ETHICAL MISCONDUCT
DURING VOIR DIRE

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Chapter 2

The attached paper is submitted for discussion purposes only and is not legal advice. It is not intended to be a comprehensive analysis of each and every topic covered. For these reasons, nothing contained in this paper should be relied or acted upon without the benefit of legal advice based upon the particular circumstances presented. The opinions contained in this paper are those of the author and do not necessarily reflect those of the State Bar of Texas. Luther Jones is Chair, Investigative Panel C-1, District 6-A Grievance Committee, Dallas, Texas
BIOGRAPHICAL INFORMATION

EDUCATION

B.S. in Economics (1964)
J.D. The University of California

PROFESSIONAL ACTIVITIES

Admitted to practice in Texas (1976), Virginia (1972) and Washington D.C. (1975)
Board Certified Specialist in Labor and Employment Law
Former Administrative Law Judge
Board of Directors, Labor and Employment Law Section, Dallas Bar Association (1991-01)
Chair, Dallas/Fort Worth Chapter of the National Employment Lawyers Association (1997-1998)
Board Member; Dallas/Fort Worth Chapter of the National Employment Lawyers Association (1991-1998)
Founding Member, Board of Directors and Treasurer, Texas Employment Lawyers Association (1997-01)
Member, College of the State Bar of Texas (since 1995)
Appointee to State Bar Grievance Committee (District 6A), State Bar of Texas (since 1997)
Chair, Dallas Bar Association Legal Ethics Committee (2000)
Admitted to practice in Texas (1976), Virginia (1972) and Washington D.C. (1975)
ETHICAL MISCONDUCT DURING VOIR DIRE

I. PRELIMINARY COMMENTS:

It is unlikely, as a practical matter, that ethics complaints will be filed with the State Bar of Texas for the ethical misconduct of an attorney committed during the voir dire stage of trial. The reason, rather obviously, is that most trial lawyers, upon obtaining knowledge of misconduct, whether unethical or not, would not wait to file an ethics complaint, but would take the more direct route of seeking corrective orders from the Judge involved. The effect of such judicial corrective orders may be more responsive to the damage to the client which was suffered than any sanctions applied to the misbehaving attorney by the State Bar of Texas.

It is unlikely also, from my experience, that an ethics complaint brought to the Grievance Panels of the State Bar of Texas regarding ethical misconduct will result in a finding of cause or, if found, result in a very onerous sanction assuming no repeated or outrageous circumstances. The reason is, in this attorney’s experience, the Investigative Panels, which consists of 1/3 public or non-lawyer members, view themselves primarily as a body whose primary purpose is to protect the public from prohibited misconduct by attorneys and do not relish refereeing disputes between attorneys particularly where it is perceived that the purpose of the complaint is to gain a tactical advantage in related or parallel litigation.

These observations seem to be born out by the facts. In my five years of service with the State Bar of Texas Grievance Committee, I have not had before me one single complaint for ethical misconduct during voir dire. There are, further, no Texas ethics opinions relative to the issue. It will be necessary, therefore, to be guided by the words of the Texas Disciplinary Rules of Professional Conduct itself and cases from other jurisdictions in reaching some conclusion about certain hypothetical situations.

In deliberating on ethical standards one must keep in mind the nature of the forum in attempting to predict the resolution of ethical issues. The Texas Disciplinary Rules of Professional conduct are much like the Ten Commandments in the sense that the rules themselves are simple, so the difficulties come in determining whether, under the facts, there was a violation of the rule. Opinions can differ. The typical Grievance Panel consists of 1/3 Public Members and 2/3 Attorneys who come from all specialties and firm sizes. There are no records of decisions. Proceedings are confidential until they become a matter of record by publication of sanctions or subsequent litigation. Prediction, to say the least, is very difficult art.

II. GENERAL BACKGROUND ON ATTORNEY INVESTIGATIONS OF JURORS:¹

¹ See, generally, Fortune, Underwood & Imwinkelried, Modern Litigation and Professional Responsibility Handbook, Chapter
There are no prohibitions about thoroughly investigating a venireman or juror. In this computer, instant-access-to-data, world, it is a wonder we rely upon voir dire as much as we do. Investigation of veniremen or potential jurors, beyond voir dire, has been going on for some time.

