal defense lawyer has a duty to seek to end the surveillance, discover the true extent of it, and find a remedy for what has already happened," in order to protect the client's Sixth Amendment rights.

"The [Sixth Amendment] right of the accused to a fair trial is undermined by actions of the government which interfere with the [Sixth Amendment] right to counsel," the opinion continues. "Thus, surreptitious monitoring of

attorney-client conversations ultimately interferes with the right to a fair trial. Counsel not armed with the full facts from his or her client is seriously disadvantaged at trial to the prejudice of the client and the 'truth-seeking function' of a trial. Uninformed counsel is ineffective counsel, and, if the government is the cause of counsel being uninformed, the accused has been denied his fundamental right to a fair trial."

The other type of monitoring criminal defense lawyers need to be mindful of is monitoring pursuant to a judicial electronic surveillance order issued pursuant to the federal wiretap act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510 et seq.) or the Foreign Intelligence Surveillance Act. NACDL members have recently reported that they have asked the government whether their attorney-client conversations are under electronic surveillance in jail, and the government's response has been that they are "not under surveillance under §§ 501.3(d)." Since electronic surveillance orders are by nature sealed, not unlike unexecuted search warrants, the government does not answer whether attorney and client are under court-ordered electronic surveillance.

"Our opinion on this issue is the same as with jail monitoring in general: a criminal defense lawyer must seek disclosure of whether the government is wiretapping or eavesdropping on attorney-client jail communications.... Counsel should seek relief from the courts to assure confidentiality of attorney-client communications. Counsel should argue that past abuses by the government, coupled with attorney-client confidentiality and privilege under the Sixth Amendment, make secretly wiretapping and eavesdropping on attorney-client communications unconstitutional."

On the other hand:

Indicted attorney's request for notice as to whether the government is engaging in surveillance of attorney client communications relating to herself, her co-defendants or her other clients was denied by the district court. U.S. v. Sattar, 314 F.Supp.2d 279 (S.D.N.Y. 2004)

In refusing the request the court said [Title III and FISA] "allow for surveillance without prior notification precisely because such monitoring can often only be effective if the targets are unaware that they are being monitored."

(6) Procedural Aspects.

(a) Assertion of the privilege.

i. Federal: The privilege belongs to the client, not the attorney, In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975); Wirtz v. Fowler, 372 F.2d 315, 332, n. 37 (5th Cir. 1966). *Cf.*, United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973) (though Ponder court did not give this rule as a reason, it held for other reasons that an attorney could not claim in response to IRS summons of his personal financial records that the number and size of the legal fees he had received from clients were confidential). *But see*, Fisher v. United States, 425 U.S. 391 (1976) where the Court acknowledged that the privilege may be raised by the attorney.

ii. Texas: The attorney-client privilege is personal to the client. Cruz v. State, 586 S.W.2d 861 (Tex. Crim. App. 1979); Burnett v. State, 642 S.W.2d 765 (Tex. Crim. App. 1982).

(b) Burden of Proof.

i. Federal: The burden of proof to demonstrate an attorney-client relationship is on the person asserting the privilege. C. McCormick, Evidence, Sec. 88, p. 179 (Clery ed. 1972), cited in United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978). Burden of proof to disprove waiver of privilege is also on party claiming the privilege. Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 24 (9th Cir. 1975). *See also,* VIII J. Wigmore, Evidence Sec. 2292 p. 554 (McNaughton rev. 1961). However, *see* Pavlick, *infra*:

Where the government makes a prima facia showing that an agreement to furnish legal assistance was part of a conspiracy, the crime or fraud exception applies to deny a privilege to the identity of him who foots the bill - and this even though he be a client of the attorney and the attorney is unaware of the improper arrangement. Such an arrangement, of course, need only be an effective one, need not be expressed, and might in a proper case be found to arise. In re Grand Jury Proceedings in the Matter of Pavlick, 680 F.2d 1026 (5th Cir. 1982).

It seems that even cursory investigations by inside counsel may be subject to the crime-fraud exception. For example, where corporate counsel communicated with employees regarding their immigration status while they were not authorized to work in the United States; these mere communications were held to be "in furtherance" of criminal activity. Therefore the Court held that the communications were subject to disclosure under the crime fraud exception. In re: Grand Jury Proceedings (Appeal of the Corporation) 87 F.3d 377 (9th Cir. 1996)

ii. Texas:

The party claiming the existence of the privilege must show that the confidential communication was made when the relation of attorney and client in fact existed. Cruz v.State, 586 S.W.2d 861 (Tex. Crim. App. 1980); Jackson v. State, 516 S.W.2d 167 (Tex. Crim. App. 1974); Frost Nat'l Bank v. Mitchell, 362 S.W.2d 198 (Tex. Crim. App. 1962); Hurley v. McMillan, 268 S.W.2d 229 (Tex. Crim. App. 1954); Simmons Hardware Co. v. Kaufman, 8 S.W. 283 (1888); Flack's Adm'r v. Neill, 26 Tex. 273 (1862).

e. Question of Law.

(1) Federal: Existence of the privilege is for the court to determine, without the intervention of a jury. Rule 104(a), F.R.Evid.

(2) Texas: "The questions of privilege and waiver . . . were for the trial court to determine and not for the relator as a witness." Ex parte Lipscomb, 239 S.W. 1101, 1103 (Tex. 1922).

f. Procedure for Federal Judicial Review of Attorney-Client Privilege Claims in Summons and Subpoena Situations.

An order enforcing an IRS summons under 26 U.S.C. Sec. 7602 is appealable. Claims of privilege are ordinarily not heard at this stage, but such claims with respect to documents are permitted in the 5th Circuit. United States v. Davis, 636 F.2d 1028, 1039 (5th Cir. 1981).

An order enforcing a grand jury subpoena or compelling testimony is not appealable. In re Grand Jury Proceedings (Fine), 641 F.2d 199, 201 (5th Cir. 1981).

Claims of privilege are usually litigated at contempt proceedings for refusal to testify and the most common method of review of such orders is by appeal of the contempt order. United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 29 L.Ed. 85 (1971).

Attorney/client privilege and Fifth Amendment do not bar government deposition of attorney as a witness in a property forfeiture. U.S. V. Saccoccia, 63 F.3d 1 (1st Cir. 1995)

The 5th Circuit recognizes a unique procedure for judicial review of privilege claims where the attorney is unwilling to risk contempt. In such cases, the anonymous 3rd party client - the real person interested in claiming the privilege - may intervene in the enforcement proceedings. The order of enforcement is immediately appealable by the client-intervenor. In re Grand Jury Proceedings in Matter of Fine, *supra,* at 201-202.

Of course, the aggrieved client can always move at his subsequent trial for exclusion of any evidence obtained in violation of his statutory or constitutional rights. United States v. Ryan, *supra,* at 532, n. 3.

Partial disclosure equals waiver: In Re: Columbia/HCA Healthcare Corporation Billing

Practices, 293 F.3d 289, (6th Cir. 2002). Sixth Circuit ruled that despite the existence of a confidentiality agreement between the company and the government, disclosed materials were not shielded from discovery in litigation brought by private parties.

F. Conflicts of Interest: General Rules.

This rule adopts the language of Rule 1.7 of the ABA Model Rules of Professional Conduct.

Rule 1.06 Conflict of Interest: General Rule.

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), 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 law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the extent, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Comment Two elaborates on loyalty:

A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term "opposing parties" as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests. Paragraphs (b) and (c) express that

general concept.

1. Representing Co-Defendants Where There is a Conflict of Interest is a Violation of the Right to Effective Assistance of Counsel Guaranteed by the Sixth Amendment.

a. The mere fact that one lawyer represents more than one co-defendant does not automatically establish a conflict of interest. Burger v. Kemp, 483 U.S. 776(1987). However, in a capital murder case since the procedure for imposing the death penalty focuses on subjective considerations of the individual offender, representing co-defendants in such a case has been held to be per se ineffective counsel by the California Supreme Court in People v. Chacon, 73 Cal. Rptr. 10, 447 P.2d 106 (S.Ct. Cal. 1968), and the Texas Court of Criminal Appeals in Ex parte McCormick, 645 S.W.2d 801, 806 (Ct. Crim. App. 1983) (en banc) has strongly suggested that it may, itself, also hold at the next opportunity.

b. Most courts utilize the "substantial relationship test" In resolving conflict of interest issues relating to former clients. In Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir. 1981), *cert. denied*, 454 U.S. 895, 102 S.Ct. 394 (1981), the Court held:

> Thus, to disqualify his former counsel, the moving party must prove not only the existence of prior attorney-client relationship but also that there is a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary. The party seeking disqualification is not required, however, to point to specific confidences revealed to his former attorney that are relevant to the pending case. Instead, he "need only to show that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him." Wilson P. Abraham Const. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977); In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); T.C. Theater Corp. v. Warner Bros. Pictures, 113 F.Supp. 265, 268 (S.D.N.Y. 1953).

