APPELLATE PRACTICE
A Practical Skills Course for New and Transitional Attorneys

Reprinted from the 1997 Advanced Civil Appellate Practice Course
This paper is an update of an article appearing in the
Travis County Bar Association Primer for Handling Civil Appeals
by Charles Herring, Jr. and Ron Moss.
Many thanks to Charles and Ron
for their permission to update this fine article.

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"Interlocutory and Accelerated Appeals" 1996 Advanced Appellate Practice Course
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LEGAL MALPRACTICE AND ETHICAL CONSIDERATIONS FOR APPELLATE LAWYERS

I. Introduction

In general, the ethical considerations for appellate lawyers mirror the same concerns applicable to non-appellate lawyers. Both types of lawyers are held to the same standards of care and the same ethical standards. Some issues, however, are uniquely applicable to appellate lawyers or occur in the appellate context more frequently than at other levels of litigation, especially in instances where the appellate counsel was not also the trial counsel. Similarly, although most legal malpractice principles applicable to non-appellate lawyers apply as well to appellate lawyers, some issues concern the appellate practice only. These materials are intended to cover those special legal malpractice and ethical considerations.

II. Initiation of Appeal

A. Trial Counsel

1. Right to Appeal; Second Opinions

After judgment at the trial level, a lawyer should fully explain a client's right to appeal. Failure to do so may result in a malpractice claim. See, e.g., Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990) (failure to oppose motion for judgment n.o.v. and failure to appeal); Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989) (failure to file statement of facts timely); Porter v. Kruegel, 106 Tex. 29, 155 S.W. 174 (1913) (failure to prosecute two suits and to pursue an appeal). In the absence of a request for assistance on the appeal, however, the attorney is under no obligation to take an appeal. Franke v. Zimmerman, 526 S.W.2d 257, 258 (Tex. Civ. App.--Austin 1975, no writ). A lawyer may not initiate an appeal without the client's authorization. See, e.g., Soliman v. Ebasco Servs., Inc., 822 F.2d 320 (2d Cir. 1987), cert. denied, 484 U.S. 1020 (1988); Perez v. State, 885 S.W.2d 568, 572 (Tex. App.--El Paso 1994, no pet.).

In order to avoid malpractice exposure, the attorney should advise the client of possible deadlines and the client's option to seek another attorney's opinion. See J. Michael Medina, Ethical Concerns in Civil Appellate Advocacy, 43 Sw.L.J. 677, 680 (1989) (hereinafter "Medina").

Sometimes a client will approach a lawyer to obtain a second opinion concerning advice from the client's first lawyer and will do so without notifying the first lawyer. The rules permit this procedure. When the client seeks a second opinion on a matter from another lawyer, the second lawyer may provide advice without notifying or obtaining consent from the first lawyer. TEXAS DISCIPLINARY R. PROF. CONDUCT 4.02(d) (1989), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, App. A (Vernon Supp. 1997) (STATE BAR RULES art. X, § 9) (hereinafter "TDRPC").

2. Termination of Representation After Trial

a. Discharge of Lawyer

A client may discharge a lawyer at any time, even without good cause. TDRPC 1.15 cmt. 4. When discharged, the lawyer must withdraw. TDRPC 1.15(a)(3). From both the disciplinary and liability perspectives, preparing a memorandum reciting the circumstances of the lawyer's discharge is often advisable. See TDRPC 1.15 cmt. 4.

If the discharge might seriously injure the client's interests or if a mentally incompetent client lacks the legal capacity to discharge the lawyer, the lawyer should make a special effort to help the client consider the consequences of the decision. In some extreme cases, the lawyer may have to initiate proceedings for conservatorship or similar protection for the client. TDRPC 1.15 cmt. 6.

Unjustified discharge of court-appointed counsel may result in court refusal to appoint new counsel, and the lawyer should make sure that the client understands the consequences of the discharge. TDRPC 1.15 cmt. 5.

b. Mandatory Termination of Representation

TDRPC 1.15 sets out three situations in which a lawyer must either decline representation or withdraw from representation if the relationship has already begun:

1. When representing the client will result in a violation of TDRPC 3.08 ("Lawyer as Witness"), other applicable rules of professional conduct, or other law;
2. When the lawyer's physical, mental, or psychological condition materially impairs the client's representation; or
3. When the client discharges the lawyer, with or without good cause.

c. Permissive Withdrawal
Apart from the three situations in which withdrawal is mandatory under TDRPC 1.15(a), TDRPC 1.15(b) provides for permissive withdrawal in the following circumstances:

1. At any time if the withdrawal will not have a "material adverse effect" on the client's interests. TDRPC 1.15(b)(1).

2. If the client persists in using the lawyer's services in a way that the lawyer reasonably believes may be criminal or fraudulent. TDRPC 1.15(b)(2). A lawyer may withdraw in this event even if the lawyer is not furthering the criminal or fraudulent conduct. Likewise, a lawyer may continue representing the client in this situation until the lawyer actually knows the conduct will be illegal or result in a violation of the Rules. At that point, the lawyer must withdraw under Rule 1.15(a)(1). TDRPC 1.15 cmt. 7.

3. If the client already has used the lawyer's services to perpetrate a crime or fraud. TDRPC 1.15(b)(3).

4. If the client insists upon pursuing an objective that the lawyer considers "repugnant or imprudent or with which the lawyer fundamentally disagrees." TDRPC 1.15(b)(4).

5. If the client substantially fails to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay agreed fees, and has received reasonable warning that the lawyer will withdraw unless the client fulfills the obligation. TDRPC 1.15(b)(5). See Vander Voort v. State Bar of Tex., 802 S.W.2d 332, 333-34 (Tex. App.--Houston [1st Dist.] 1990, writ denied) (affirming a public reprimand of two lawyers who ceased representing a client for nonpayment of fees but failed to tell the client that fact or return the file until after a bankruptcy court trial date on which they failed to appear).

6. If the representation will unreasonably burden the lawyer financially or has been rendered unreasonably difficult by the client. TDRPC 1.15(b)(6).

7. If other good cause for withdrawal exists. TDRPC 1.15(b)(7).

A lawyer may withdraw for reasons (2) through (7) even if the withdrawal may have a material adverse effect upon the client's interests. TDRPC 1.15 cmt. 8.

If a tribunal orders a lawyer to continue representation, the lawyer must do so, despite good cause for terminating the representation. TDRPC 1.15(c). In some cases, however, a lawyer may be entitled to mandamus relief if the trial court orders continued representation despite the presence of a conflict. Cf. Haley v. Boles, 824 S.W.2d 796, 798 (Tex. App.--Tyler 1992, orig. proceeding) (holding that a trial court erred in refusing to grant a lawyer's motion to withdraw as appointed counsel in a criminal case because the appointed lawyer's partner was married to the district attorney).

As a practical matter, the sooner a lawyer attempts to withdraw from a litigation matter, the more likely a judge is to permit withdrawal.

### d. Assisting a Client Upon Withdrawal

Withdrawal during the technical and time-sensitive appeal process presents special risks if adequate protective measures are not taken before withdrawal. Under TDRPC 1.15(d), a lawyer must take all reasonable steps to mitigate the consequences of withdrawal, even if the client unfairly discharges the lawyer. Such steps include giving reasonable notice of withdrawal, surrendering papers and property to which the client is entitled, and refunding any advance fee payments that the lawyer has not earned.

#### (1) Retention of Client's Property

The duty to surrender property to which the client is entitled may require return of unearned fees or, in some circumstances, even a "non-refundable retainer" if retention of such fees would be "unconscionable." See TDRPC 1.04 cmts. 2, 4.

The lawyer may retain papers relating to the client only to the extent permitted by other law and only if the retention will not prejudice the client in the subject matter of the representation. TDRPC 1.15(d). Under an attorney's common law lien, a lawyer may retain papers as security for a fee; however, from a disciplinary perspective, the practical significance of that legal right is severely limited because the lawyer may not retain the papers if prejudice to the client would result. TDRPC 1.15 cmt. 9; see Nolan v. Foreman, 665 F.2d 738 (5th Cir. 1982) (concluding that a lawyer could not retain client papers because no lien claim existed).

#### (2) Notice of Deadlines

A lawyer who withdraws or is discharged after trial should caution the client in writing in a "non-engagement letter" of any post-trial deadlines, because the transition between trial counsel and appellate counsel can be a delicate process, often complicated by the short deadlines and procedural requirements of appeal. Cf. Villarreal v. Cooper, 673 S.W.2d 631, 634 (Tex. App.--San Antonio 1984, no writ) (concluding that a fact issue existed regarding whether attorneys engaged in
negligence when they failed to file suit for sixteen months and they arguably failed to protect the clients interest when she discharged them seventy-seven days before the limitations period ran).

3. Undertaking an Appeal

a. Competence

Before undertaking an appeal, a lawyer should ensure that she is competent to handle the appeal. TDRPC 1.01(a) provides:

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.