Both the Code of Professional Responsibility (hereafter “DR”) and the Model Rules (hereafter “Model Rule”) prohibit “vexatious or harassing investigations,” but does not prohibit investigations. Attorneys are warned that investigators “should avoid surveillance techniques that might seem intimidating.” DR 1-102(A); Model Rule 8.4(c). Investigations are to be “unobtrusive.” If attorneys are allowed to check documents open to public inspection, such as voter registration records, it would not be a stretch to check the internet and other available computer generated records. A prosaic “drive-by” – checking such items as bumper stickers on the family car, checking whether the grass is cut, and whether there is a “strong fence or watchdog or other sign of fear of outsiders” – is likewise proper. Attorneys are warned that while an “innocuous drive-by” is allowable, the attorney’s investigator should avoid “rough” shadowing or intrusive questioning of friends and neighbors.” Of course, we are reminded, that under the Model Rules attorneys must exercise care for selecting and supervising “nonlawyer assistants” which would include investigators.

In view of all this, conduct in the courtroom during voir dire seems mild stuff.

III. HYPOTHETICALS:

A. Hypothetical Number One:
One of the jurors is related in some way to one of the attorneys and the attorney knows it, however, the juror has not disclosed the fact or has responded, falsely, that he or she is not related in any way to any of the attorneys.

It would be unethical for the attorney not to advise the court that a juror is, in some way, related to one of the attorneys involved, if the attorney has knowledge of it or a juror has responded falsely to voir dire by the court or participating attorneys that he or she is not related to any attorney in the case. Texas Disciplinary Rules of Professional Conduct (hereafter “TDRPC, ____.”) 3.06(f), 3.03(a)(2), 3.05(a), 8.04(a)(2),(3) & (4). TDRPC, 3.06(f), provides that “[a] lawyer shall reveal promptly to the court

9, Relations with Jurors.

2 G. Hazard, Jr., and W. Hodes, The Law of Lawyering §3.5:200 (2nd ed. 1990)

3 Id, Fortune, Underwood & Imwinkelried, pg. 331.

4 Id, Fortune, Underwood & Imwinkelried, pg. 331.

5 Id. Fortune, Underwood & Imwinkelried, pg. 331 (fn.21)

6 Id. Fortune, Underwood & Imwinkelried, pg. 331.
improper conduct by a venireman or a juror . . . of which the lawyer has knowledge.” Voir Dire means “to speak the truth” and the juror has failed to do so.

TDRPC, 3.03(a)(2), provides that “[a] lawyer shall not knowingly . . . fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act.” The juror has responded falsely under oath and has committed a criminal act. The lawyer, with knowledge, must advise the court. As stated in the Comments to this Rule, “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” Comment, TDRPC, 3.03, Paragraph 2.

TDRPC, 3.05(a), provides that “[a] lawyer shall not . . . seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure.” Failure to act to correct an improper influence on the court, as well as affirmatively acting to unethically influence a tribunal, would both be ethical misconduct.

TDRPC, 8.04(a)(3) provides that “[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation. A knowing acquiescence would certainly constitute “dishonesty” and may constitute “deceit,” “fraud” and “misrepresentation” as well.

TDRPC, 8.04(a) (2), provides that “[a] lawyer shall not . . . commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects.” This, of course, would require that the juror committed a “serious crime” and that the attorneys knowledge, without any further involvement, would constitute a criminal act. A “serious crime” is defined, as is relevant here, as “any felony involving moral turpitude” or “any conspiracy or solicitation of another to commit any of the foregoing crimes.” TDRPC, 8.04(b).

TDRPC, 8.04(a)(4), provides that “[a] lawyer shall not . . . engage in conduct constituting obstruction of justice.” If one were to define “obstruction of justice” liberally with the definition of “impeding those who seek justice in a court or those who have duties or powers of administering justice therein” as used in Black’s Law Dictionary, Fourth Edition, page 1228, it is conceivable that there could be a finding of “obstruction of justice.”

B. Hypothetical Number Two:

The bailiff approaches you and says, “I’ve got some info on one of the jurors.”

It would not be misconduct for an attorney to accept the proffered information from the bailiff. There is no law or rule of court, to this attorney’s knowledge, that makes it improper to receive information about a juror from a bailiff. It must be assumed from the hypothetical that the attorney does not have any knowledge about what information, exactly, the bailiff is about to communicate.

It is true that TDRPC, 8.04(a)(6), which provides that “[a] lawyer shall
not . . . knowingly assist . . . a judicial officer in conduct that is a violation of applicable rules of judicial conduct or other laws,” makes it misconduct to participate with a bailiff in violation of court rules or laws, but at this point in time there would be no reason to believe that the bailiff is involved in improper conduct.