Party seeking disqualification of opposing counsel bears the burden of proving "substantial relationship". Once established, the court will irrefutably presume that relevant confidential information was disclosed. In re American Airlines, Inc., AMR, 972 F.2d 605 (5th Cir. 1992). Denial of a motion to disqualify is not an appealable collateral order, and the standard of review on appeal is abuse of discretion. In re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992). *See also* Insurance Co. of North America v. Westcapden, 794 S.W.2d 812 (Tex. App.–Corpus Christi 1990); NCNB Texas National Bank v. Coker, 765 S.W.2d 398 (Tex. 1989).

c. Nothing in the Sixth Amendment requires trial courts, themselves, to initiate inquiry into the propriety of multiple representation. Absent special circumstances, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accepted such risk of conflict. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980). Limitation: Conflict between lawyer's personal interests and those of client may not be as clear. See Beets v. Collins, 986 F.2d 1478 (5th Cir. 1993).

d. However, trial of a defendant without adequate representation by counsel is fundamentally unfair and the requisite government involvement for Fourteenth Amendment purposes is present whether or not the responsible governmental official is aware of the conflict. Stephens v. United States, 595 F.2d 1066, 1069 (5th Cir. 1979); Cuyler

v. Sullivan, 446 U.S. 335 (1980).

e. In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, *supra*; Gonzalez v. States, 605 S.W.2d 278, 282 (Tex. Crim. App. 1980); Ex parte Parham, 611 S.W.2d 103 (Tex. Crim. App. 1981) (en banc); Slater v. State, 646 S.W.2d 528, 531 (Tex.App. 1 Dist. 1982); Simons v. State, 805 S.W.2d 519, 521 (Tex. App.--Waco 1991).

f. Once the defendant demonstrates that his counsel had a conflict of interest and that said conflict adversely affected the lawyer's performance, he need not demonstrate any specific prejudice to obtain relief. Cuyler, *supra*; Gonzalez, *supra*; Ex parte Parham, *supra*; Calloway v. State, 699 S.W.2d 824 (Tex. Crim. App. 1985).

g. The Sixth Amendment may arise from conduct of the governments attorneys.The defendant's case was remanded for an evidentiary hearing in U.S. v. Amlani, 111 F.3d 705 (9th Cir. 1997) when the prosecutor repeatedly made disparaging remarks about the defendant's counsel in front of him. The prosecutor allegedly made statements to the defendant and his wife that his defense counsel did not care about him, was incompetent, and could not prevent the defendant's conviction. The Court held that if the prosecutor truly made these statements to the defendant and the defendant acting on those comments retained different counsel for trial then this conduct constituted a violation of the defendant's Sixth Amendment right and the defendant's conviction should be vacated.

2. Examples:

a. A and B, co-defendants to murder, represented by same court-appointed lawyer. Testimony developed that B may have perpetrated the actual killing, but the lawyer was prevented from exploiting that testimony to mitigate A's case, because the more he mitigated A's case, the harsher B's case appeared. Under these circumstances the prejudice was obvious and the case was reversed. Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975); Ex parte Parham, 611 S.W.2d 103 (Tex. Crim. App. 1981) (en banc).

b. Where trial counsel represents all parties charged with joint possession of a large quantity of marijuana and trial counsel puts one of said parties on the witness stand and elicits testimony that inculpates other defendants likewise represented by said counsel, there is both a conflict of interest and a showing that said conflict adversely affected the lawyer's performance and the case is reversed. Gonzalez v. State, 605 S.W.2d 278 (Tex. Crim. App. 1980). but see also: **Gaston v. State**, 136 S.W.3d 315, Tex. App. –Houston [1st Dist] 2004)

c. Where defendant's attorney concurrently represents a prosecution witness at trial, or where attorney has previously represented such witness on other occasions, there is a conflict of interest and a showing that said conflict adversely affects performance. United States v. Martinez, 630 F.2d 361 (5th Cir. 1980).

d. A lawyer representing a murder defendant may stay on a s counsel even though the defense will include pointing the finger at a key state witness whom the same lawyer defended in a criminal case a decade earlier. Daniels v. State, 17 P.3d 75(Alaska, Ct. App. 2001)

3. Other Examples:

a. County attorney's disqualification to defend criminal cases extends to his partners and

associates in all courts throughout the state whether privately employed or court appointed. Tex. Op. No. 323 (Oct. 1966).

b. Where an attorney is a city judge and also a member of a law firm, it would be improper for him or another member of his firm:

(1) To represent civil litigants in a suit ancillary to criminal proceedings determined by him in his capacity as a city judge.

(2) To represent defendants in a criminal action in another court where the arresting officers are city policemen.

(3) To represent Civil Service employees of the city at hearings before the Civil Service Commission of the city.

(4) To represent defendants convicted in the city court upon appeal to a higher court.

(5) In the context of a small or medium-sized county prosecutor's office, the issue of whether a prosecutor must recuse himself if he somehow was involved in the defense of the accused before his employment with the District Attorney's Office, arises in an en banc decision of the Court of Criminal Appeals, State ex rel. Eidson v. Edwards, 793 S.W.2d 1 (Tx. Crim. App. 1990).

In that case, the judge of the 104th District Court of Taylor County, Texas, disqualified the entire District Attorney's Office "to avoid the appearance of impropriety." The trial court judge felt this was a proper response in light of the fact that an Abilene attorney, who was appointed by the trial judge to represent the defendant in several cases, and did so for several months until the attorney was appointed judge of the County Court at Law No. 2 of Taylor County, withdrew from representing Clayton and later resigned being judge and then became employed by Eidson as an assistant district attorney.

The **issue** was whether the trial judge was authorized to grant the motion to disqualify Eidson and his entire staff from prosecuting the defendant. The Texas Court of Criminal Appeals felt that by preventing the Taylor County District Attorney and his entire staff from participating in the prosecution, the trial court had constructively removed the District Attorney from his elected office with respect to that particular case. The court felt that only under narrow, statutorily defined circumstances may a trial court remove a district attorney and his office. "If there is a conflict of interest on the part of the district attorney or his assistants, however, the responsibility of recusal lies with them, not with the trial court judge." Id. at 6. The Court of Criminal Appeals goes on to note that they are not in any way saying that Texas prosecutors are immune from the Code of Professional Responsibility. They distinguish in Footnote No. 6 at Page 6 that "[T]here is quite a difference in the relationship between lawyers working in private law firms and lawyers representing the State." The American Bar Association Committee of Professional Ethics recognizes that:

> [T]here are substantial reasons against treating the State as a private enterprise. The Committee has ruled that other Government lawyers should not be disqualified from handling matters in which an associate was involved in his or her former private practice. The Committee concluded that when an individual attorney is separated from any participation in matters affecting his former client, the vicarious disqualification of a Government department is not necessary or wise.

Id.

Several useful points are raised in the Eidson dissent beginning at Page 7. Beginning with an analyzation of the difference between **disqualifying** and **removing** an office or a particular lawyer, and also touching on a point hinted at during the case opinion, but not fully discussed: to wit, Chinese Walls.

4. "Chinese Walls"

A "Chinese Wall" is a device erected by a law firm intended to "quarantine" a new member with confidential information received from an adversary of one of the firm's clients. On the civil side of Texas law lies an important case, Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295 (Tex.App.-- Dallas, 1988, no writ). The facts of the case are succinctly summarized in the concurrence of Wadley Blood Bank v. Morris, 776 S.W.2d 271, 284 (Tex.App.--Dallas 1989, no writ):

> If during the course of the same litigation, Lawyer I (the lawyer complained about) departs from Firm I, which is involved in the representation of Client I (the offended party), and if Lawyer I then affiliates with Firm II (the firm sought to be disqualified), which is involved in the representation of Client II (adversary in the same litigation), the mere affiliation between Lawyer I and Firm II acts as an automatic disqualification of Firm II to participate in the litigation. A "Chinese Wall" between Lawyer I and Firm II will not remedy the situation. **The reason**: the rule or policy against dual representation has been breached. Public policy forbids the relationship.

Most Texas cases have consistently taken the position that Chinese Walls will not be recognized. It seems, however, that in the **criminal law context**, after the Eidson case that if the new prosecutor does not discuss the case with anyone else in the office and no one is allowed to discuss it in his presence, that this lack of participation equals a "Chinese Wall" sufficient to block off the appearance of impropriety. *See* the facts of Eidson, 793 S.W.2d at 3.

> The Court does not wish to imply that a defendant would be left without recourse if the prosecution's failure to recuse itself violated his due process rights. If, for example, a prosecutor who had previously represented a defendant, later personally prosecuted the defendant in the same matter, the defendant's conviction would violate the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Texas Constitution.

Id. at 6. *See also*, Indust. Accident Bd. v. Spears, 790 S.W.2d 55 (Tex.App.--San Antonio 1990, n.w.h.). Turbin v. Navajo County Superior Court, 797 P.2d 734 (Ariz.App. 1990); 48 Crim. L. Rep. (BNA) 1076.

It would be improper for the attorney to hear cases as city judge where the party involved is or has been a client of the firm. Tex. Op. No. 116 (Sept. 1955). It is improper for an attorney who is mayor or member of the city council to practice in municipal court or to represent defendants in criminal cases initiated by police from the city where the attorney holds office. Tex. Bar Comm. Op. No. 382 (1975). Query: What about county commissioners in county court or representing defendants in cases made by the sheriff's office?

c. Conflict of interest where defense attorney carries on covert intimate relationship with Defendant's wife during murder

trial. California v. Singer, 275 Cal. Rptr. 911 (Cal. App. 1. Dist. 1990)

d. Classic conflict where defense counsel represents both the defendant and the defendant's wife who is the beneficiary of the victim's life insurance policy. McConico v. Alabama, 919 F.2d 1543 (11th Cir. 1990)

e. Conflict created by non-attorney (staff member). Occidental Chemical Corp. v. Brown, 877 S.W.2d 27 (Tex. App.--Corpus Christi 1994).

f. District Attorney can prosecute a criminal case where an Assistant D.A. is the complainant and fact witness. Stanley v. State, 880 S.W.2d 219 (Tex. App.--Ft. Worth 1994).

g. Client who gives attorney a bad check or stolen goods does not create a conflict of interest per se so as to avoid a plea. DeLoro v. State, 712 S.W.2d 805 (Tex. App.–Houston[1st Dist.] 1986).

5. Potential Conflict of Interest Can Be Waived By Co-Defendants.

If each client consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent and professional judgment on behalf of each client, then the lawyer may represent the multiple parties to the offense. Old DR 5-105(C).

The Texas Court of Criminal Appeals has held that the right to conflict-free counsel may be waived, if done so knowingly and voluntarily. Ex parte Prejean, 625 S.W.2d 731 (Tex. Crim. App. 1981); Juarez v. State, 677 S.W.2d 285 (Tex.App. 1 Dist. 1984). The waiver of the right to conflict-free counsel should include a showing that the defendant is aware of the conflict of interest, realizes the consequences of continuing with said counsel, and is aware of his right to obtain other counsel. Id.