One commentator has concluded that "an attorney inexperienced with the appellate process might be considered negligent or unethical in not referring a case to an attorney who handles appellate work." Medina, 43 Sw.L.J. at 680; *see also* Villarreal v. Cooper, 673 S.W.2d at 632 (in a malpractice suit, the plaintiff alleged as one ground of negligence a "failure to seek specialists in the event [the lawyers] were unqualified").

b. Scope of Representation

If a lawyer has represented a client in several matters, the client sometimes assumes that the lawyer will continue to provide representation, unless the lawyer gives notice to the contrary. TDRPC 1.02 cmt. 6. *See, e.g.,* Kotzur v. Kelly, 791 S.W.2d 254, 257-58 (Tex. App.--Corpus Christi 1990, no writ) ("An attorney-client relationship may be implied from the conduct of the parties.... Further, an attorney may be held negligent when he fails to advise a party that he is not representing them on a case when the circumstances lead the party to believe that the attorney is representing them." (citations omitted)).

The risk of confusion and disagreement is especially high if the fee arrangement calls for a set amount of attorney's fees (whether contingent or non-contingent) and when the contract is ambiguous regarding the scope of representation. Thus, a lawyer who undertakes representation of a client in a litigation matter should make clear in the contract of representation or the engagement letter whether the scope of engagement includes, or potentially includes, post-trial matters and appeal. If a lawyer does not wish to include appellate matters within the scope of the lawyer's engagement, the lawyer may limit the scope of engagement under TDRPC 1.02(b), which provides: "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation."

c. Contingent Fees

A lawyer must have a written fee agreement in a contingent fee case. TDRPC 1.04(d). The agreement must describe the method for determining the fee. If there is a difference in the percentages applicable in the event of settlement, trial or appeal, the agreement shall state those percentages. The agreement shall identify the expenses to be deducted from recovery and whether such deductions are before or after the contingent fee is calculated. Section 82.065(b) of the Government Code provides that a contingent fee contract is "voidable" by the client if procured as a result of conduct "violating the laws of this state or the Disciplinary Rules of the State Bar of Texas regarding barratry by attorneys or other persons." TEX. GOV'T CODE ANN. § 82.065(b) (Vernon Supp. 1997). *Cf. Standards for Appellate Conduct (hereinafter "SAC") Duties to Clients 2* ("Counsel will explain the fee arrangement and cost expectation to their clients").

d. Notice of Grievance Process

Section 81.079 of the Texas Government Code requires that each attorney "[p]rovide notice to each of the attorney's clients of the existence of a grievance process," by one of the following methods:

1. making available complaint brochures prepared by the State Bar;
2. posting a sign prominently in the attorney's place of business describing the process;
3. including the information on a written contract for services; or
4. providing the information in a bill for services to the client.


The State Bar's Office of General Counsel has approved the following language for use in attorney-client contracts or in billing statements:
Notice to Clients

The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys.

Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint.

For more information, please call 1/800/932-1900. This is a toll-free phone call.

Brochures and signs are available incorporating the notice from the State Bar.

e. Appointments and Pro Bono Service

Texas lawyers have an ethical responsibility to provide public interest legal service by accepting a fair share of unpopular matters and indigent clients. TDRPC 6.01 cmt. 5. Indeed, the provision of free legal services to those unable to pay reasonable fees is "a moral obligation of each lawyer as well as the profession generally." TDRPC Preamble ¶ 6. Texas Lawyer's Creed (hereinafter "TLC") Article I.2 makes each Texas lawyer "responsible to assure that all persons have access to competent legal representation regardless of wealth," and Article I.3 requires each lawyer to commit "to an adequate and effective pro bono program."

Although no statewide program of mandatory pro bono legal services exists, a number of statutes and rules provide for mandatory pro bono appointments. Sections 24.016 and 26.049 of the Texas Government Code allow such appointments. Section 24.016 provides: "A district judge may appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend to the cause." TEX. GOV'T CODE ANN. § 24.016 (Vernon 1988). The Government Code also provides that the "county judge may appoint counsel to represent a party who makes an affidavit that he is too poor to employ counsel." Id. § 26.049.

Additionally, Texas Rule of Civil Procedure 308a allows a court to appoint counsel in suits affecting the parent/child relationship. Rule 308a provides that when an allegation arises of a violation of a court order concerning child support or possession of or access to a child, the court "may appoint a member of the bar to investigate the claim to determine whether there is reason to believe that the court order has been violated." Tex. R. Civ. P. 308a. The rule further provides that "except by order of the court, no fee shall be charged by or paid to the attorney representing the claimant." Id.

Courts also have used pro bono legal services as a sanction. In Braden v. Downey, 811 S.W.2d 922 (Tex. 1991), the Texas Supreme Court addressed the power of Texas courts under Texas Rule of Civil Procedure 215 to impose sanctions compelling an attorney to undertake personal performance of specified services. In that case, the trial court assessed sanctions requiring a lawyer to perform ten hours of community service for the Child Protective Services Agency of Harris County. Although the Supreme Court conditionally granted mandamus relief against the trial court because the sanctions order set a deadline for performance of the service that preceded conclusion of the litigation and thereby would have precluded appellate review, the Supreme Court implicitly approved that form of sanction. The Court stated that it did "not criticize this type of creative sanction," and that while such sanction was not specifically mentioned among the listed sanctions in Rule 215(2)(b), "the rule generally authorizes a trial court to sanction discovery abuse by such orders ... as are just." Braden, 811 S.W.2d at 930; see also Braden v. South Main Bank, 837 S.W.2d 733, 740 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (upholding the personal services sanction on remand), cert. denied, 508 U.S. 908 (1993); cf. Bleckner v. General Accident Ins. Co. of Am., 713 F. Supp. 642 (S.D.N.Y. 1989) (assessing federal Rule 11 sanctions against an insured's counsel for asserting, among other things, baseless claims for coverage, and requiring that counsel "undertake the representation of a pro se plaintiff" from a specified list of cases on the court's docket and enter a notice of appearance in such case within three weeks).

Additionally, some federal courts in Texas have programs making mandatory appointments in certain civil cases, and El Paso County also has a program of mandatory pro bono appointments.

Although a lawyer usually may decline to accept a private client, a different standard applies to court appointments, and a lawyer should not seek to avoid such appointments except for good cause. TDRPC 6.01. Good cause may exist if the representation would be likely to result in a violation of law or the disciplinary rules, or if the representation would result in "unreasonable financial burden," or the client or the cause is so "repugnant to the lawyer" as to impair the lawyer-client relationship or the representation. TDRPC 6.01. See also Haley v. Boles, 824 S.W.2d 796, 798
(Tex. App.--Tyler 1992, orig. proceeding) (holding that the trial court erred in failing to allow appointed counsel to withdraw from representation under circumstances that the appellate court concluded raised a conflict of interest).

In criminal cases, failure of appointed counsel to comply with applicable rules of criminal procedure, such as the time for filing briefs, may result in sanctions, including contempt. See, e.g., Robinson v. State, 661 S.W.2d 279, 282 (Tex. App.--Corpus Christi 1983, no writ); Marroquin v. State, 652 S.W.2d 429, 433 (Tex. App.--Corpus Christi 1982, no writ). Such failure may also amount to ineffective assistance of counsel. See, e.g., Ex Parte Zepeda, 819 S.W.2d 874, 876-77 (Tex. Crim. App. 1991) (holding that counsel's failure to request an instruction on accomplice witness testimony during the guilt/innocence phase of trial constituted ineffective assistance of counsel); Vicknair v. State, 702 S.W.2d 304 (Tex. App.--Houston [1st Dist.] 1982, no pet.) (concluding that an attorney's failure to designate a statement of facts of a suppression hearing amounted to ineffective assistance of counsel).

If appointed counsel learns that the client has obtained an appointed attorney by falsely swearing to indigency, or that the client later obtains employment allowing the client to employ counsel, the appointed counsel is obligated to inform the court of such facts if the client does not take corrective action. Tex. Comm. on Professional Ethics Op. 473 (1992).

4. Cooperation with Appellate Counsel

An appellate attorney should ensure the trial counsel's cooperation to help understand the record and to answer questions throughout the appellate process. Medina, 43 Sw.L.J. at 685.

5. Disclosure of Trial Counsel's Conduct

a. Disclosing Malpractice

In some instances, an appellate attorney may have an ethical obligation to inform the client, or take other action, concerning the trial counsel's malpractice. In analyzing this question, the ABA's Committee on Ethics and Professional Responsibility issued Informal Opinion 1465:

The question is whether, in such cases, the Model Code of Professional Responsibility imposes upon appellate counsel a duty to advise the client that he may have a civil cause of action against trial counsel for malpractice, even though the client has not sought the advice and appellate counsel's scope of representation does not include civil claims for damages.

The Committee's view is that the Disciplinary Rules of the Model Code neither prohibit nor require the advice.

