ETHICS AND THE BOUNDS OF ADVOCACY

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ETHICS AND THE BOUNDS OF ADVOCACY

I. INTRODUCTION
Most, if not all, law schools require students to take an ethics course before graduating. As licensed attorneys, we have ethical rules to follow that go above and beyond basic good morals of lay people. The American Bar Association promulgated Model Rules of Professional Conduct. In Texas, we have our Code of Professional Responsibility. Additionally, we have the Texas Lawyer’s Creed, which encourages lawyers to treat their clients, each other and judges with courtesy and respect. However, lawyers who practice family law are dealing with clients with particularly emotional and personal legal problems. Perhaps there are ethical considerations in family law cases that go even beyond the rules and aspirations of the Texas Lawyer’s Creed.

A. History of the Bounds of Advocacy: Goals for Family Lawyers
This idea was considered in 1987 by the American Academy of Matrimonial Lawyers, which is a national organization for attorneys specializing in family law founded in 1962. Its mission is “to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be preserved.”

In 1987, a committee of the AAML created the Bounds of Advocacy: Goals for Family Lawyers to guide matrimonial lawyers confronting moral and ethical problems for which existing codes did not necessarily provide adequate guidance. In a 1988 survey of AAML members, the most significant problem for which there is insufficient guidance in existing ethical codes was the harm done to children in an acrimonious family dispute. The Bounds were revised in 2000.

B. Purpose of the Bounds of Advocacy: Goals for Family Lawyers
Most attorneys are certainly able to distinguish “black” (unethical or illegal conduct) from “white” (ethical and proper practice). These Goals are therefore directed primarily to the “gray” zone where even experienced, knowledgeable matrimonial lawyers might have concerns, and constitute an effort to provide clear, specific guidelines in areas most important to matrimonial lawyers. Bounds of Advocacy: Goals for Family Lawyers – Preliminary Statement.

The Bounds of Advocacy specifically state preliminarily that these are aspirations to a level of practice above the minimum established in the ABA’s Model Rules of Professional Conduct. So, similar to the Texas Lawyer’s Creed, it is inappropriate to use these aspirations to define the level of conduct required of lawyers for purposes of malpractice liability or state bar discipline.

This paper discusses those portions of the Bounds of Advocacy: Goals for Family Lawyers that highlight the ethical considerations unique to family law cases that are not otherwise addressed in other general ethical rules or creeds.

II. OVERVIEW OF BOUNDS OF ADVOCACY
These Bounds reaffirm the attorney’s obligation to competently represent individual clients. They also promote a problem solving approach that considers the client’s children and family as well. Additionally, they encourage efforts to reduce the cost, delay and emotional trauma and urge interaction between parties and attorneys on a more reasoned, cooperative level. Bounds of Advocacy: Goals for Family Lawyers – Preliminary Statement. This is what differentiates them from other ethical codes.

A. Organization of the Bounds of Advocacy
The Bounds of Advocacy is produced in a small bound volume, which can be purchased through the AAML. It is organized into a preliminary statement, an index, and nine chapters. Each chapter deals with an area of ethical consideration in family law cases. The goal is stated in each chapter, followed by sections and comments.

An effort was made to avoid repetition of rules and principles already addressed in the other codes. For example, the basic conflicts of interest requirements are addressed in the ABA’s Model Rules of Professional Conduct, so the Bounds address only those conflicts where additional guidance was deemed desirable, or where the RPC did not adequately address the unique requirements of family law practice. Bounds of Advocacy: Goals for Family Lawyers – Preliminary Statement.

Citation to legal authority was kept to a minimum in the original publication, but to indicate the basis and provide support for the goals and comments, some footnotes were added in the 2000 revision.

B. Chapters in the Bounds of Advocacy
The following are the nine chapters of the Bounds of Advocacy:

1. Competence and Advice
2. Communication and Decision Making Responsibility
3. Conflict of Interest
4. Fees
5. Client Conduct
This paper is not intended to be a full discussion of each and every chapter of the *Bounds of Advocacy*. Every attorney who practices a substantial amount of family law really should obtain a copy of this publication, and review it on a regular basis to remind himself or herself of the special goals or aspirations that should be kept in mind in every family law situation. The following are some of the most common, unique-to-family-law goals discussed in some of the chapters of the *Bounds*.

### III. ANALYSIS OF SELECTED CHAPTERS

The major portion of the *Bounds of Advocacy* deals with the goals of the matrimonial lawyer as a counselor and advocate. In the preamble to Chapter 1, Competence and Advice, an interesting comparison is made in describing the attorney’s role in family law cases. “Just as a physician diagnoses the causes of the patient’s pain and counsels the patient about a variety of treatments before undertaking surgery, the matrimonial lawyer serves an analogous role.” Furthermore, it is pointed out that these *Bounds* are intended to reflect a shift toward the role of constructive advocacy, a counseling, problem-solving approach for a family member in need of assistance in resolving difficult issues and conflicts within the family.