Consider the example of several police officers charged with numerous illegal acts and all represented by the same attorney. Trial judge refused to proceed, feeling that there was a conflict between the interests of the several defendants. Defendants insisted on being represented by the same attorney. Held: Reversed. "If defendants may dispense with the right to be represented by counsel altogether . . . it would seem that they may waive the right to have their retained counsel free from conflicts of interests." United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

6. Procedure in Trial Courts.

a. State Courts

Unless a state trial judge knows or reasonably should know that a particular conflict exists, *cf*. Wood v. Georgia, 450 U.S. 261, 272 (1981), the federal constitution does not require a state trial judge to sua sponte inquire into the existence of any potential or actual conflicts due to multiple or successive representation. Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980); Calloway v. State, 699 S.W.2d 824 (1985). The Texas Courts have repeatedly held that trial counsel was the primary responsibility for advising the prospective clients of possible conflicts of interests in their positions. Gonzalez v. State, 605 S.W.2d 278 (Tex. Crim. App. 1980); Pete v. State, 533 S.W.2d 808 (Tex. Crim. App. 1976). Where, however, an attorney or the client timely objects to multiple or successive representation a state trial judge must make an inquiry into the existence of any such conflict and take appropriate measures to ensure that effective assistance of counsel is not impaired due to an actual conflict. Holloway v. Arkansas, 435 U.S. 475, 482 (1978); Cuyler v. Sullivan, *supra*.

An actual conflict exists if "counsel's

introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981). *See also*, Annotation, Multiple Representation of Defendants in Criminal Cases as Violative of the Sixth Amendment Right to Counsel - Federal Cases, 65 L.Ed.2d 907-983 (1980). The Texas Courts have held that an actual and significant conflict of interest exists where "one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing." Ferguson v. State, 639 S.W.2d 307 (Tex. Crim. App. 1982); Amaya v. State, 677 S.W.2d 159, 162 (Tex. App. 1 Dist. 1984).

b. Federal Courts

Although the constitutional considerations stated above are fully applicable to federal courts, the federal courts have historically placed a duty upon federal trial judges to ensure that defendants are afforded conflict-free counsel. *See* Notes of Advisory Committee on Rules, 1979. That duty was codified in 1979 in Rule 44(c), Federal Rules of Criminal Procedure, which states:

Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The Fifth as well as the Fourth and Eleventh Circuits have held that even where a trial court fails to comply fully with the mandate of Rule 44(c), a defendant must still demonstrate an actual conflict of interest before an alleged Sixth Amendment violation will result in a reversal. *See* United States v. Arias, 678 F.2d 1202, 1205 (4th Cir. 1982), *cert. denied*, 459 U.S. 910, 103 S.Ct. 218 (1983); United States v. Benavidez, 664 F.2d 1255, 1258-59 (5th, Cir), *cert. denied*, 457 U.S. 1121 (1982), United States v. Alvarez, 696 F.2d 1307, 1309-10 (11th Cir.), *cert. denied*, 461 U.S. 907, 103 S. Ct. 1878 (1983). These opinions recognize that the inquiry and advice provided for by Rule 44(c) are not ends in themselves, but a procedure designed to prevent conflicts of interest. This interpretation of Rule 44(c) is consistent with Holloway, *supra* and Cuyler, *supra*. However, *see* Cole v. White, 376 S.E.2d 599, 44 Crim. L. Rep. (BNA) 2350 (1989) where West Virginia Appellate Court in interpreting their state's Rule 44(c) equivalent held that the trial court's failure to give warnings about joint representation requires a new trial if conflict "likely" existed.

The most important issues embodied within Rule 44(c) are: (1) what action the trial court can take to protect each defendant's right to counsel; and (2) whether the Government can initiate a Rule 44(C) hearing. The answers to these issues are discussed below in connection with disqualification of defense counsel.

7. Disqualification of Defense Counsel

a. Federal Prosecutor's Motions To Disqualify Defense Counsel.

The Federal Government has embarked upon a course of conduct designed to thwart a client's constitutional right to counsel and his right to waive his right to conflict-free counsel. *See* Margolin & Culver, Pretrial Disqualification of Criminal Defense Counsel, 20 AM. Crim. L. Rev. 227 (1982) (hereinafter cited as M&C, *supra*). The

Government's attempts have occurred during grand jury investigations. *See e.g.*, In re Gopman, 531 F.2d 262 (5th Cir. 1976); In re Grand Jury, 536 F.2d 1009 (3rd Cir. 1976); and cases cited at M&C, *supra* at 234 n. 37 and accompanying text. The Government's attempts have also occurred after indictment but prior to trial. *See e.g.*, United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Mahar, 550 F.2d 1005 (5th Cir. 1977); United States v. Agosto, 675 F.2d 965 (8th Cir. 1982).

While Rule 44(c), discussed above, certainly applies to a post-indictment, pretrial situation, thereby mandating that trial courts make appropriate inquiries into the existence of conflicts of interest, it is not clear that Rule 44(c) applies to grand jury proceedings. Yet, the absence of specific statutory authority under Rule 44(c) has not deterred prosecutors or the courts from disqualifying defense counsel who attempt to represent witnesses or targets summoned before grand juries. In re Gopman, *supra*, illustrates the problem. There, the Fifth Circuit held that, based on alleged conflicts of interest, the government had standing to move to disqualify an attorney who represented certain labor unions and official of those unions who were summoned before the grand jury. The Fifth Circuit also held that federal district judges have jurisdiction to consider governmental motions to disqualify. The Fifth Circuit went on to uphold the district court's order disqualifying the attorney and noted that the attorney "had placed himself in a situation where conflicting loyalties could affect his professional judgment." Id. at 267. The Court noted the importance of a client's sixth Amendment right to counsel of his choice, but added that it must yield to an overriding public interest. Id. at 268. The Court concluded by stating:

"We hold only that the public interest in a properly functioning judicial system must be allowed to prevail in the case presently before us. Appellant had placed himself in a clear conflict situation from which the district court had the duty to rescue both the lawyer and his clients."

Id. at 268.

While there may be logic to the Gopman analysis, it is difficult to reconcile that analysis with the Sixth Amendment right to counsel and the right to waive conflict-free counsel.

In the context of post-indictment, pretrial motions to disqualify, a defendant's waiver of conflict-free counsel and his right to counsel of his choice should prevail. In the context of grand jury investigations, however, a witness has no Fifth or Sixth Amendment right to counsel. *See e.g.*, Miranda v. Arizona, 384 U.S 436 (1966); Kirby v. Illinois, 406 U.S. 682 (1977). Thus, since it is impossible to waive a right you do not possess, logically a witness should not rely upon a waiver of the right to conflict-free counsel as a device to overcome a motion to disqualify his counsel at the grand jury. *See* Rule 44(c), Federal Rules of Criminal Procedure.

b. Consistent with the Sixth Amendment, a District Court has great latitude in refusing waivers of conflict of interest not only in cases where actual conflict is demonstrated, but also where potential conflict may burgeon into actual conflict as the trial progresses. Wheat v. U.S. 108 S. CT. 1692 (1988). However, state constitutions may be used to grant greater rights than the U.S. Constitution, and may limit the trial court's power to disqualify counsel because of conflict. Alcocer v. Superior Court, 206 Cal. App. 3d 951, 254 Cal. Rptr. 72 (Cal. App. 2 Dist. 1988), 44 Crim. L. Rep. (BNA) 2284.

c. A government's motion for disqualification of defense counsel may not be grounded on appearance of impropriety. A showing of an actual conflict of interest is required. U.S. v. Washington, 797 F.2d 1461 (9th Cir. 1986); McFarlan v. District Court, 718 P.2d 247 (Colo.

1986).

d. Appealability of Motions To Disqualify Defense Counsel.

As of February 21, 1984 an order disqualifying a defense attorney from representing a witness or target before the grand jury or from representing a defendant under indictment is not immediately appealable under 28 U.S.C. sec. 1291. Flanagan v. United States, 104 S.Ct. 1051 (1984). Flanagan resolved the prior conflict among the circuits as to this issue.

The issue of whether the government may appeal a denial of a motion for disqualification is still unresolved. Although the Supreme Court has held that there is no right to appeal an order denying a motion for disqualification in a civil case, pursuant to 28 U.S.C. sec. 1291, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), the Court declined to express any view on the appealability of such an order in a criminal case. Firestone, *supra* at 372 n. 8. *See also* In re Dresser Industries, *supra*.

8. Tactical Considerations: Evaluation of Facts.

a. Do the facts permit the attorney to fashion a consistent defense for both potential clients?

If not, no multiple representation should be attempted. United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973) (Retained attorney represented D1 and D2 in a conspiracy to distribute amphetamine prosecution. D1's only possible defense was entrapment, and attorney pursued this line. Entrapment unavailable to D2 since he never dealt with law enforcement personnel. Held: D2 had ineffective counsel).

b. Do the facts suggest possible inconsistent defenses?

(1) If not, multiple retainer is possible. Courtney v. United States, 486 F.2d 1108 (9th Cir. 1973) (Retained attorney represented D1 and D2 in obstruction of justice prosecution. Both testified as to same facts regarding discussions with complaining witness); United States v. Valenzuela, 521 F.2d 414 (8th Cir. 1975) (Retained attorney represented D1 and D2 in possession of stolen property prosecution. Both relied on alibi defenses).

(2) If facts suggest possible inconsistent and consistent defenses, relative strengths of each must be evaluated.

9. Tactical Considerations: Trial Tactics

a. Will the attorney be able to adequately examine all witnesses on behalf of both clients?

(1) U. S. ex rel. Horta v. DeYoung, 523 F.2d 807 (3rd Cir. 1975) (Retained attorney represented D1-D3 in an unlawful lottery prosecution. Government witnesses testified males were present at lottery operation. Held: Counsel ineffective as to D3, a female. Counsel failed to pursue distinction with witnesses and failed to ask for cautionary instructions).

(2) Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) (Appointed counsel represented D1 and D2 in murder prosecution. Government medical witness suggested victim died from beating. D2 was not involved in beating victim. Motives established for D1 and another defendant only. Held: Counsel ineffective as to D2. Counsel failed to pursue distinction).

b. Will the attorney be able to

effectively respond to events during course of trial?

(1) Larry Buffalo Chief v. State of South Dakota, 425 F.2d 271 (8th Cir. 1970) (Retained attorney represented D1 and D2 in murder prosecution. Unanticipated testimony of only disinterested witness failed to identify assailants as wearing light colored shirts. D2 wore dark long sleeved coat. Court effectively returned case to state court to clarify a confused record).