In the Committee's view, however, it would be proper for appellate counsel to advise the client of a right or possible right to assert a claim, when the matter comes to the attention of appellate counsel, and when the claim arises from the same facts with which appellate counsel is dealing even though outside the particular representation. See EC 2-2, which urges lawyers to assist laypersons to recognize legal problems which may not be self-revealing and may not be timely noticed. Minimum standards for adequate representation by counsel in defending a person accused of crime have not been precisely defined. Accordingly, the suggestion of a malpractice cause of action should be accompanied by explanation of the practical limitation on expectations of success.


The current ethical rule in Texas concerning when a lawyer must report another lawyer's misconduct to a disciplinary authority appears in TDRPC 8.03(a):

"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." (emphasis added).

Comparing Opinion 1465 and Rule 8.03(a), one commentator has concluded that a duty of client notification exists: "It is uncertain whether the Committee's reasoning [in Informal Opinion 1465] would exonerate a civil appellate counsel from notifying the client of possible trial malpractice. The better view would require such notification. Not requiring the appellate counsel to notify the client of the malpractice, but requiring counsel to notify the appropriate court or disciplinary body of the trial lawyer's breach of professional ethics would be incongruous. The incongruity would approach the ridiculous in the common situation where the breach was discovered by the appellate attorney under circumstances that made discovery a privileged communication. The attorney would then need the client's permission to inform the disciplinary body." Medina, 43 Sw.L.J. at 687 & n.45.
Of course, the rules "require that if a lawyer clearly knows that negligent legal advice has been given to a client by another lawyer in his law firm, the lawyer is obligated to take appropriate action to insure that the client is informed so that remedial action can be taken." Tex. Comm. on Professional Ethics Op. 523 (1997). An associate is required to inform the partners or shareholders of the firm of another lawyer's negligence and if the associate leaves the firm and the client is not informed, to inform the client. Id.

b. Reporting Misconduct

(1) Misconduct of Other Lawyers

Self-regulation of the legal profession requires that lawyers initiate disciplinary proceedings, when necessary, against other lawyers. Specifically, 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, must inform the appropriate disciplinary authority. TDRPC 8.03(a). Even an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover, and thus a lawyer should not fail to report an apparent disciplinary violation merely because its existence or scope is not absolutely certain. TDRPC 8.03 cmt. 1. Failure to report a disciplinary violation constitutes a disciplinary violation for a non-reporting lawyer. TDRPC 8.03 cmt. 2; cf. In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988) (disciplining a lawyer who failed to report another lawyer's misconduct).

Although TDRPC 8.03 limits the reporting obligation to violations that raise a "substantial question," the Rule does not prohibit a lawyer from reporting other types of violations. TDRPC 8.03 cmt. 2. The term "substantial" refers to the "seriousness of the possible offense," and not the quantum of evidence of which the lawyer is aware. TDRPC 8.03 cmt. 2. The Texas Professional Ethics Committee has determined that: "Before reporting an alleged violation, however, Rule 8.03(a) requires that a lawyer have knowledge that another lawyer has in fact committed a violation of rules. A report of misconduct must therefore be based upon such objective facts that are likely to have evidentiary support." Tex. Comm. on Professional Ethics Op. 520 (1997).

(2) Misconduct of Self

The obligation to report misconduct does not apply to the lawyer's own misconduct, only to that of "another lawyer." TDRPC 8.03(a).
(3) **Misconduct of Partners and Associates**

The obligation to report does extend to misconduct of the lawyer's partners or associates. Cf. ABA Informal Op. 1203 (1972) (applying former DR 1-103). Cf. Tex. Commission on Professional Ethics Op. 522 (1997) (law firm obligated to report partner who provided the firm with false information concerning his law degree and licenses; the law firm also had the duty to inform all clients or potential clients who received this false information).

(4) **Misconduct of Judges**

In addition to the obligation to report misconduct of other lawyers, a lawyer also has an obligation to report a judge's violation of the rules of judicial conduct, if such violation "raises a substantial question as to the judge's fitness for office." TDRPC 8.03(b). The lawyer should make such report to the Texas Commission on Judicial Conduct.

(5) **Confidentiality Limitation**

The confidentiality obligations of TDRPC 1.05 apply to the disclosure of information required by this Rule. Thus, a lawyer need not report misconduct if the report would violate Rule 1.05. Nonetheless, a lawyer should encourage a client to consent to disclosure if the prosecution of the violation would not substantially prejudice the client's interests. TDRPC 8.03 cmt. 3.

B. **Frivolous Appeal**

A frivolous appeal exposes counsel to sanctions under appellate rules in both state and federal courts, to disciplinary action under the TDRPC, and to sanctions under the TLC, which is enforceable by Texas courts "when necessary ... through their inherent powers and rules already in existence." Joint Order of Texas Supreme Court and Texas Court of Criminal Appeals (Nov. 7, 1989); see also Chambers v. NASCO, 501 U.S. 32, 111 S. Ct. 2123 (1991) (holding that a federal district court had the authority under the inherent powers doctrine to impose sanctions of almost $1 million, including attorney's fees and expenses, against a party that had attempted to deprive the trial court of jurisdiction through fraudulent acts, had filed false and fraudulent pleadings, and had used other tactics of "delay, oppression, harassment, and massive expense"); Kutch v. Del Mar College, 831 S.W.2d 506, 509-10 (Tex. App.--Corpus Christi 1992, no writ) (holding that Texas courts "have inherent power to sanction for bad faith conduct" even when no specific rule authorizes sanctions).

If an attorney determines that an appeal is frivolous, the attorney has the responsibility to inform the client. This duty to advise is continuous, because a case may not be frivolous at the start, but may become frivolous when appealed or as a result of intervening case law. See Holloway v. Walter, 811 F.2d 263, 264 (5th Cir. 1982).

1. **Texas Rules of Appellate Procedure 45 and 62**

Texas Rule of Appellate Procedure ("TRAP") 45 provides: "If the court of appeals determines that an appeal is frivolous, it may -- on motion of any party or on its own initiative, after notice and a reasonable opportunity for response -- award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs or other papers filed in the court of appeals."

TRAP 62 provides: "If the Supreme Court determines that a direct appeal or a petition for review is frivolous, it may -- on motion of any party or on its own initiative, after notice and a reasonable opportunity for response -- award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs or other papers filed in the court of appeals or the Supreme Court."

See Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 46 (Tex. App.--Houston [14th Dist.] 1996, no writ) (appellant sanctioned for frivolous appeal because his points of error contained "little or no authority, and in most instances, when he did cite authority, it was off point"); Jim Arnold Corp. v. Bishop, 928 S.W.2d 761, 772 (Tex. App.--Beaumont 1996, no writ) (sanctions awarded under former Rule 84 for frivolous appeal because appellant's "statements, arguments, and cited authorities are minimal, and authorities cited only tenuously relate to appellant's claimed points of error"); Campos v. Investment Management Properties, Inc., 917 S.W.2d 351, 354-58 (Tex. App.--San Antonio 1996, writ denied) (sanctions awarded for frivolous appeal when appellant argued there were fact issues precluding summary judgment but appellant had not filed a response below, and because appellant's embellishment of statutory language was found to be a material misrepresentation to the court); Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.--Texarkana 1989, writ denied) (awarding sanctions under former TRAP 84 of...
double court costs against a pro se litigant, even though the court concluded that he "possessed sincere personal expectations of prevailing," when he was pursuing the sixth proceeding on the same subject matter), cert. denied, 493 U.S. 1021 (1990); Avila v. Havana Painting Co., 761 S.W.2d 398, 401 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (sanctioning a lawyer who appealed his own malpractice judgment); but cf. Schwager v. Texas Commerce Bank N.A., 813 S.W.2d 225, 227 (Tex. App.--Houston [1st Dist.] 1991, no writ) (denying a motion to disqualify counsel but refusing to award sanctions to the respondent because "[b]efore sanctions can be imposed, the record must clearly show that appellees had no reasonable basis on which to believe their motions would be granted").

In deciding whether to impose sanctions under former TRAP 84, courts of appeals were instructed to view the record from the point of view of the advocate at the time the appeal was taken to determine whether reasonable grounds existed to believe the case should be reversed. See Color Tile, Inc. v. Ramsey, 905 S.W.2d 620, 624 (Tex. App.--Houston [14th Dist.] 1995, no writ). Under former TRAP 84, sanctions were inappropriate unless the record reveals that the appeal could have been taken only for purposes of delay and no reasonable hope of reversal existed. Id.; Valenzuela v. St. Paul Ins. Co., 878 S.W.2d 667, 671 (Tex. App.--San Antonio 1994, no writ).

It remains to be seen whether "delay" is necessary for imposing sanctions under TRAP 45 and 62, since an appeal need only be found "frivolous" to award sanctions under these new rules. Cf. The 1967 Advisory Committee Notes to Fed. R. App. P. 38, ("the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay").