As a general rule, the TDRPC are stated in the negative, that is, they prohibit conduct, but do not, with certain exceptions such as “advertising,” generally require specific conduct. There is no obligation on the part of the attorney under Texas law to affirmatively act to receive the proffered information. For instance, although it would be misconduct to an attorney, who has knowledge of juror misconduct as set forth above, there is no obligation to affirmatively seek the information.

The hypothetical becomes interesting, however, upon delivery of the information to the attorney. Once the attorney has “knowledge,” this knowledge may trigger a number of ethical obligations. In hypothetical number one we discussed the fact situation where a juror was related to one of the attorneys in the litigation which raised an affirmative duty on the part of the attorney to inform the court. Consider the possibility that the attorney is advised that opposing counsel or one of his trial team or a member of his or her own trial team, has been seen talking to one of the jurors during a break in the voir dire. This would be misconduct on the part of the attorney involved, as well as the juror, and the attorney, now with knowledge, is required under the Rules to inform the court. Failure to do so would violate TDRPC, 3.06(f), which provides that “[a] lawyer shall reveal promptly to the court improper conduct by a venireman or a juror . . . .” Consider the possibility that the attorney is advised that the juror has a bumper sticker which states,”Gore/Lieberman” or “My Other Car is a Zamboni” or “___ (fill in what you want which tells you the predisposition of the juror)___ .” This would be misconduct only if it is a violation of the procedures of court or law for the bailiff to disclose the information. TDRPC, 8.04(a)(6).

C. Hypothetical Number Three: A potential juror approaches you and says, “I like your case. Its terrible what happened to your client.”

It is not misconduct, if the comment ensures from a “chance encounter,” for the attorney to hear the potential juror’s comment. Thereafter, however, there may be a requirement to report the incident to the judge.

Private contact with potential jurors is, as it has always been, forbidden. The problem is the so called “chance encounter.” In a chance encounter, such as innocently finding oneself in an elevator with a potential juror, the attorney’s only permitted comment to a

7 Fortune, Underwood & Imwinkelried, Modern Litigation and Professional Responsibility Handbood, §9.5.
potential juror, who attempts to converse, is to politely but firmly disengage from any conversation.\textsuperscript{8}

TDRPC, 3.06(b), provides that “[a] lawyer shall not . . . prior to the 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.” Assuming the attorney has done nothing culpable to initiate the actions and comments of the potential juror, the attorney has, at this point in time, committed no misconduct under the TDRPC.

TDRPC, 3.06(f), provides that “[a] lawyer shall reveal promptly to the court improper conduct by a venireman or a juror . . . of which the lawyer has knowledge.” This hypothetical situation raises a perfect example of the truth that compliance with the TDRPC is not instinctive. In many instances the TDRPC requires an attorney to act in a way that is absolutely contrary to human nature. The nature of man and woman, when faced with a venireman who confesses great sympathy to your client’s case as is set out here, is, if you can overcome the physical effects of blood rushing to your head and the primordial urge to yell “Yes!” to excuse yourself quickly, but politely, and look around to see if any one has noticed. We are, however, lawyers and must be guided by rules in our professional activities.

The debatable question here is whether the potential juror or venireman did anything “improper.” Veniremen and venirewomen are not born with, nor burdened by, legal ethical standards and, as a general rule, have little knowledge of what would be proper conduct while participating in legal proceedings. Usually, the judge, at some time in the proceedings, may instruct the venirepersons, as to proper conduct toward the participating attorneys. My experience has been that these detailed instructions may not be given right away by the judge. If there has been no instructions to the potential jurors on the matter, then it would appear that there has been no “improper” conduct; if there has been, there is “improper” conduct. If the former, there is no obligation to reveal to the court the comments of the potential juror, but if the latter, then there has been improper conduct and it must be reported.

\section*{IV. CONCLUSION:}

The Texas Disciplinary Rules of Professional Conduct set forth \textbf{minimum} standards for attorney conduct. In other words, these standards set forth guidelines for “How low can you go?” The measuring stick for a true professional, however, is not how low can you demean yourself without official state sanction, but rather with what dignity and professionalism you can conduct yourself and still serve

\footnotesize{\textsuperscript{8} Id., Fortune, Underwood & Imwinkelried, §9.5 (fn.6)}
the best interests of your client and, at the same time, honor the great traditions of the legal profession.