(2) Craig v. United States, 217 F.2d 355 (6th Cir. 1957) (Retained counsel represented D1 and D2 in tax fraud prosecution. No apparent conflict when trial began. Government witnesses testified about some transactions with D1 which occurred prior to D2's involvement. Counsel failed to pursue the distinction. Held: Counsel ineffective as to D2).

G. Conflicts of Interest: Prohibited Transactions

There are many areas that a Texas lawyer must avoid, and they are set out in State Bar Rule 1.08. Texas is stricter than the ABA model rules 1.8(d) regarding literary rights, but more expansive on advanced litigation costs [1.8(e) ABA]. But, this new version reflects the old DR 5-104 generally. Note prohibition of aggregate pleas in Section f.

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses, and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

A lawyer shall not acquire an interest in publication rights prior to conclusion of the case. Case remanded to investigate allegation that lawyer acquired interest in right to publish books, plays, or movies about the case in question. Such financial interest may cause the attorney to deliberately compromise the client's interest in order to further the financial success of the books, plays, or movies. Defendant contends that his attorney "forced" him to plead guilty so that the "full story" could be released for the first time in a movie instead of in the courtroom. Ray v. Rose, 491 F.2d 285 (6th Cir. 1974); U.S. v. Hearst, 638 F.2d 1190 (9th Cir. 1980).

1. Rule 1.08(h) Retaining Lien for Unpaid Fee.

a. Risky.

"[A]ny lawyer contemplating retaining possession of a client's property, papers or money should be cognizant of the possibility that his action may be deemed unethical if enforcement of the lien foreseeably prejudices the client's legal rights." Tx Ethics Op. No. 411 Jan. 84 Tx. Bar J. p. 47.

b. Otherwise Lawful.

Legal authority for retaining lien by attorney who has made demand for payment exists in this states subject to above limitation. Tx. Ethics

Op. No. 411 Jan. 84 Tx. Bar J. p. 47. *See also*, Sales, Client Files and Attorney's Liens: The rule in Texas, Tx. Bar J. p. 510 May 1984.

2. Prior Representation as a Conflict

What to do when the government witness against your client is a former client? "Substantial relationship test:, i.e., is the matter on trial so substantially related to the prior representation that there is a conflict because there is no chance that information gained through one relationship would not be used in the new relationship.

See Duncan v. Merrill, Lynch, Etc. 646 F.2d 1020 (5th Cir. 1981); Wheat v. United States, 108 S.Ct. 1692 (1988). Actual transfer of attorney/client information that could be used to the detriment of the former client. United States v. Agosto, 675 F.2d 965 (8th Cir. 1982). What about if a partner or associate is the one who participated in the prior representation? United States v. Varca, 896 F.2d 900 (5th Cir. 1990). *See also* Davis v. Stansbury, 824 S.W.2d 278 (Tex. App.--Houston[1st Dist.] 1992).

Sometimes the Court saves us from ourselves. Mickens v. Taylor 122 S. Ct. 1237; 152 L. Ed. 2d 291(2002). In a capital case, trial counsel did not reveal his prior representation of the victim to his client, co-counsel or the trial judge. On habeas review the district court and court of appeals held that the Petitioner showed no harm. The Supreme Court ultimately had the last word when it held *in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance*.

H. Organization as Client

The State Bar has adopted a new rule for areas of group representation such as banks and corporations. Remedial actions should first be taken within the organization (*cf*., Rule 1.12(b) & (c).

Rule 1.12 Organization as a Client.

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal

procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(d) Upon a lawyer's resignation or termination of the relationship in compliance with rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

1. <u>The comments assist the Texas lawyer to interpret this new Rule 1.12</u>.

a. The Entity as the Client:

Comment 1: A lawyer employed or retained to represent an organization represents the organization as distinguished from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. The fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

Comment 2: As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officers, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization, such as an unincorporated association, union, or other entity.

Comment 3: When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

b. Sarbanes Oxley Act: Disclosure

Section 307 of the Act now 15 USCA 7245 introduced a very controversial provision affecting lawyers. The Act compels the SEC to adopt new rules of professional conduct applicable to attorneys practicing before it in any way in the representation of issuers.

The text of 15 UCS §§ 7245 is as follows:

> Not later than 180 days after the date of enactment of this Act [enacted July 30, 2002], the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule--
>
> > (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
> >
> > (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

In response the SEC has proposed rule 205 to reflect the requirements of 307 in 67 Fed. Reg. 71670, 71673 to be codified at 17 C.F.R. pt. 205. The proposed rule incorporates several corollary provisions that are not explicitly required by section 307.

Section 205.3(b) codifies an attorney's duty to report when he becomes aware of information that would lead a reasonable attorney to believe a material violation has occurred, is occurring, or is about to occur. The attorney is required to report the material violation to the issuer's chief legal officer or chief executive officer. The CLO or CEO is obligated to determine whether the report has any merit, and if it does, to remedy the situation. If the CLO or CEO find that the report does not have merit, then they must report their findings to the attorney. An attorney only fulfills their obligations once they receive an appropriate response within a reasonable time and has taken reasonable steps to document his or her report and the response to it has satisfied his or her obligations under the rule. An attorney who does not receive an appropriate response, or believes that reporting the violation to the CLO or CEO is futile, must report the violation to the issuer's audit committee or a subcommittee of the board of directors containing independent directors or to the full board. The attorney is also required to document the response, or absence thereof.

Proposed rule 205.3(d) outlines the obligations of both outside and in-house attorneys who report material violations and do not receive an appropriate response. An outside attorney who does not receive an appropriate response is required to withdraw from representation, notify the SEC of their withdrawal on the basis of "professional considerations," and disaffirm any submission to the SEC that they have participated in that may be tainted by the violation.

Rule 205.3(d)(4), provides protection to an attorney, whether outside or in-house, who reasonably believes was discharged because they fulfilled their reporting obligations. Under the proposed protection provision, the attorney may report their discharge to the SEC without violating the attorney-client privilege, presumably based on

the whistleblower protections provided by 806 of the Act.

Section 602 of the Act, now 15 U.S.C. 78d-3, provides the SEC with the authority to "censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission" (for, among other reasons, willful violation or willful aiding and abetting the violation of the securities law or the rules and regulations issued thereunder).

c. Clarifying the Lawyer's Role:

Comment 4: There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Comment 5: A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06. If the organization's consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

See In re Office Products of America, Inc., 136 B.R. 983 (W.D. Tex. 1992). Attorney owes allegiance to the entity, not to any person connected with the entity.

II. LAWYER AS COUNSELOR

In keeping with the ABA model rules, the Texas State Bar has adopted the new Rule 2.01:

A. Rule 2.01 Lawyer as Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment Five adds some more generalities to this already basic rule regarding the offering of advice:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

B. Imputed Disqualification of Fellow Attorneys:

For lawyers in firms, a prohibited transaction will keep the rest of the lawyers in the firm from handling the case. *See*, Rules 1.06(f), 1.07(e), 1.08(i), 1.09(b).

III. LAWYER AS ADVOCATE

The Texas State Bar has written in a new rule specifically to deal with dilatory practices of the Bar.

A. Rule 3.02 Minimizing the Burdens and Delays of Litigation

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

Comment Three deals with Unreasonable Delay:

Dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be "unreasonable" within the meaning of this Rule. *See also,* Rule 1.01(b) and (c) and paragraphs 6 and 7 of the Comment thereto. This Rule, however, does not require a lawyer to eliminate all conflicts between the demands placed on the lawyer's time by different clients and proceedings. Consequently, it is not professional misconduct either to seek (or as a matter of professional courtesy, to grant) reasonable delays in some matters in order to permit the competent discharge of a lawyer's multiple obligations.

B. Rule 3.03 Candor Towards the Tribunal

Rule 3.03 covers the difficult area of Perjury.

(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.

1. The comments provide further help in this touchy area.

Comment 9: Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering perjurious testimony or other false evidence, there has been dispute concerning the lawyer's duty when that persuasion fails. If the

confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

Comment 10: The proper resolution of the lawyer's dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer's resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, the lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Comment 11: Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

The answer seems to be in **Comment Twelve**:

Comment 12: The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take reasonable remedial measure which may include revealing the client's perjury. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury other than falsification of evidence. *See* Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983).

2. Perjury Problem.

a. No Definitive Solution in this State. "It may be seen that there is no accepted solution to the problem of the perjurious client. The question is not whether the appellant's attorneys followed the only acceptable course, for no such course is established." Maddox v. State, 613 S.W.2d 275, 283 (Crim. App. 1981).

b. What to Do if Counsel Anticipates Perjury.

(1) Head it off at initial interview, i.e., "anything you tell me is privileged. But, I can reveal information about a crime you are planning in the future, like perjury. So if you try to lie on the stand, I can reveal that. Now, I don't think that you would lie, but I want you to know that I will investigate what you tell me, and in fairness, you should know how the attorney-client privilege works."

(2) If client insists on testifying falsely does the 6th amendment require the lawyer to call the client to the stand? ABA Formal Opinion 87-353 (4/20/87) says "no"; and *see* Nix v. Whiteside, 106 S.Ct. 988, 998 (1986); "Whatever the scope of the right to testify, it is elementary that

such a right does not extend to testifying falsely" (emphasis the court's).

Notion of allowing client to testify in narrative form expressly rejected in ABA Formal Opinion 87-353 (4/20/87), *but cf.,* Maddox v. State, 613 S.W.2d 275, 284 (Crim. App. 1981): "We hold that the appellant was not deprived of effective assistance of counsel when he was permitted to testify in narrative form rather than in answer to questions from his attorney."

Revealing a client's perjurious testimony to the court outside the presence of the jury does not necessarily require the attorney to withdraw from representation. People v. DePallo,96 N.Y.2d 437 (Ct. App. 2001).

(3) Apparently, attorney can ethically reveal client's intent to commit perjury if client insists on testifying falsely. ABA Ethics Opinion 353 so states and *see* Helton v. State, 670 S.W.2d 644 (Tex. Crim. App. 1984) holding that counsel acted properly by advising court, out of jury's presence, that he could not question a witness whom defendant insisted be called, because lawyer believed that witness would commit perjury.

c. What To Do When Perjury is Not Anticipated.