Federal Rule of Appellate Procedure ("FRAP") 38 provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." See also McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 771 F.2d 649, 653 (5th Cir. 1986) (awarding double costs and $1000 damages against a party who had unsuccessfully sued a law firm and then appealed); Olympia Co. v. Celotex Corp., 771 F.2d 888 (5th Cir. 1985) (sanctioning a lawyer for a frivolous appeal for failing "to produce any evidence of antitrust injury" and asserting a theory of damages that "has been expressly rejected by ... prior case law," for making "virtually no effort to point to evidence raising a genuine issue of material fact," and for filing "rambling briefs [that] include citations to affidavits in the record which have little to do with the issues in this case, and which are unaccompanied by any explanation of what relevant evidence the cited affidavits supposedly contain"), cert. denied, 493 U.S. 818 (1989).

Additionally, a federal statute, 28 U.S.C. § 1912, allows a federal appellate court to order payment to the prevailing party of "just damages for his delay, and single or double costs." Although § 1912 does not expressly refer to appeals that are "frivolous," as a practical matter, the "delay" standard has the same effect.

In general, a showing of delay is not required to recover under either FRAP 38 or § 1912; rather, it is enough for recovery if it is shown that the suit was frivolous. See, e.g., Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 472 (1st Cir. 1985) ("Although § 1912 and Rule 38 differ slightly -- the former speaking of `delay` while the latter concerns `frivolous` appeals -- courts have typically ignored this distinction and imposed sanctions under the Rule and the statute." (citations omitted)); LeFebvre v. Commissioner, 830 F.2d 417, 418 (1st Cir. 1987) ("[D]amages, attorneys' fees and other expenses incurred by an appellee are properly allowed if the appeal is frivolous, without the necessity of a specific finding that it resulted in delay."); see generally GREGORY P. JOSEPHI, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE §§ 30-34 (2d ed. 1994).

3. TDRPC 3.01

TDRPC 3.01 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue

C. Appeals to Delay Litigation or for Harassment

1. Delay in Litigation

In instances where an appeal is not completely frivolous, a lawyer may have violated ethical obligations if the appeal "unreasonably" increases costs or causes delay. TDRPC 3.02 provides: "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or that unreasonably delays resolution of the matter." See also SAC Duties to the Court 2 ("An appellate remedy should not be taken for purely tactical reasons, such as delay"); SAC Duty to Lawyers 3 ("Counsel will not request an extension of time solely for the purpose of unjustified delay"); cf. TLC Article II.2 (requiring that a lawyer attempt to achieve client objectives "as quickly and economically as possible").

Moreover, a lawyer "shall not" use tactics that have "no substantial purpose" other than to embarrass, delay, or burden a third person. TDRPC 4.04(a). Also prohibited is counseling or assisting a client who deliberately seeks to multiply costs or other litigation burdens in the hope of gaining an advantage over a weaker opponent. TDRPC 3.02 cmt. 7; see also TLC Article II.7 ("The lawyer shall not pursue conduct intended primarily for delay or to harass or drain the financial resources of the opposing party"). *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 401 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (sanctioning a lawyer under former TRAP 84 for "filing this appeal for purposes of delay only"); *Florida Bar v. Rosenberg*, 387 So.2d 935 (Fla. 1980) (sanctioning a lawyer who initiated four separate appeals that were either voluntarily or involuntarily dismissed).

The federal statute that allows a court to sanction a lawyer who "multiplies proceedings unreasonably and vexatiously" also applies to appeals. 28 U.S.C. § 1927 (West 1994). Under § 1927, the court
may require that the lawyer personally pay excess costs, expenses, and attorney's fees incurred because of the lawyer's conduct. In In re Reed, 861 F.2d 1381 (5th Cir. 1988), for example, the court assessed § 1927 sanctions when the majority of an appellate brief merely attacked the constitutionality of the Federal Rules of Civil Procedure. See also McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649 (5th Cir. 1986) (assessing § 1927 sanctions against the lawyer of a client who sued its former law firm seeking return of documents the firm held). Even if the suit has a plausible basis, the suit may be an abuse of process under § 1927 if it is brought only to impose costs on the opponent. In re TCI, Ltd., 769 F.2d 441 (7th Cir. 1985). But see ABA Comm. on Professional Ethics, Informal Op. 689 (1963), 1 Informal Ethics Opinions 271 (1975) (finding it ethically acceptable to appeal a case to gain time for settlement unless the appeal is meritless).

Delay and costs in litigation are inevitable, of course, and oftentimes legitimate. The Rules do not attempt the impossible task of completely eliminating delay and cost. For example, although dilatory tactics solely for the lawyers' convenience are impermissible, necessary delays to prepare responses to extensive discovery requests are entirely proper. TDRPC 3.02 cmt. 4; compare TLC Article III.6 (requiring that counsel agree to "reasonable requests for extension of time") and SAC Lawyer's Duty to Lawyers 2 (counsel cannot unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation) and SAC Duties to Clients 10 (counsel must advise client that counsel reserves the right to grant reasonable accommodations and that the client has no right to instruct a lawyer to refuse such requests).

2. Harassment

Comment 5 to TDRPC 3.02 provides: "]A] client may seek to have a lawyer delay a proceeding primarily for the purpose of harassing or maliciously injuring another. Under this Rule, a lawyer is obliged not to take such an action.... It is not a justification that similar conduct is often tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable." Cf. SAC Duties to Client 11 ("a client has no right to demand that counsel abuse anyone or engage in any abusive conduct").

III. Conflicts of Interest

A. Adverse Legal Positions

TDRPC 1.06(b) states that "a lawyer shall not represent a person if the representation of that person ... 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." Comment 10 to Rule 1.06(b) defines the scope of the rule further as it relates to "positional conflicts": "A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court." TDRPC 1.06(b) cmt. 10 (emphasis added).

Professor Dzienkowski has described positional conflicts as follows: "A positional conflict of interest occurs when a law firm adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an opposite legal result, in a completely different matter. The classic positional conflict of interest arises in litigation when a lawyer or law firm argues for one interpretation of the law on behalf of one client and for a contrary interpretation on behalf of another client." John S. Dzienkowski, Positional Conflicts of Interest, 71 TEX. L. REV. 457, 460 (1993) (footnotes omitted) (emphasis in original). Positional conflicts of interest frequently occur in lobbying and transactional matters as well. Id. at 464.

Little case law has developed on the idea of "positional conflicts" of clients. One commentator has suggested the following examples of situations possibly raising positional conflicts:

1. a legal aid office's representation of landlords;
2. a legal aid office's representation of individual indigents with interests that differ from those of community groups traditionally favored by the office;
3. a lawyer who represents corporate entities whose business is exploiting natural resources has the opportunity to represent a surface landowner;
4. a lawyer represents banks; a debtor has a dispute with a bank that is not one of the lawyer's clients and the debtor's case presents a good opportunity to narrow the holder in due course rule;
(5) a law firm has an associate who represents a citizen group advocating clean air and opposing strip mining; a coal company wants the firm to serve as general counsel;

(6) a client labor union wishes to argue for a broad interpretation of a federal law; a corporate client, in another case, wishes to plead for a narrow interpretation of the same federal law.

Medina, 43 Sw.L.J. at 693 (footnotes omitted).

"Positional conflicts are unlikely to be asserted as grounds for disqualification; cases are therefore wanting. The lack of case law, however, should not reassure the bar. A positional conflict, especially if undisclosed, could make a client feel that his attorney's vigor in prosecuting his cause was tempered by the interests of the other clients, leading to either malpractice consideration, bar grievance procedures, or simply loss of the client." Id. at 694.

To avoid positional conflicts, a lawyer should counsel clients with potentially conflicting positions, fully disclose the possible conflict, and obtain consent to representation. TDRPC 1.06(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 existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.").

B. Lawyer as Witness

1. Lawyer Testimony for Client -- Necessary Witness for "Essential Fact"

Except for the certain enumerated instances discussed below, a lawyer knows or believes that she "is or may be a witness necessary to establish an essential fact on behalf of her client," shall not accept or continue employment as an advocate before a tribunal. TDRPC 3.08(a); see Mauze v. Curry, 861 S.W.2d 869, 870 (Tex. 1993). The prohibition does not apply absent the belief or knowledge that the lawyer may be (1) a necessary witness (2) concerning an essential fact.

The Rule allows a lawyer to accept or continue employment, despite the status as a potential necessary witness, in any of the following circumstances:

a. The testimony relates to an uncontested issue.

b. The testimony relates solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

c. The testimony relates to the nature and value of legal services rendered in the case.

d. The lawyer is a party to the action and is appearing pro se. (In Ayres v. Canales, 790 S.W.2d 554 (Tex. 1990), a trial court abused its discretion in disqualifying a lawyer who was also a party suing another lawyer to obtain a declaratory judgment that a referral fee was owed; under TDRPC 3.08(a)(4), the lawyer was entitled to represent himself. The court also held that the lawyer's firm was entitled to participate under TDRPC 3.08(a)(5)).

e. The lawyer has promptly notified opposing counsel that she expects to testify in the matter and her disqualification would work substantial hardship on the client. "This exception generally contemplates an attorney who has some expertise in a specialized area of law such as patents, and the burden is on the attorney seeking to continue representation to prove distinctiveness." Warrilow v. Norrell, 791 S.W.2d 515, 520 (Tex. App.--Corpus Christi 1989, writ denied). In Warrilow, the appellate court further held that the trial court had erred in refusing to disqualify a lawyer who was both a material fact witness and an expert witness for his client in a case alleging breach of good faith and fair dealing against an insurance company. Cf. Health & Tennis Corp. v. Jackson, 928 S.W.2d 583, 591 (Tex. App.--San Antonio 1996, no writ) (trial court did not abuse its discretion in allowing party's attorney to testify at hearing on class certification since "trial-related evidentiary standards" are not applied to review of class certification order); Solvex Sales Corp. v. Triton Mfg. Co., 888 S.W.2d 845, 848 (Tex. App.--Tyler 1994, writ denied) (holding that Rule 3.08 was not violated when the attorney of record testified as a material witness but did not appear as counsel for his client during the trial).

In one instance, the Texas Committee on Professional Ethics concluded that a lawyer husband could represent his wife in a matter in which he was not a named party but in which he shared common liability and interest with his wife, and in which he necessarily would appear as a witness for his wife, provided that (1) the lawyer's wife would experience substantial hardship if he did not represent her, and (2) the lawyer gave prompt notice to the opposing counsel that he would testify. See Tex. Comm. on Professional Ethics Op. 468 (1991).

2. Lawyer Testimony -- Adverse to the Client
TDRPC 3.08(b) prohibits a lawyer from continuing as an advocate if the lawyer believes that the lawyer will be compelled to give "substantially adverse" testimony, unless the client consents after full disclosure.

3. Advocate from Same Firm as the Lawyer-Witness

If a lawyer is barred from representing a client under either paragraph (a) or (b) of Rule 3.08, paragraph (c) allows another member of the firm to represent the client if the client gives informed consent. This Rule does not prohibit the testifying lawyer from participating in the preparation of the matter as long as the testifying lawyer takes no active role as an advocate before the tribunal. Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 422 (Tex. 1996); Spain v. Montalvo, 921 S.W.2d 852, 857 (Tex. App.--San Antonio 1996, orig. proceeding); see TDRPC 3.08 cmt. 8.

4. Other Law Firm Employee as Expert Witness

In Opinion 513, the Texas Committee on Professional Ethics addressed whether a certified public accountant employed as an internal controller by a law firm could ethically testify as an expert in a case in which the law firm was employed. Because under TDRPC 5.03, the disciplinary rules are applicable to non-lawyer employees, and because use of an in-house CPA could lead to waiver of the attorney-client privilege once the CPA was designated as a testifying expert, the Committee determined that use of an in-house CPA as a testifying expert would violate TDRPC 3.08 "unless the accountant's testimony is the same nature as would permit an attorney to testify as an expert on a case in which he or she is representing a party." Tex. Comm. on Professional Ethics Op. 513 (1996).

5. Former Witness as Appellate Lawyer

In Opinion 471, the Texas Committee on Professional Ethics dealt with the situation in which the partner of an attorney who served as a witness at trial is asked to represent the client on appeal. The Committee's opinion stated: "With the informed consent of the client, a law firm may represent a client in an appeal from a trial at which an attorney in the law firm, other than the attorney who will argue the appeal before the appellate tribunal, testified as a fact witness on behalf of the client at the trial."

C. Disqualification and Sanctions

1. Raising a Conflicts Issue

The disciplinary rules contemplate that a conflict of interest issue is primarily the responsibility of the lawyer undertaking the representation. TDRPC 1.06 cmt. 17. A judge, however, may raise the issue during litigation if the judge concludes that the lawyer has neglected the responsibility. TDRPC 1.06 cmt. 17. Although opposing counsel may raise the issue when the conflict clearly calls into question "the fair or efficient administration of justice," the judge should view such objections with "great caution," as such objections often are used as a means of harassment. TDRPC 1.06 cmt. 17; TDRPC Preamble ¶ 15 ("[T]hese rules can be abused when they are invoked by opposing parties as procedural weapons."); see Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 131 (Tex. App.--Corpus Christi 1995, orig. proceeding) ("We must adhere to an exacting standard when considering motions to disqualify to discourage their use as a dilatory trial tactic.").

2. Disqualification Standards

Although TDRPC 3.08 sets out a disciplinary standard, it is not "well suited to use as a standard for procedural disqualification." TDRPC 3.08 cmt. 9. Nevertheless, the comments recognize that the rule may furnish "some guidance" when the party seeking disqualification can demonstrate actual prejudice from the opposing lawyer's service in the dual roles. TDRPC 3.08 cmt. 10.

In Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 421 (Tex. 1996), the Texas Supreme Court stated that "[a]lthough Rule 3.08 was promulgated as a disciplinary standard, rather than a procedural disqualification standard . . . we have recognized that the rule articulates considerations relevant to a procedural disqualification determination." In Ayres v. Canales, 790 S.W.2d 554, 556-57 n.2, 558 (Tex. 1990), the Texas Supreme Court also referred to TDRPC 3.08 "for guidance" in determining whether the trial court abused its discretion in disqualifying a lawyer. "[T]he rule articulates considerations relevant to a procedural disqualification determination, and a trial court order that disqualifies an attorney in order to prevent violation of Rule 3.08 is appropriate when warranted .... In order to prevent ... misuse of the rule, the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual roles." Id.

The Supreme Court also discussed the role of Rule 3.08 in a disqualification context in Spears v.
Fourth Court of Appeals, 797 S.W.2d 654 (Tex. 1990). In that case, the Supreme Court upheld the trial court’s refusal to disqualify a firm with a member who formerly had served as chairman of the Industrial Accident Board and, in that capacity, had received notice nine days before her tenure ended of an accident in an IAB office.

"While this rule is not intended as a standard for procedural disqualification, it may provide guidance in those cases in which the movant can demonstrate actual prejudice as a result of the dual roles of lawyer and witness. The Comments, however, vehemently discourage the use of motions to disqualify as tactical weapons, as well as the unnecessary calling of an opponent’s lawyer as a witness to invoke the rule's prohibition." Id. at 658. "Disqualification is a severe remedy ... The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory tactic." Id. at 656; see also TLC Article III.19 (prohibiting a lawyer from seeking "disqualification unless it is necessary for protection of [the] client’s lawful objectives or is fully justified by the circumstances").

Courts are more likely to use the conflict-of-interest rules as standards for disqualification. See, e.g., National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996) (“The Texas Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.”).

Henderson v. Floyd, 891 S.W.2d 252, 253 (Tex. 1995) ("We look to the Texas Rules of Professional Conduct for guidance in determining whether an attorney should be disqualified from representing a party in litigation."); Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 131 (Tex. App.--Corpus Christi 1995, orig. proceeding) ("Whether an attorney should be disqualified is a decision to be made by the trial court with reference to the Texas Rules of Professional Conduct.").

A party desiring to raise a conflict-of-interest ground for disqualification must do so promptly or risk waiver. See Vaughn v. Walther, 875 S.W.2d 690, 690 (Tex. 1994) (holding that a delay of six and a half months to file a motion to disqualify waived the right to disqualify opposing counsel); HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622, 629 (Tex. App.--Austin 1992, writ denied) (concluding that a delay of eleven months between learning of the conflict and moving for disqualification constituted a waiver of the remedy of disqualification); Conoco Inc. v. Baskin, 803 S.W.2d 416 (Tex. App.--El Paso 1991, no writ) (holding that a delay of four months in filing a motion to disqualify constituted a waiver); see also Thompson v. DeLoitte & Touche, L.L.P., 902 S.W.2d 13, 18 (Tex. App.--Houston [1st Dist.] 1995, no writ) (rejecting a motion to disqualify filed less than thirty days before trial); compare Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 n.1 (Tex. 1990) (condemning the dilatory filing of motions to disqualify, but not reaching the question whether a motion was dilatory when it was filed six days before trial and after more than four months of delay); but cf. Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 131 (Tex. App.--Corpus Christi 1995, orig. proceeding) (stating that a delay of two and a half months did not constitute a waiver when the parties were exchanging correspondence and telephone calls on the issue during that time).

If a judge disqualifies a lawyer based upon a finding of a TDRPC violation, the judge may refer the matter to a grievance committee. Texas Code of Judicial Conduct, Canon 3(B)(3).

3. Conflicts in Sanctions Hearings

Determination of a motion for sanctions often requires analysis of the respective roles or culpability of the attorney and client in the conduct leading to sanctions. The Supreme Court emphasized this culpability determination in Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (1991):

[A] direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both.

Id. at 917 (emphasis added). Courts have reversed sanctions orders in numerous cases because of the trial court’s failure to determine whether the attorney or client was responsible for the sanctionable conduct. See, e.g., Jones v. Andrews, 873 S.W.2d 102, 106 (Tex. App.--Dallas 1994, no writ).