(1) Make an effort to cause the witness to recant.

(2) Do not develop the perjury further either through questions or through jury argument, doing so violates DR7-102 (A) (4) id.

(3) Some authority that lawyers should reveal to court if client refuses to rectify, but not clear; *see* Nix vs. Whiteside, 106 S.Ct. 988 (1986) holding no violation of 6th amendment when defendant`s lawyer reveals anticipation of perjury to the trial court; *but cf.*, old DR 4-101 (C)(3) giving a lawyer the option to reveal his client's intention to commit a crime in the future. ABA Formal Opinion 87-353 (4/20/87) states that failing to reveal the unrectified perjurious event amounts to assisting the client to commit perjury, therefore, lawyer must reveal. This ABA opinion is based on Model Rule 3.3(b), not adopted in Texas, *but cf.,* old DR 7-102 (A)(7) containing similar language. *See*, Jackson v. United States, 928 F.2d 245 (8th Cir. 1991), 49 Crim. L. Rep. (BNA) 1004.

d. Real World before Rule 3.03. Maddox v. State, *supra*, provides real world guidelines for testimonial perjury: (a) when counsel is not told directly of contemplated perjury, a Motion to Withdraw is not justified by mere conjecture; (b) when counsel is told of contemplated perjury before trial, he may seek to withdraw, but the court should not be advised of the attorney's reason for so doing either directly or indirectly, but by using a Motion to Withdraw based upon "vague ethical considerations"; (c) when counsel learns of contemplated perjury during trial, for his own protection, and simultaneously, to preserve the attorney/client privilege, he should make a confidential notation, ideally signed by the client and witnessed by another attorney of his efforts to dissuade the client from committing perjury. Counsel should not inform trial court of the situation because of attorney/client privilege. Federal: *see* U.S. ex rel. Wilcox v. Johnson, 555 F.2d 115 (3rd Cir. 1977).

e. Quashing indictments. An attorney for the defense is not required to point out defects in an indictment prior to trial. Op. No. 131, Texas Ethics Committee, June, 1956. However, failure to point out the defect may waive any jeopardy claim. "(Mid-trial objection waives) protection of the double jeopardy clause when . . . objections to the indictment are sustained." United States v. Kehoe, 516 F.2d 78 (5th Cir. 1975).

f. Note, however, Art. 1.14(b), Tex. Code of Crim. Proc. which states, "If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post conviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code."

g. Motion for instructed verdict. Still necessary to preserve certain error in Federal (note: FRCP Rule 29). In state, remember Art. 36.02, Tex. Code of Crim. Proc. which provides "The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears necessary to a due administration of justice". (emphasis added) Sufficiency of evidence is of constitutional dimension and can be raised for the first time on appeal with no objection necessary to preserve error. Burks v. U.S. 437 U.S. l (1978); Greene v. Massey 437 U.S. 19 (1978).

h. Fundamentally defective charge. *See* Rodriguez v. State, 758 S.W.2d 787 (Tx. Crim. App. 1988).

i. Useful discussion with numerous practical examples of "bounds of the law." Zunker, Zealous Representation Within the Bounds of the Law, 47 Tex. B. J. 530 (May 1984).

C. Handling Evidence, Physical or Otherwise.

Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

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

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

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

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

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

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

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

(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 urge 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.

These new rules are essentially the same as DR 7-106 and DR 7-109.

1. Handling Incriminating Physical Evidence

a. Lawyer's rights and obligations the same as those of the client.

Problems in how to deal with physical evidence may be analyzed by placing the attorney "in the shoes of the client" i.e., the attorney has roughly the same privileges to deal with the evidence as the client has. For example, a client has the privilege against self-incrimination, and cannot be made to say anything incriminating. Consequently, the attorney, himself, has a privilege of confidentiality and cannot be forced to reveal what his client tells him, e.g., the location of physical evidence. However, the police can enter the defendant's home or office and search for physical evidence if they have probable cause. Since the purpose of a lawyer is to protect the rights which the law grants to the accused, and not to give the accused additional rights, physical evidence should not be hidden from the State by being placed in the lawyer's possession. Consequently, an attorney may be obligated to turn incriminating physical evidence in his possession over to the prosecution, or to withdraw from the case if the client refuses to agree to this tactic. Consider the following examples:

(1) Attorney removed money and shotgun used in robbery from client's safe deposit box and placed in his own safe deposit box. Attorney suspended. In re Ryder, 263 F.Supp. 360 (E.D. Va. 1967).

(2) "The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.) . . . It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution . . . The State, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests. State ex rel. Sowers v. Olwell, 394 P.2d 681 (Wash. 1964).

(3) Where the client delivered stolen items to the attorney's receptionist, neither the attorney nor his receptionist could be required to divulge the source of the stolen items which the attorney forwarded to the prosecution, and in order for the attorney-client privilege to be meaningfully preserved, the prosecution cannot introduce into evidence the fact that they received the items from the attorney's office. Anderson v. State, 297 So.2d 871 (Fla. 1974).

(4) Although the attorney is obligated to turn the physical evidence, itself, over to the State, any information obtained by the attorney or the attorney's investigator during the course of the investigation that leads to the finding of the evidence (e.g. the location and physical position of the evidence at the time it is discovered) is privileged and need not be revealed. However, there is an exception to this rule,if in removing the evidence, the attorney or the attorney's investigator thus forever precluded the State from making the same discovery (as to a case where incriminating evidence is removed from the scene of the crime). In such event the testimony of the attorney or of the investigator as to the location and physical placement of the evidence at the time it was removed is not privileged and the attorney or the investigator may be called to testify about same. People v. Meredith, 631 P.2d 46, 175 Cal. Rptr. 612 (S.Ct. Cal. 1981).

(5) Attorney's instructions to client by phone, "Get rid of the weapon and sit tight, and don't talk to anyone and I will fly down in the morning."was not a privileged statement.". . .No shield such as the protection afforded to communications between attorney and client shall be interposed to protect a person who takes counsel on how he can safely commit crime." Clark v. State, 261 S.W.2d 339 (Tex. Crim. App. 1953).

(6) Defense attorney received incriminating physical evidence from a friend of the defendant. Held: Attorney obligated to turn the evidence over to the prosecution. Morrell v. State, 575 P.2d 1200 (S.Ct. Alaska 1978); Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. S.Ct. 1985).

(7) Accountant's working papers, delivered to attorney by client in a tax fraud case, can be reached by government subpoena. Fisher v. United States, 425 U.S. 391 (1976).

b. Federal Rule.

(1) Rule 16(b) of the FEDERAL RULES OF CRIMINAL PROCEDURE requires the defendant to permit inspecting and copying of documents, tangible objects, examinations and tests which he has in his possession or control and intends to introduce as evidence in chief at trial, if the defendant requests disclosure of the same items. Rule held constitutional in United States v. Bump, 605 F.2d 548 (10th Cir. 1979).

(2) Rule 12.1 of the FEDERAL RULES OF CRIMINAL PROCEDURE requires a written notice of his intention to offer a defense of alibi if prosecutor makes written demand which states time, date and place at which the alleged offense was committed. The notice must state the specific place or places and names and addresses of witnesses.

(a) Trial court did not abuse discretion by barring alibi witnesses because of defendant's untimely response to the government's requests for notice. The opinion noted the defendant's refusal to cooperate with appointed counsel. United States v. Barron, 575 F.2d 752 (9th Cir. 1978).

(b) Failure to know address does not alleviate duty to disclose. United States v. White, 583 F.2d 899 (6th Cir. 1978).

D. Rule 3.05 Maintaining Impartiality of Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) "Matter" has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that entity will be so selected.

Old DR 7-110(B) (2) and (3) provided: "In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except: in writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer. [or] Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer." Note that the Disciplinary Rules of the Code of Professional Responsibility are quasi statutory materials, Touchy v. Houston Legal Foundation, 417 S.W.2d 625 (Tex. Civ. App. - Waco 1967), rev'd on other ground, 432 S.W.2d 690, appeal after remand, 475 S.W.2d 604, writ ref'd.

In a recent Texas case, the appellate court vacated the sentence and remanded the cause for further sentencing and ordered the appointment of a new judge to hear the sentencing where the prosecutor had tendered to the judge and the judge had accepted a document containing information about the defendant and the motorcycle gang to which the defendant belonged. All of this was without the knowledge of the defense counsel and when defense counsel learned of the booklet the judge refused counsel the right to review the document. The appellate court pointed out that the court's reception of the evidence ex parte violates the State Bar of Texas's Rules of Professional Responsibility DR 7-110(B) (1) and (2) and violates the State Bar of Texas' Rules and Code of Judicial Conduct, Canon No. 3A(4) (1983). Tamminen v. State, 644 S.W.2d 209, 217 (Tex.App.--San Antonio 1983). Although, later the State's highest court overturned this remedy of remand and order of further proceedings as too severe; while affirming the basic conviction. *See*, 653 S.W.2d 799, 802-3 (Tex.Crim.App. 1983) (echoing, however, the Fourth Ct. App. findings with respect to the reprehensible conduct of the prosecutor and intolerable behavior of the trial court judge). *See also* Elbaor v. Smith, 845 S.W.2d 240 (Tex. 1992), Regarding "Mary Carter" agreements.

See also, State v. Barker, 420 N.W.2d 695, 227 Neb. 842 (Neb. Sup. Ct. 1988). The Nebraska Supreme Court vacated and remanded the defendant's sentence holding that the sentencing judge should have recused himself as requested by the defendant following the judge's ex parte contact with members of the victim's family.

E. Rule 3.06 Maintaining Integrity of Jury System

(a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror; or

(2) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected or any juror or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(e) All restrictions imposed by this Rule upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(f) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

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

Note: New State Bar Rule 3.06 expands old rules which used to cover this area in the ethical considerations (E.C.'s).

F. Rule 3.07 Trial Publicity

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;

(3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation;

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

1. Lawyer's First Amendment Rights are Abridged When Acting as Counsel.

a. First Amendment rights may be abridged when the expression threatens a significant state interest. An attorney may be disciplined for speech if it interferes with the State's significant interest in the process of administration of justice. NAACP v. Button, 371 U.S. 415 (1963).

b. Examples.

(1) In order to encourage a finding of insanity, defense counsel released information to newspapers regarding the horror and brutality of the murders committed by his client. 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)

(2) 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.

(3) Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991). Rule which prohibits an attorney from making extra judicial statements that a reasonable person would expect to be disseminated by public communication if the attorney knew or should have known that the statements would have a substantial likelihood of materially prejudicing the trial does not violate the First Amendment.

(4) Sanctions: see Susman Godfrey L.L.P. v. Marshall, 832 S.W.2d 105 (Tex. App.--Dallas 1992).

(5) When lawyer's comments violate local rules governing statements to media. U.S. v. Cutler, 58 F,3d 825 (2nd Cir. 1995)

2. When Not Acting as Counsel, a Lawyer Retains His First Amendment Rights.

a. A lawyer issued a press statement criticizing the judge and the district attorney for dishonest and unethical conduct in a criminal case where the lawyer was charged with a crime. The Federal District Court in the Northern District of Texas permanently enjoined the grievance committee from issuing a reprimand. The court stated: "It cannot be seriously asserted that a private citizen surrenders his right to freedom of expression when he becomes a licensed attorney in this state."Polk v. State Bar of Texas, 374 F.Supp. 784 (1974).

b. The prosecutor's action in criticizing a trial judge at a post-trial press conference ("The actions of the judge were unethical, illegal and grounds for reversible error") did not violate any disciplinary rule, but is questionable conduct under EC 8-6. State Bar of Texas Opinion 369 (Nov. 1974).

c. Note: New rules hold prosecutor responsible to prevent persons employed or controlled by the prosecutor (i.e. police witnesses) from making an extrajudicial statement that the prosecutor would be prohibited from making. Rule 3.09(e).

G. Rule 3.08 Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in

opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Comments:

Comment 1: A lawyer who is considering accepting or continuing employment in a contemplated or pending adjudicatory proceeding in which that lawyer knows or believes that he or she may be a necessary witness is obligated by this Rule to consider the possible consequences of those dual roles for both the lawyer's own client and for opposing parties.

Note that the old DR would prohibit a lawyer from taking the stand to impeach a witness. Accordingly, counsel is wise to avoid talking with witnesses in the absence of a bystander. However, a 1926 Texas case (prior to enactment of the Code) holds that defense counsel is a proper witness in a criminal case to impeach with a prior inconsistent statement that testimony has been offered by the prosecution witness. Shannon v. State, 284 S.W. 586 (Tex. Crim. App. 1926). *See also*, Harrison v. State 788 S.W.2d 18 (No. 1048-89, (Tx. Crim. App., 1990); Stanley v. State, *supra*.

The first time the Texas Supreme Court has recognized a new State Bar Rule in a case: Rule 3.08 -- Ayres v. Canales, 790 S.W.2d 554 (Tex. 1990).

H. Rule 3.09 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

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

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the

accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

1. Codification of Prosecutorial Ethical Standards

Standards of ethical conduct for prosecutors are codified in several different sources:

a. Article 2.01, TEX. CODE CRIM. PROC. ANN.: "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secret witnesses capable of establishing the innocence of the accused." Note that it is the primary duty "to see that justice is done" that distinguishes the prosecutor's role from that of the defense attorney in the adversary system.

b. Old Code of Professional Responsibility. Only portions of the Code of Professional Responsibility specifically applied to prosecutors. The Old Ethical Consideration 7-13 provided:

"The responsibility of a public-prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt."

c. American Bar Association Project on Standards for Criminal Justice: Standards Relating to the Prosecution Function and the Defense Function (approved draft, 1971). This volume contains a complete dialogue relating to the responsibilities and ethical duties of both prosecution and defense.

d. National Prosecution Standards (National District Attorneys Association), (Chicago 1977). Standard 25.1 of the National Prosecution Standards, enacted by the prosecutors themselves, applies the Code of Professional Responsibility to prosecutors:

"A. To insure the highest ethical conduct and maintain the integrity of prosecution and the legal system, the prosecutor shall be thoroughly acquainted with and shall adhere to at all times to the Code of Professional Responsibility as promulgated by the American Bar Association and as adopted by the various state bar associations.

B. Of the greatest importance to the functioning of the prosecutor is the ability to exercise the 'independent professional judgment' of Canon 5. The prosecutor shall be afforded the discretion necessary to exercise 'independent professional judgment' and this judgment shall be tempered by strict adherence to the Code of Professional Responsibility."

In a civil case where a police officer brought a suit against the San Francisco District Attorney's Office for refusing to proceed on cases he investigated. The prosecutors concluding that the officer had given false testimony in a prior case, refused to proceed on his cases without independent

corroboration of the facts that were the basis of his cases. The prosecutors were granted summary judgment in the officer's suit for damages and injunctive relief against them. On appeal the 9th Circuit held that a prosecutor is entitled to absolute immunity for the decision not to prosecute. Roe v. City and County of San Francisco, 109 F.3d 578 (9th Cir. 1997)

e. No affirmative duty on prosecutor to furnish information on prospective jurors where information is available to defense on voir dire. Linebarger v. State, 469 S.W.2d 165 (Tex. Crim. App. 1971); Enriguez v. State, 429 S.W.2d 141 (Tex. Crim. App. 1968); Martin v. State, 577 S.W.2d 490 (Tex. Crim. App. 1979); Redd v. State, 578 S.W.2d 129 (Tex. Crim. App. 1979). In Armstrong v. State, 897 S.W.2d 361 (Tex. Crim. App. 1995), the court held that prospective juror whose husband was best man in prosecutor's wedding and prosecutor was best man at her wedding, and was treasurer of campaign fund for prosecutor, but failed to disclose information in light of non-specific questions, was not reversible error.

f. The State of Texas has recently codified the special responsibilities of the prosecutor. Under Art. 56.08. of the Texas Code of Criminal Procedure the prosecutor has certain duties to the complaining witnesses and crime victims including the following:

(a) Not later than the 10th day after the date that an indictment or information is returned against a defendant for an offense, the attorney representing the state shall give to each victim of the offense a written notice containing:

(1) a brief general statement of each procedural stage in the processing of a criminal case, including bail, plea bargaining, parole restitution, and appeal;

(2) notification of the rights and procedures under this chapter;

(3) suggested steps the victim may take if the victim is subjected to threats or intimidation;

(4) notification of the right to receive information regarding compensation to victims of crime as provided by Subchapter B of this chapter, including information about:

(A) the costs that may be compensated under Subchapter B of this chapter, eligibility for compensation, and procedures for application for compensation under Subchapter B of this chapter;

(B) the payment for a medical examination for a victim of a sexual assault under Article 56.06 of this code; and

(C) referral to available social service agencies that may offer additional assistance;

(5) the name, address, and phone number of the local victim assistance coordinator;

(6) the case number and assigned court for the case;

(7) the right to file a victim impact statement with the office of the attorney representing the state and the pardons and paroles division of the Texas Department of Criminal Justice; and

(8) notification of the right of a victim, guardian of a victim, or close relative of a deceased victim, as defined by Section 508.117, Government Code, to appear in person before a member of the

Board of Pardons and Paroles as provided by Section 508.153, Government Code.

(b) If requested by the victim, the attorney representing the state, as far as reasonably practical, shall give to the victim notice of any scheduled court proceedings, changes in that schedule, the filing of a request for continuance of a trial setting, and any plea agreements to be presented to the court.

(c) A victim who receives a notice under Subsection (a) of this article and who chooses to receive other notice under law about the same case must keep the following persons informed of the victim's current address and phone number:

(1) the attorney representing the state; and

(2) the pardons and paroles division of the Texas Department of Criminal Justice if after sentencing the defendant is confined in the institutional division.

(d) An attorney representing the state who receives information concerning a victim's current address and phone number shall immediately provide that information to the community supervision and corrections department supervising the defendant, if the defendant is placed on community supervision.

I. Frequently Encountered Instance of Conflict Between Prosecutor Conduct and Ethical Standards

1. Dealing with Unrepresented Criminal Defendants.

Does an assistant district attorney have a duty to advise an unrepresented criminal defendant with whom he deals to secure legal representation?

a. Old DR 7-104(A) (2) stated: "During the course of his representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of his client." New Rules: Rule 4.03; Rule 3.09(c).

b. For a complete discussion of this problem, *see* Henvey, "The Ethics of Prosecutors Dealing with Unrepresented Criminal Defendants," VOICE FOR THE DEFENSE (Spring 1976).

The defendant's case was remanded for an evidentiary hearing in U.S. v. Amlani, 111 F.3d 705 (9th Cir. 1997) when the prosecutor repeatedly made disparaging remarks about the defendant's counsel in front of him. The prosecutor allegedly made statements to the defendant and his wife that his defense counsel did not care about him, was incompetent, and could not prevent the defendant's conviction. The Court observed that the crucial issue was not whether the defendant's counsel was present, although his absence further aggravates the behavior of the prosecutor. The Court ultimately held that if the prosecutor truly made these statements to the defendant and the defendant acting on those comments retained different counsel for trial then this conduct constituted a violation of the defendant's Sixth Amendment right and the defendant's conviction should be vacated.

2. Holding Private Parleys with the Court about Pending Cases.

"A person commits an offense if he privately addresses a representation, entreaty, argument or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an

intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law." Art. 36.04(a), TEX. CODE ANN. Query: Is a private parley with the court "authorized by law"?

3. Failure to Disclose Mitigating Evidence.

a. Old DR 7-103(B) required disclosure 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." *But cf.*, United States v. Bagley, 473 U.S. 667, 682, 105 Sup. Ct. 3375, 3383 (1987) wherein the court held that there was no reversible error unless the evidence withheld by the prosecutor was such that it produced a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Thus, the DR, patterned after Brady is no longer in tune with the legal test for reversibility.

b. Old EC 7-13 provided that "with respect to evidence and witnesses, the prosecutor has responsibilities different from those of the lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."

c. Section 3.11 of the ABA Standards Relating to the Prosecution Function provides:

"(a) 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 that 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.