The required culpability determination may create a conflict of interest between attorney and client. See Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 623 (2d Cir. 1991) (“A potential for conflict is inherent in a sanctions motion that is directed against both a client and a lawyer, even when, as here, the two agree that an action was fully warranted in fact and law.... A sanctions motion attacking the factual basis for the suit
will almost inevitably put the two in conflict, placing in question the attorney's right to rely on his client's representations and the client's right to rely on his lawyer's advice."; *Buyers Prods. Co. v. Clark*, 847 S.W.2d 270, 273 (Tex. App.--Beaumont 1992, orig. proceeding) ("There are those situations which may create adversarial relationships between attorneys and their clients, thus bringing about questions of legal malpractice. Have we reached the time where trial judges should warn clients of the possible conflicts of interest and the possible need for additional representation, if only at the sanctions hearing?").

Thus, in some instances, at the sanctions hearing a client may need separate representation when such a conflict arises. On the other hand, the attorney and client may be able to resolve the sanctions issue by agreement in advance of the hearing. When such a sanctions motion is filed, counsel should consider this issue in advance of the hearing. In some cases, the client may need independent legal advice even to determine how to proceed. In other cases, such as when the client has in-house counsel, or when the client (or the lawyer) admittedly and knowingly assumed the sanctions risk prior to engaging in the challenged conduct, the respective responsibilities for sanctions may be clear to all concerned.

Certainly courts should avoid acting to interject unnecessarily a divisive conflict issue into the attorney-client relationship. Often a court can avoid the matter by postponing the "culpability determination," or even the determination or imposition of sanctions, until the resolution of the merits of the litigation.

Sometimes the culpability determination may require an allocation not only between counsel and client, but also among various clients. *See, e. g., Bastien v. R. Roland & Co.*, 116 F.R.D. 619, 621-22 (E.D. Mo. 1987) (imposing monetary sanctions one-half on counsel, one-fourth on a particular plaintiff, and one-fourth in equal parts among the remaining seven plaintiffs), aff'd, 857 F.2d 482 (8th Cir.), cert. denied, 490 U.S. 1081 (1989).

Besides the general danger of intruding into the attorney-relationship, another risk is the potential disclosure of privileged information in the form of attorney-client privilege or work product material. Federal court commentators have emphasized that courts should take appropriate steps to avoid unnecessary satellite litigation, and, when necessary, should use protective orders and in camera inspection "to protect a party claiming privilege or work product protection."

Advisory Committee Note, Fed. R. Civ. P. 11; see also ABA Section of Litigation, Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure, Standard (L)(3)(b) ("In allocating sanctions between counsel and client, the court takes into account the privileged nature of their relationship and avoids encroaching upon the attorney-client privilege or jeopardizing counsel's ability to act, and act effectively, for the client.").

IV. Candor to the Appellate Court

Although an advocate's task is to present the client's case persuasively, the Texas Disciplinary Rules of Professional Conduct limit that obligation by another series of duties requiring truthfulness and candor to tribunals. TDRPC 3.03 cmt. 1. The Standards for Appellate Conduct also explain:

"Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues to be decided by the court, while persuading the court that an interpretation and application favored by the lawyer's clients is in the best interest of the administration of equal justice under law."

A. False Statements and Evidence

1. False and Untrustworthy Evidence

The Rules prohibit a lawyer from knowingly making a false statement of fact or law, or offering or using evidence known to be false. TDRPC 3.03(a)(1), (5). TLC Article IV.6 prohibits misrepresenting or mischaracterizing any facts.

In some circumstances a client may be unaware both of the serious consequences that may result from introducing false testimony and of the lawyer's ultimate obligation to disclose. A naive, misguided client may suggest offering false evidence. The lawyer should explain candidly the full extent of the obligations and that the Rules prohibit the lawyer from offering false evidence and would require the lawyer to disclose the truth if such evidence were introduced. Faced with that reality, most clients will withdraw the suggestion. If the client agrees not to offer false evidence, the lawyer may proceed with the representation. See TDRPC 1.15(b)
(2)-(3) (permissive withdrawal if the client persists in criminal/fraudulent conduct). Even if withdrawal is necessary, however, the lawyer still may have a duty to inform new counsel of the client's intended course of action. See TDRPC 1.05(e), 4.01(b).

While normally an advocate need not have personal knowledge of matters asserted in pleadings, the false-statement prohibition applies directly to assertions in affidavits or in open court. TDRPC 3.03 cmt. 2.

If the lawyer merely believes that evidence is untrustworthy, but does not know it is false, the lawyer may still refuse to offer the evidence. The lawyer should exercise such discretion cautiously, however, so as not to impair the client's legitimate interests. TDRPC 3.03 cmt. 15. Under TDRPC 3.03(b), however, "[i]f 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."

2. Subsequent Discovery of Falsity

If a lawyer has offered material evidence and later becomes aware of its falsity, the lawyer has two additional duties. First, she must try to persuade the client to allow the lawyer to "correct or withdraw" the evidence. Second, if those efforts fail, the lawyer must take "reasonable remedial measures," including disclosure of the true facts. TDRPC 3.03(b).

3. False Evidence Introduced by Another

The two duties of persuasion and disclosure that apply if the lawyer learns that the client has offered false evidence do not apply to the same extent if another person introduces the false evidence. For example, a lawyer may introduce the testimony of a witness or client who testifies truthfully on direct examination but gives false testimony on cross-examination. In this instance, the duty to urge correction or withdrawal of the evidence still applies, but disclosure is discretionary, not mandatory. TDRPC 3.03 cmt. 13. Nevertheless, the lawyer cannot use or rely upon the false evidence and should not refer to the evidence in final argument or otherwise. TDRPC 3.03(a)(5) & cmt. 13.

B. Disclosures to Avoid Criminal/Fraudulent Acts

A lawyer must disclose facts to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act. TDRPC 3.03(a)(2).

1. Preventing/Correcting Client Crime or Fraud

A lawyer may disclose information based upon a reasonable belief that it is necessary to do so to prevent the client from committing a criminal or fraudulent act. TDRPC 1.05(c)(7). Similarly, revelation is permissible to rectify the consequences of such acts if the client used the lawyer's services in the commission of the acts. TDRPC 1.05(c)(8). TDRPC 1.02(d) imposes a duty to dissuade a client from potential criminal conduct: "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."

2. Prior Client Misconduct: Duty to Persuade

If a lawyer learns after the fact of a client's criminal or fraudulent acts, a duty to undertake certain remedial efforts may arise. Specifically, when a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act using the lawyer's services, the lawyer must make reasonable efforts under the circumstances to persuade the client to take corrective action. TDRPC 1.02(e). This obligation is inapplicable if:

(1) The information does not clearly establish that the client has committed the act.

(2) The act is not a criminal or fraudulent act in which the client has used the lawyer's services. Note, however, that the after-the-fact duty to persuade is not limited to criminal or fraudulent acts "likely to result in substantial injury to the financial interest or property of another," as is true of the obligation that arises in advance of the act under TDRPC 1.02(d).

Again, the lawyer need only make "reasonable efforts" under the circumstances to persuade the client to take corrective action.

C. Disclosures in Ex Parte Proceedings

In an ex parte proceeding, a lawyer must disclose to a tribunal any "unprivileged fact" that the lawyer "reasonably believes" should be known for an "informed decision." TDRPC 3.03(a)(3).
This may require disclosure of confidential client information otherwise protected by TDRPC 1.05.

Thus, disclosures may be necessary when seeking a default judgment or a temporary restraining order. For example, counsel may be aware of unprivileged facts potentially establishing equitable defenses to a TRO request (e.g., unclean hands, estoppel, etc.), or even negating an element required for TRO relief (e.g., imminent threat of irreparable harm). If so, the lawyer must disclose such facts.

The Texas Lawyer's Creed provides that a lawyer must not take advantage of opposing counsel by obtaining a default judgment without first inquiring about counsel's intentions to proceed. TLC Article III.11. If an opposing party obtains a default judgment in violation of this provision, a motion for new trial or other motion to set aside judgment should cite this provision.

TDRPC 3.05 contains prohibitions against improper influence and improper ex parte communications with tribunals. A lawyer shall not seek to influence a tribunal concerning a pending matter by any means prohibited by law or other applicable rules of practice or procedure. TDRPC 3.05(a). This includes bribery, as well as more subtle forms of influence. The Code of Judicial Conduct more specifically addresses forms of improper influence. TDRPC 3.05 cmt. 1.

TDRPC 3.05(b) prohibits ex parte communications with a tribunal for purposes of influence concerning a pending matter, except as otherwise permitted by law and applicable rules. See also TEX. PENAL CODE ANN. § 36.04 (Vernon 1994) (prohibiting certain "private" communications with "public servants," including judges).

TRAP 9.6 also provides that "[p]arties and counsel may communicate with the appellate court about a case only through the clerk." In In re J.B.K., 931 S.W.2d 581 (Tex. App.--El Paso 1996, no writ), the El Paso Court of Appeals held that communications between a lawyer and a court staff member concerning the merits of a pending case were ex parte communications not authorized by law. Id. at 584. The lawyer, after presenting oral argument in the case, telephoned a court staff member and asked about his chances on appeal and whether the case should be settled before the court issued its decision. Id. at 583. The court found this conduct violated not only the rules of appellate procedure but also the disciplinary rules as well, and referred the matter to the State Bar General Counsel. Id. at 584-85.