(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the defense."

d. Standard 13.2(c) of the National Prosecution Standards requires the prosecutor to disclose "any material or information within his actual knowledge and within his possession and control which tends to negate or reduce the guilt of the accused pertaining to the offense charged. "For a further discussion of Brady violations by prosecutors, *see* Rosen, Richard A., "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger,: 65 N.C. L. Rev. 693 (1987).

Failure of prosecutors to disclose precise terms of plea agreements the state had with key witnesses, coupled with inaccurate statements in the state's closing argument about the agreements and the witnesses's motives for testifying, violated the state's obligation under Brady v. Maryland, 373 U.S. 83 (1963) Wilson v. State, Md., No. 650-2000, 3/9/01.

e. Ex parte Lewis, 587 S.W.2d 697 (Tex. Crim. App. (1979), holds that prosecutor's failure to disclose favorable evidence before entry of plea negated knowing and intelligent plea.

f. Although not soliciting false evidence, if the State allows false evidence to go uncorrected, there is a failure of due process. Napue v. Illinois, 360 U.S. 264 (1959).

g. When an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the State as

a part of the prosecution team. Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979).

h. Court alludes to repeated warnings to government attorneys who fail to comply with Brady. United States vs. Starusko, 729 F.2d 256 (3rd Cir. 1984).

i. United States v. Bagley, 105 S. Ct. 3382 (1985). Changes standard on appeal for remedy for prosecutor suppression of Brady material. No reversal "unless failure to disclose provides reasonable probability that result would have been different".

j. United States v. Blueford,279 F.3d 1084 (9th Cir. 2001). Prosecution asking the jury to infer that the defendant had fabricated his alibi in certain telephone calls with witnesses in the weeks before the trial, when in fact the government had evidence contradicting its assertions, warranted reversal and a new trial.

4. Improper Communication with Discharged Jurors: Old DR 7-108(D); New Rules: Rule 3.06(d).

After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

5. Prosecutor a Witness (see also rule 3.08) Prosecutor who was arresting officer but had become a prosecutor by the time of trial was allowed to testify. He was not the prosecutor trying the case and the Court of Criminal Appeals said that the dual role did not affect a substantial right of the Appellant. Tex.Crim.App. No 1380-04, (6/15/05)

6. Prosecutors may not pursue different theories in separate trials of co-defendants Use of two conflicting theories concerning the identity of the shooter to convict both the Defendant and accomplice was prosecutorial misconduct. Stumpf v. Mitchell, 6th Cir. No. 01-3613

J. Remedies for Prosecutor's Unethical Conduct

1. Need for Action: Over 50 years ago, Roscoe Pound recognized the problem:

"The number of new trials for grave misconduct of the public prosecutor which may be found in the reports throughout the land in the past two decades is significant. We must go back to the seventeenth century . . . to find parallels for the abuse and disregard of forensic propriety which threatens to become staple in American prosecutors."

For a thorough discussion of disciplinary action taken against prosecutors for professional misconduct while performing various aspects of the prosecution function, *see* Annotation: Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney, 10 ALR 4th 605. Steele, Unethical Prosecutors and Inadequate Discipline, 38 SW L.J. 965 (1984).

The Hyde Amendment. 18 U.S.C. §3006A In 1997, Congress enacted the Hyde Amendment in response to perceived instances of prosecutorial abuse by the United States. The provision that a district court may award attorney's fees and other costs to a prevailing defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith. United States v. Knott, 256 F.3d 20, 28 (1st Cir. 2001); United States v. Gilbert, 198 F.3d 1293, 1299-1303 (11th Cir. 1999)

2. Tattle-Tale DR. Old DR 1-103(A); New rule 8.03 requires a lawyer possessing

unprivileged knowledge of a violation of any disciplinary rule should report such knowledge to the proper tribunal.

"The integrity of the profession can be maintained only if conduct of lawyer in violation of disciplinary rules is brought to the attention of the proper official. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyer which he believes clearly would be in violation of the disciplinary rules." Old EC 1-4, State Bar of Texas Code.

IV. NON-CLIENT RELATIONSHIPS

A. Rule 4.01 Truthfulness in Statement to Others

In the course of representing a client, a lawyer shall not knowingly:

> (a)make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

This new rule adopting of ABA Model Rule 4.1 provides that as to any third-person, a lawyer cannot make false statements or fail to disclose a material fact, as the comments explain:

False Statements of Fact

Comment 1: Paragraph (a) of this Rule refers to statements of *material* fact. Whether a particular statement should be regarded as one of *material* fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim are viewed merely as negotiating positions rather than as accurate representation of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

Failure to Disclose A Material Fact

Comment 3: Paragraph (b) of this Rule also relates only to failures to disclose *material* facts. Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. Failure to disclose under such circumstances is misconduct only if the lawyer intends thereby to mislead.

Comment 4: When a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer's services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of

these rules require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be "necessary" only if the lawyer's attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also, Rule 1.05.

B. Rule 4.02 Communication with One Represented by Counsel

Note: The language of (c) explains an important distinction:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

1. District Attorney interviewed defendant without attempting to obtain consent of defendant's court appointed attorney. The issue raised: Does a violation of a Disciplinary Rule constitute a violation of State law? The court ruled that when it comes to interpreting this issue in light of Art. 38.23 (the exclusionary rule of the C.Cr.P.) the Code of Professional Responsibility is not considered state law, and violation thereof will not bar introduction of that evidence at trial. Pannell v. State, 666 S.W.2d 96 (Tex. Crim. App. 1984)(en banc).

2. A defendant can negotiate with an Assistant District Attorney just minutes before giving a videotaped confession, in apparent violation of Old DR 7-104 (*see* New Rule above--4.02) and the confession remains admissible. Gentry v. State, 770 S.W.2d 780, 790-92 (Tex. Crim. App. 1988) (en banc) (Court ruled that Appellant waived his right to counsel prior to the confession, and that a Sixth Amendment issue was not raised on appeal).

3. In light of the aforementioned cases, however, an interesting issue has been raised which may just circumvent and at least partially eliminate these unpunished problems of prosecutorial misconduct. In Holloway v. State, 780 S.W.2d 787, 791 (Tex. Crim. App. 1989)(en banc) the question raised: Was appellant, who had been indicted for capital murder of a Longview police officer, and who had been appointed counsel, **capable** of waiving his Sixth Amendment right to counsel before he submitted to questioning?

Unlike the Fifth Amendment, the Sixth Amendment guarantees more than an entitlement to counsel upon invocation. Our adversary system is central to the administration of criminal justice. Parity between participants is critical to prevent unfair and unjust outcomes that would be tainted by one side's superiority... Extending Sixth Amendment right to counsel to certain pretrial "critical stages" was based upon concerns that equalization at trial could prove to be an empty gesture if the government could take advantage of an accused in the earlier phases of post-indictment investigations.

Id. at 793.

The Court of Criminal Appeals goes on to say: "**Governmental attempts** to secure incriminating statements from an accused are among the pretrial phases to which the Supreme Court has extended Sixth Amendment protection." Id. Later in the case after an excellent discussion of the differences between the Fifth and Sixth Amendment rights to counsel, and how the Appellant's Sixth Amendment rights had indeed attached, the court uses the wording "**police-initiated** interrogation of an indicted person who has retained or has been appointed defense counsel." Id. at 795. Does it not follow that if the context of this decision is the beginning, "police-initiated" phase of the investigation, the Sixth Amendment explicitly protects the criminal defendant from contact by the Prosecutor?

In fact the court ruled in the Holloway case that at the time of indictment and establishment of the attorney-client relationship, the Sixth Amendment right to counsel had attached and as such, "Appellant's unilateral waiver of his Sixth Amendment right was invalid despite appellant having received the required Miranda warnings." Id. at 796. (emphasis added).

It seems now that a government/defendant dialogue like that which took place in Pannell, irrespective of whether there was waiver, as in Gentry, is not admissible in light of the Sixth Amendment protections discussed in Holloway.

Subsequent to Holloway, the Supreme Court held that an indicted defendant's, voluntary, knowing and intelligent waiver of his Sixth Amendment right to counsel may allow the prosecution to use statements made in police initiated interrogations to impeach the defendant at trial. Michigan v. Harvey 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed. 2d 293, 58 USLW 4288 (1990)

4. District Attorney directed informant to attend and to secretly record proceedings between defendants and their attorney. This violated appellant's Sixth and Fourteenth Amendment rights. Brewer v. State, 649 S.W.2d 628 (Ct. Crim. App. 1983) (en banc).

5. Cases abound wherein prosecuting attorneys or their agents have had conversations with represented defendants, and in most of such cases the courts have explicitly stated that such conduct violates the DRs, *e.g.*, People v. Green, 274 N.W.2d 448 (Mich. 1979); United States v. Weiss, 599 F.2d 730, 739041 (5th Cir. 1979); United States v. Cross, 638 F.2d 1375, 1379 (5th Cir. 1981); Killian v. United States, 639 F.2d 206, 210 (5th Cir. 1981). A prosecuting attorney may not have a defendant in a criminal case examined by doctors during the course of the trial without the knowledge or consent of defendant's attorney." Tex. Op. No. 87 (Nov. 1953).

6. Federal prosecutors meeting with an indicted defendant without obtaining consent from the defendant's attorney caused sufficient prejudice to the defendant to justify a downward departure from the federal sentencing guidelines. (the Court departed downward three levels, not "for governmental misconduct" but, based on the prejudice suffered as a result of the government's conduct.) U.S. v. Lopez 60 Crim. L. Rep. (BNA) 1455 (1997).

C. Rule 4.03 Dealing With Unrepresented Person

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

This provision pertains especially to prosecutors and their contact with victims and witnesses. This practice often called, "soaping," is now covered by this new rule, and adoption of ABA Rule 4.3.