In some adjudicatory settings, such as zoning determinations and some forms of alternative dispute resolution, applicable rules may authorize ex parte contacts. TDRPC 3.05 cmt. 4. The Code of Judicial Conduct also allows certain communications, such as those concerning uncontested administrative or procedural matters, or, with the consent of all parties, separate conferences for the purpose of mediation or settlement. TCJC Canon 3A(5)(a), (b).

A lawyer who knowingly assists a judge or judicial officer in conduct that violates Rule 3.05 or the Texas Code of Judicial Conduct also violates TDRPC 8.04(a)(6). TDRPC 3.05 cmt. 3.

D. Disclosure of Adverse Legal Precedent

Under TDRPC 3.03(a)(4), "[a] lawyer shall not knowingly ... 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." See also SAC Duties to the Court 4 ("Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and will take care not to cite authority that has been reversed, overruled, or restricted without informing the court of those limitations"); and TLC Article IV.6 ("I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage."). This duty continues "until remedial legal measures are no longer reasonably possible." TDRPC 3.03(c).

"Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, . . . an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." TDRPC 3.03(a)(4) cmt. 3; see Medical Protective Co. v. Groce, Locke & Hebdon, 814 S.W.2d 124 (Tex. App.--Corpus Christi 1991, writ denied) (sustaining a trial court sanctions order that granted default judgment and awarded the opposing party $28,054 in damages, and noting that counsel had erroneously cited to the trial court a court of appeals opinion withdrawn prior to publication); Ryan Mortgage Investors, Inc. v. Lehmann, 544 S.W.2d 456, 462 (Tex. Civ. App.--Beaumont 1976, writ dism'd w.o.j.) (finding it "inexcusable" for an attorney not to bring the court's
attention to a case in which the attorney had been counsel); see also White v. Carlucci, 862 F.2d 1209, 1213 (5th Cir. 1989) (admonishing an attorney for not citing to the Fifth Circuit its own controlling precedent, and noting that the court "may infer that this omission was not inadvertent, given that the same attorney had also represented the plaintiff in [the prior case]"); Hampton v. Long, 686 F. Supp. 1202, 1205-06 (E.D. Tex. 1988) ("But what renders the use of this case very unconvincing is the Bank's failure also to mention that it was later reversed by a New York appellate court. It is deplorable that the Bank's counsel were not more assiduous in briefing this issue. They are hereby admonished that future lapses of this character will render them vulnerable to the imposition of sanctions under Fed. R. Civ. P. 11"); Croy v. Skinner, 410 F. Supp. 117 (N.D. Ga. 1976) (suggesting that good practice would be for an appellate lawyer to submit a supplementary brief disclosing reversal of the principal case relied upon).

The ABA also has dealt with this topic in issuing its ethics opinions. ABA Informal Opinion 84-1505 involved the obligation of a lawyer who had defeated a motion to dismiss in a case of first impression involving statutory interpretation to inform the court of a subsequent appellate decision rendered elsewhere in the state that interpreted the statute differently. The ABA determined that, even though the trial court would not be bound by the appellate decision and that one could have interpreted the appellate ruling in a way not directly adverse to the position of the client, the trial court could have benefitted from knowing of the appellate decision. Therefore, the lawyer had a duty to reveal that information. See Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A HOUS.L. REV. 1, 250 (1990).

"[T]he more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it." 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT 588 (2d ed. 1994). Indeed, failing to reveal the adverse precedent may result in worse connotations when the precedent is discovered than would have resulted if the precedent had been revealed. "If nothing else, a court's late discovery that an advocate has failed to confront an adverse authority is likely to produce the impression that the awakened precedent, because suppressed, should be regarded as particularly vicious." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.8, at 682 (Pract. ed. 1986).

One major consideration for determining if a lawyer must disclose adverse legal precedent is whether the authority is from the "controlling jurisdiction." This consideration may present some problems. The following hypotheticals, adapted from similar examples cited by Medina, 43 Sw.L.J. at 709-12, illustrate these difficulties.

(1) A Texas Supreme Court decision is directly adverse to the position advocated in the Fifth Circuit. This would clearly require disclosure under the rules because a state court's decisions on substantive law are binding on the federal court. Id. at 710.

(2) A reported Texas court of appeals decision is directly adverse to the position taken on appeal to the Fifth Circuit. This also would clearly require disclosure because the state law precedent would be binding upon the court. Although the decision is not from the Texas Supreme Court, the Erie doctrine suggests that federal courts should look to intermediate state court decisions in the absence of state supreme court decisions. Id. at 709.

(3) An unreported Texas court of appeals decision that is directly adverse to the position advocated in the Fifth Circuit would not require disclosure. Under TRAP 47.7, unpublished opinions may not be cited as authority by counsel or by the court. Because the federal court must give the state court decision the same effect as, a state court would, the federal court would not require disclosure. Id. at 711.

(4) A Fifth Circuit decision construing Texas law is directly adverse to the position taken on appeal to the Texas Supreme Court. This would probably best be considered to be authority within the controlling jurisdiction because, although not binding, federal decisions are generally considered persuasive authority in state court. Such an interpretation would also avoid accidental conflicting interpretations of Texas law. Id. at 709-10.

(5) A Tenth Circuit decision construing federal law is directly adverse to the position taken in an appeal to the Fifth Circuit. Such a decision is not binding on the Fifth Circuit. Therefore, disclosure would not be required. Id. at 710.

(6) An Oklahoma Supreme Court decision construing Texas law in a manner directly adverse to the position taken in a case before the Texas Supreme Court
would probably not require disclosure. Disclosure would only be required if one were to broadly construe "controlling jurisdiction" as "all cases construing the governing law." *Id.* at 711.

7. A Fifth Circuit decision on federal constitutional law that is directly adverse to a position advanced in the Texas Supreme Court probably would require disclosure. Although the federal decision concerning federal law is considered persuasive, it is not binding, and the Texas Supreme Court need not give any more deference to a Fifth Circuit decision than it would have to give to a decision in another circuit. To prevent accidental conflicting interpretations within the jurisdiction, however, the best policy would require disclosure. *Id.* at 712.

8. A New York decision construing New York law is directly adverse to a position taken in a case before the Texas Supreme Court in which New York substantive law will govern. This would require disclosure because the controlling jurisdiction would be New York. *Id.* at 712.

9. The failure of an appellee to find a line of reasoning that supports the affirmation of a trial court would not require disclosure. *Id.* at 712.

E. Mischaracterization of Legal Precedent and the Record

Before relying upon information provided in earlier briefs, an appellate lawyer who did not represent the client during lower court proceedings should ensure that the information is accurate and has not misrepresented the law or facts. Medina, 43 Sw.L.J. at 699; see also TLC Article IV.6 ("I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage."); *Grogen v. State*, 745 S.W.2d 450, 451 (Tex. App.--Houston [1st Dist.] 1988, no pet.) ("Counsel's brief misstates the holdings of the cases described, creating the impression that these cases hold completely opposite to their actual holdings. We condemn this practice as unprofessional conduct, and refer the matter to the Disciplinary Review Committee of the State Bar of Texas, as we are required to do under the ... Code of Judicial Conduct....").

Making false, misleading, or unsupported statements to the court may be considered fraud. See, e.g., *Holcomb v. Colony Bay Coal Co.*, 852 F.2d 792, 797 (4th Cir. 1988) (doubling an attorney's costs for misstating the record); *In re Boucher*, 850 F.2d 597, 599 (9th Cir. 1988) (censuring an attorney for misrepresentations in a brief); *In re Chakeres*, 101 N.M. 684, 687 P.2d 741 (1984) (publicly censuring an attorney for declaring that inconsistent testimony was "uncontroverted").

Additionally, selectively cropping portions of the record to distort the proceedings and undermine the opponent's arguments is considered as unethical as making false or unsupported statements. *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476 (D.C. Cir.) (concluding that an attorney's editing violated the candor requirement of Rule 3.3 of the Model Rules of Professional Conduct), *cert denied*, 469 U.S. 924 (1984); *Frausto v. Legal Aid Society*, 563 F.2d 1324 (9th Cir. 1977) (noting appellate counsel's
duty of scrupulous accuracy in referring to authorities and the record); Medina, 43 Sw.L.J. at 700.

"Selective cropping" is especially improper in emergency ex parte proceedings when the judge does not have the opportunity to thoroughly examine the record. State v. Weinstein, 411 S.W.2d 267 (Mo. Ct. App. 1967) (admonishing parties seeking a writ of prohibition for failure to inform the appellate court that they had already entered a general appearance and a request to examine files); Medina, 43 Sw.L.J. at 700-01.

Plagiarism, both mischaracterizing borrowed material as original and simply failing to attribute material to its source, is also considered unethical. Frith v. State, 325 N.E.2d 186, 189 (Ind. 1975).

F. Advancing a Moot Appeal

An attorney may have an obligation to inform an appellate court of a settlement reached between parties even though the client wants to proceed with the appeal to get a definitive ruling by the court and the other party does not object. See, e.g., Board of License Comm'r's v. Pastore, 469 U.S. 238, 240 (1985) ("When a development after this Court grants certiorari or notes probably jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court without delay.") (emphasis in original); Amherst & Clarence Ins. Co. v. Cazenovia Tavern, Inc., 59 N.Y.2d 983, 466 N.Y.S.2d 660, 453 N.E.2d 1077, 1078 (1983) (rejecting the attorney's attempt to keep the action alive and stating that attorneys are obliged to keep the court fully informed of all matters pertinent to the appeal and are prohibited from agreeing to keep a moot appeal alive).

G. Criticism of Court

In characterizing the decision of a lower court in a case, an appellate attorney should be cautious that the characterization is not improperly critical or abusive. "As one judge observed, "[y]ou can think it, but you better not say it."" Medina, 43 Sw.L.J. at 716 (quoting Vandenberghe v. Poole, 163 So.2d 51, 52 (Fla. 2d Dist. Ct. App. 1964) (Rawls, J., concurring)). Improper conduct also may be considered sanctionable. See, e.g., Gregoire v. National Bank, 413 P.2d 27, 37 (Alaska 1966) (reprimanding an attorney for accusing the court of condoning unethical behavior of the opposing party and circumventing a trial on the merits); Ramirez v. State Bar, 619 P.2d 399, 406 (Cal. 1980) (suspending an attorney for alleging that the court justices were parties to the theft of the client's property); Northwest S.D. Prod. Credit Ass'n v. Dale, 361 N.W.2d 275, 279 (S.D. 1985) (rebuking an attorney for accusing the court of being advocates for his opponent's client); Farmer v. Board of Professional Responsibility, 660 S.W.2d 490, 491 (Tenn. 1983) (suspending an attorney for declaring in a brief that the court made "intentionally false findings" and "lied"); appeal dism'd, 466 U.S. 946 (1983); State v. Rhodes, 131 N.W.2d 118, 120 (Neb. 1964) (stating that an attorney violated the Canons of Professional Ethics by calling the court a "kangaroo court" in his answer to disciplinary charges); see also TLC Article IV ("Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack."); TLC Article IV.1 ("I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol."); SAC Duties to the Court 7 ("Counsel will conduct themselves before the Court in a professional manner respecting the decorum and integrity of the judicial process"); SAC Duties to the Court 8 ("Counsel will be civil and respectful in all communications with the judges and staff"); SAC Duties to the Court 10 ("Counsel will not permit a client's ill feelings toward the opposing party, opposing counsel, or the Court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties"); Medina, 43 Sw.L.J. at 716 & n.203.

But see Jackson v. State, 21 Tex. 668 (1858) (referring to a statute providing that no court shall strike an attorney from the rolls for contempt "unless it involves fraudulent or dishonorable conduct or malpractice," the court stated that the conduct referred to means official conduct as an attorney, not merely as an individual, and that applying out-of-court opprobrious and abusive epithets to a judge in reference to his decisions cannot be considered a contempt involving fraudulent or dishonorable conduct or malpractice); Polk v. State Bar, 374 F. Supp. 784, 788 (N.D. Tex. 1974) (holding that "[a] state may not regulate an attorney's exercise of his right to free speech under the guise of prohibiting professional misconduct unless his conduct clearly falls" within the attorney's conduct as a lawyer and not as a private citizen).

V. Special Issues in Appellate Malpractice

A. Standard of Care

1. Common Appellate Errors

A lawyer is liable for negligence, and appellate
legal malpractice claims center on four general areas: (1) failure to advise the client of the right to appeal; (2) failure to take preliminary post-trial steps; (3) failure to take required steps on appeal; and (4) negligent representation of a client's contentions on appeal. See generally Lynn Liberato, Appellate Legal Malpractice, in St. Mary's Twelfth Annual Procedural Law Institute Litigation Malpractice 4-5 (Nov. 1990).

As the Texas Supreme Court stated in Millhouse v. Wiesenthal, 775 S.W.2d 626, 628 n.4 (Tex. 1989), "Other jurisdictions have recognized that appellate legal malpractice generally includes the following: negligently advising a client not to appeal; negligently failing to take the preliminary post-trial steps necessary to appeal, such as filing a motion for new trial when required; negligently failing to timely file the notice of appeal, cost bond, record, or brief, and negligently presenting the client's contentions on appeal."

2. Examples in Cases

a. Burns v. Thomas, 786 S.W.2d 266 (Tex. 1990) (failure to oppose motion for judgment n.o.v. and failure to appeal).


c. Porter v. Kruegel, 106 Tex. 29, 155 S.W. 174 (1913) (failure to prosecute two suits and to pursue an appeal).


g. Jimenez v. Maloney, 646 S.W.2d 673 (Tex. App.--San Antonio 1983, writ diss'd w.o.j.) (failure to file a motion for new trial and to perfect an appeal).


3. Specialization

The Texas Board of Legal Specialization certifies lawyers in specified practice areas, including civil appellate law, and lawyers may advertise such certification. See TDRPC 7.01.

At least one Texas court has approved a higher standard of care for a lawyer who holds himself or herself out as a specialist. See Rhodes v. Batilla, 848 S.W.2d 833 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (holding that a jury question inquiring whether a lawyer met the standard of care applicable to a "tax attorney" was proper when the attorney held himself out as a "tax expert"); cf. Patterson & Wallace v. Frazer, 79 S.W. 1077, 1080-81 (Tex. Civ. App. 1904, no writ) ("Whether the want of such skill, prudence, and diligence as are possessed and commonly exercised by lawyers of ordinary skill and capacity, versed in the particular practice of the particular locality or subject, be regarded as gross negligence or not, it seems to us that the failure of a lawyer to possess and exercise them, when by such failure his client is damaged, . . . renders the lawyer liable for such damages as proximately flow from such negligence . . ." (emphasis added)).

B. Statute of Limitations

A legal malpractice cause of action is in the nature of a tort and is generally governed by the two-year statute of limitations. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988). Regardless whether the plaintiff phrases the cause of action in terms of negligence or breach of contract, the two-year period applies. See, e.g., Mathew v. McCoy, 847 S.W.2d 397 (Tex. App.--Houston [14th Dist.] 1993, no writ); Black v. Willis, 758 S.W.2d 809, 814 (Tex. App.--Dallas 1988, no writ); Pham v. Nguyen, 763 S.W.2d 467, 479 (Tex. App.--Houston [14th Dist.] 1988, writ denied); Gabel v. Sandoval, 648 S.W.2d 398, 399 (Tex. App.--San Antonio 1983, writ dism'd). But cf Jampole v. Matthews, 857 S.W.2d 57, 62 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (distinguishing between actions for negligent legal practice, on the one hand, and actions for fraud pertaining to fees or breach of contract pertaining to fees, on the other hand, and holding that a
four-year limitations period applies to the fraud and breach of contract claims, even though they arose from the attorney-client relationship).

For a legal malpractice suit to be timely under the statute of limitations, the plaintiff must bring the suit within two years of the date that the cause of action "accrues." TEX. CIV. PRAC. & REM. CODE § 16.003(a) (Vernon Supp. 1997). The accrual of an action "signifies the date when the plaintiff first becomes entitled to sue the defendant based upon a legal wrong attributed to the latter." Zidell v. Bird, 692 S.W.2d 550, 554 (Tex. App.--Austin 1985, no writ). Often, however, a client does not learn of the lawyer's malpractice until long after the act or omission occurred. If the cause of action were to accrue at the time of the act or omission, it would be possible for the statute of limitations to run before the client discovers that there is a cause of action. To deal with the gap that may exist between the date of the injury and its discovery by the client, the Texas Supreme Court has adopted the "discovery rule" to determine when the statute of limitations begins to run for a legal malpractice action. See Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988).

When a lawyer commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations is tolled until all appeals on the underlying claim are exhausted. Hughes v. Mahaney & Higgins, 821 S.W.2d 154 (Tex. 1991).

C. Suit-Within-a-Suit Requirement

In the case of alleged appellate malpractice, the suit-within-a-suit requirement means that the plaintiff must show that, but for the error, the appeal would have succeeded. Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989) ("[T]he determination of causation requires determining whether the appeal in the underlying action would have been successful. The plaintiff must show that but for the attorney's negligence the client would have prevailed on appeal."). See Veschi v. Stevens, 861 S.W.2d 291, 293 (Tex. App.--San Antonio 1993, no writ); Maxey v. Morrison, 843 S.W.2d 768, 770 (Tex. App.--Corpus Christi 1992, writ denied). Although the determination of proximate cause is nominally a question of fact in a malpractice action, that is not true in appellate malpractice cases. "[I]n a case of appellate legal malpractice the determination of causation is a question of law." Millhouse 775 S.W.2d at 628; see Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 47 (Tex. App.--Houston [1st Dist.] 1995, no writ); Veschi, 861 S.W.2d at 293.