D. Rule 4.04 Respect for Rights of Third Persons

A Texas lawyer could never act in the way described in section (b). But now the additional requirements of section (a) have been put in Rule 4.04.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:

(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

(2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

V. LAW FIRMS AND ASSOCIATIONS

Rule 5.01 Responsibilities of a Partner or Supervisory Lawyers

This new rule should be noted for its broad language of part (b):

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

VI. PUBLIC SERVICE

Rule 6.01 Accepting Appointments by a Tribunal

A new rule regarding the court appointed attorney:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(1) representing the client is likely to result in violation of law or rules of professional conduct;

(2) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(3) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

VII. INFORMATION ABOUT LEGAL SERVICES

A. Rule 7.02. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm. 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.

(b) Rule 7.02(a)(5) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(5) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media that the lawyer is a specialist except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or writing with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

B. Rule 7.03 In-Person or Telephone Contact with Prospective Clients

As a result of Shapero v. Kentucky Bar Ass'n., 486 U.S. 466, 108 S.Ct. 1916 (1988), Texas formulated the following rule:

Rule 7.03 Prohibited Solicitations and Payments

(a) 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 nonclient 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. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating

the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

> (1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment:
>
> (2) the communication contains information prohibited by Rule 7.02(a); or
>
> (3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for adverting and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Article 320(d), Revised Statutes.

(c) A lawyer, in order to solicit professional employment shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320(d), Revised Statutes.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

A. Rule 8.02 Judicial and Legal Officials

Particular notice should be paid to (a) in the context of post-trial comments by an attorney to the press.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct.

(c) A lawyer who is a candidate for an elective public office shall comply with the applicable provisions of the Texas Election Code.

B. Rule 8.03 Reporting Professional Misconduct

Similar standard from the Old DRs:

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to

paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

(1) by Rule 1.05 or

(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

C. Rule 8.04 Misconduct

This list has been greatly expanded in the new set of rules.

(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 on 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.

In the context of misconduct subject to disbarment, but not conduct generally within the ambit of the "practice of law," such as what State Bar Rule 8.04 (a) (1)-(3) elucidates, *see* Minnick v. State Bar of Texas, 790 S.W.2d 87, 91-2 (Tex.App.-

-Austin 1990, n.w.h.).

IX. CONTEMPT BY ATTORNEYS

A. Old Disciplinary Rule on Contempt

1. Old DR7-106 (C) states:

In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as the justness of a cause.

(5) Fail to comply with known local customs of courtesy or practice of the Bar of a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

2. ABA Defense Function Standard 4-7.1 (C) states that it is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court or the prosecutor.

3. New Rules: The current state of Texas law is found in Rule 3.04.

B. Civil Contempt/Criminal Contempt

"Criminal contempt results from doing that which the court has prohibited; civil contempt generally results from failing to follow an order of the court.... [A] proceeding which has as it purpose to punish a condemner through fine or imprisonment is classified as criminal; the contempt is considered civil if the purpose of the sentence is coercive or remedial." Ex parte Krupps 712 S.W.2d 144, 149 (Tex. Crim. App. 1986) (emphasis supplied). If the contempt is designed to enforce a court order and terminates upon compliance, then the contempt is "civil"; but if the contempt is designed to vindicate the court for disrespect and does not terminate until penalty paid, then the contempt is criminal. Smith v. Sullivan 611 F.2d 1050 (5th Cir. 1980). There must be a willful or reckless state of mind for criminal contempt. In re Joyce 506 F.2d 373 (5th Cir. 1975).

DUE PROCESS CONSIDERATIONS: Hicks v. Feiock, 485 U.S. 624, 108 S.CT. 1423, (1988). Proceeding and remedy are for civil contempt if punishment is remedial and for the complainants benefit; criminal contempt if sentence is punitive to vindicate court's authority. If relief is fine, remedial when paid to complainant, punitive when paid to court. If imprisonment, remedial if committed till performs act, punitive if limited to unconditional imprisonment for a definite period. If criminal, due process requires Constitutional protections, including proof beyond a reasonable doubt. Query: does this outlaw summary contempt?

C. Texas Procedure

1. Criminal Contempt Punishment:

Government Code 21.002 Contempt of Court: (b) $500 or not more than 6 months in the county jail or both. Private parties criminal contempt action is not double jeopardy for criminal acts underlying the contempt. Ex parte Williams, 799 S.W.2d 304 (Tex.Crim.App. 1990).

2. Must Have Hearing:

Summary punishment for contempt of an officer of the court is precluded by what is now

Government Code 21.002 (c): "Because of the procedure prescribed by Article 1911a V.A.C.S., an officer of the court may no longer be similarly punished even though his conduct deemed contumacious is before the court. The statute requires that an officer of the court be granted a hearing before another judge. Ex parte Martin, 656 S.W.2d 443 (Tex. Crim. App. 1982), *see also* Ex parte Krupps, 712 S.W.2d 144 (Tex. Crim. App. 1986) (drawing a distinction between procedures when a civilian contemptor is involved and when an officer of the court is involved). The result that a "civilian" is subject to summary punishment for direct contempt seems unfair, *see* Ex parte Daniels, 722 S.W.2d 707 (Tex. Crim. App. 1987).

3. Personal Recognizance Pending Hearing:

Government Code 21.003(d): "A officer of a court...shall on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court that is not the offended court."

4. Right to Habeas Corpus If No Personal Recognizance.

If the offended court refuses to allow the lawyer to be released or to have the case heard by a different judge the lawyer is entitled to habeas corpus on those grounds. Ex parte Griffitts, 711 S.W.2d 225 (Tex. Sup. Ct. 1986).

5. Show Cause Order.

The procedure to invoke the jurisdiction of the disinterested district court mentioned in Government Code 21.003(d) and to invoke the jurisdiction over the person of the offending attorney is to issue and personally serve on the offending attorney a show cause order specifying the offending conduct and appointing a time and place for hearing

6. Appeal from finding of contempt.

There is no right to appeal from an order of contempt - the remedy is to file an original application for habeas corpus with the Court of Criminal Appeals. Ex parte Moorehouse, 614 S.W.2d 450 (Tex. Crim. App. 1981).

7. "Restraint" is Jurisdictional to Writ Application.

A mere order of contempt will not justify habeas corpus - there must be restraint. Consequently, there can be no habeas corpus for a court's order to pay a fine for contempt. Cine-Matics, Inc. v. State, 578 S.W.2d 530 (Tex. Civ. App. 1979) no writ. One assumes that refusal to pay the fine will result in arrest from which the habeas corpus will then lie.

8. Bail Pending Hearing Court of Criminal Appeals on Habeas Corpus.

To be eligible for habeas corpus attorney must be in "custody." Ex parte Eureste, 725 S.W.2d 214 (Tex. Crim App. 1986). Note that the personal recognizance bond mentioned in the Government Code expires once the order of contempt is entered and there can be no valid appeal bond because appeal is not the remedy. The Court of Criminal Appeals is the only court that can set bond, which it will consider upon issuing the writ of habeas corpus. Eureste and Article 11.32 TCCP (writ bond). Therefore, the wise attorney, prior to the hearing on the show cause order specified in Govt. Code 21.003(d) will make arrangements with an Austin lawyer to stand by the telephone on the date of the show cause hearing. If the offending lawyer is found in contempt and ordered to jail (*See* G id.) jailed lawyer calls Austin with instructions to "throw a writ" on Texas Court of Criminal Appeals. Must deliver original and eleven copies of Application for Writ of Habeas Corpus to Court of Criminal Appeals. Also file written request with Court of Criminal Appeals to be released on personal bond pending hearing on the writ per Art. 11.32 T.C.C.P. Hopefully the Court of Criminal Appeals will routinely grant the request for personal bond and instruct the Executive Administrator of the Court to communicate that order to the person

holding the condemner in restraint.

D. The Federal Procedure.

1. 18 USC 401.

"A court of the United States shall have power to punish by fine or by imprisonment, at its discretion, such contempt of its authority, and none other, as -

a. Misbehavior of any person in its presence....

* * *

b. Disobedience or resistance to its lawful writ, process, order...command.

2. Rule 42. Two types of Contempt.

a. Summary punishment if judge certifies that act was committed in the actual presence of the court and that court saw or heard the conduct.

b. Others prosecuted on notice stating facts and setting time and place for hearing. If contempt involves disrespect of judge, that judge disqualified from setting. Condemner entitled to bail.

3. Warning Favored.

Although not necessary, a warning is favored by the appellate courts before direct contempt power is exercised. U.S. vs. Brannon, 546 F.2d 1242, 1249 (5th Cir. 1977).

4. Summary Contempt Disfavored.

Because of its lack of due process, Rule 42(a) must be used sparely and only in instances where the attorney's conduct tends to bring the administration of justice into disrepute and there is a need for immediate vindication of the dignity of the court. *See generally,* Attorney's Conduct as Justifying Summary Contempt Order Under Rule 42(a). 58 ALR Fed. 22.

5. Appeal.

a. Contrary to the common law rule, the federal rule is that judgments of contempt are appealable like other judgments - *see* cases discussed in Appealability of Contempt Adjudication or Conviction, 33 ALR 3d 448, 467-78.

b. Since 18 USC 401 sets no limit on the trial court's power, Circuit Court has power to review and to modify an excessive sentence. United States vs. Powers, 629 F.2d 619 (9th Cir. 1980).

E. Examples of Contemptuous Conduct by Attorneys

1. Defendant's brother substituted at counsel table in an attempt to produce mis-identification by the prosecution witness resulted in contempt. Ex parte Clayton, 350 S.W.2d 926 (Tex. Crim. App. 1961).

2. Failure to file appellate brief, as ordered by appellate court is contempt. In re Taylor, 674 S.W.2d 922 (Ct. App. 1984); In re Ganne, 643 S.W.2d 195 (Ct. App. 1982).

3. Conduct with court. Ex parte Pink, 746 S.W.2d 758 (Tex.Crim.App. 1988) failure to accept court appointment. State v. Jones (In re Banks), 726 S.W.2d 515 (Tenn. 1987).

4. *See also,* Attorney's Failure to Attend Court or Tardiness as Contempt, 13 ALR 4th 122; Attorney's Addressing Allegedly Insulting Remarks to Court During Course of Trial as Contempt, 68 ALR 3rd 273; Kilgarlin and Ozmun, Contempt of Court in Texas - What you Shouldn't Say to the Judge, 38 Baylor L. Rev. 291 (1986).

*Last updated January 2007