#### A. Chapter 1. Competence and Advice

Chapter one sections and comments are aimed at describing the goals of family law attorneys to become as competent as possible in all of the areas affecting a family law case. Many of these sections are familiar to Texas attorneys, because they are similar to our Code of Professional Responsibility.

1. **Section 1.2**
   An attorney should advise the client of the emotional and economic impact of divorce and explore the feasibility of reconciliation. We all know that we are supposed to encourage reconciliation when it seems that is what the client really wants. Here it finally is stated in black and white.

2. **Section 1.3**
   An attorney should refuse to assist in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect. The Comment discusses how some clients will want their lawyer to reflect the highly emotional vengeful personal relationship between spouses. This is the caution not to do that, but to discuss with and remind the client that discourteous and retaliatory behavior does no one any good.

3. **Section 1.4**
   An attorney should be knowledgeable about different ways to resolve marital disputes, including negotiation, mediation, arbitration and litigation. Collaborative law should definitely be added to this list. This section points out that family law attorneys really must be adept at all forms of alternate dispute resolution.

4. **Section 1.5**
   An attorney should attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution. This certainly coincides with the attitude of Texas courts with regard to alternate dispute resolution. The Comment following this section discusses and points out the fact that an agreement between the parties is far more likely to maximize the parties’ autonomy and priorities; whereas a court-imposed resolution maximizes legal principles that may seem arbitrary or unfair. An agreement may establish a positive tone for continuing post-divorce family relations by avoiding the animosity and pain of a court battle. Settlement can be less costly financially. All of this should be pointed out to the client.

#### B. Chapter 2. Communication and Decision Making Responsibility

Family law clients view their attorneys somewhat differently than clients in other areas of law. Clients come to family law attorneys when there is a significant problem in the family relationship, and emotions often render rational decision-making difficult.

1. **Section 2.3**
   An attorney should keep the client informed of developments in the representation and promptly respond to communications from the client. This is probably one of the biggest reasons family law attorneys receive complaints or grievances: not returning telephone calls. The Comment after this section points out that frequent communication with the client on important matters empowers the client, satisfies the client’s need for information about the progress of the case, helps build a positive attorney-client relationship, and helps the client understand the amount and nature of the work the attorney is performing, thereby reducing concern that nothing is
happening and that the attorney’s fees are not being earned.

2. **Section 2.6**
   
   An attorney should not permit a client’s relatives, friends, lovers, employers, or other third persons to interfere with the representation, affect the attorney’s independent professional judgment, or, except with the client’s express consent, make decisions affecting the representation. In the Comment after this section are some examples given of how third persons may try to affect the representation in a family law matter. These are really worth reviewing. One common example is when another person is actually paying the fee, and then demands certain action be taken, against the attorney’s judgment for the client. This section is the encouragement a family law attorney needs to insist on the course of action that is in the client’s best interest.

3. **Section 2.9**
   
   An attorney should not communicate with the media about an active case under most circumstances. An attorney should not communicate with the media about a case, a client or a former client without the client’s prior knowledge and consent, except in exigent circumstances when client consent is not obtainable. While this probably does not come up very often for most family law attorneys, most of us will some day have a case in which the media is interested. Unlike criminal attorneys, who seem to feel it helps their client to make official statements for the media, family law cases should never be discussed. It just is not any else’s business. The Comment to this section points out that it is no excuse if the other side has talked to the media first. And, an attorney should never attempt to gain an advantage for the client by providing information to the media to embarrass or humiliate the opposing party or counsel.

C. **Chapter 3. Conflict of Interest**

   This Chapter contains most of the common rules about conflicts of interest, such as not representing both parties to a divorce, not having a sexual relationship with a client, opposing counsel, or a judicial officer in the case, and not advising unrepresented parties. However, one section of this chapter is particularly interesting.

1. **Section 3.3**
   
   An attorney should not simultaneously represent both a client and a person with whom the client is sexually involved. The Comment points out the pitfalls of doing this. Joint representation may make it difficult to advise the client of the need to recover from the emotional trauma of divorce, the desirability of a prenuptial agreement, or the dangers of early remarriage. The testimony of either might be adverse to the other.

D. **Chapter 6. Children**

   The cornerstone of the *Bounds of Advocacy* in differentiating family law cases from other types is the chapter on children. Here, more than any other chapter, the family law attorney’s unique position in handling a case that affects a child’s life is spotlighted. One of the most troubling issues in family law is determining a lawyer’s obligations to children. The lawyer must competently represent the interest of the client, but not at the expense of the children. The parents’ fiduciary obligations for the well being of a child provide a basis for the attorney’s consideration of the child’s best interests consistent with a traditional advocacy and client loyalty principles.

1. **Section 6.1**
   
   An attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children. Texas, as most other jurisdictions, bases child custody issues on the “best interests of the child.” However, the other ethical codes provide little, or contradictory, guidance for an attorney whose client’s expressed wishes, interests, or conduct are in direct conflict with the well-being of children. This section emphasizes that the welfare of each family member is interrelated.

   Family law attorneys should counsel their clients to examine their wishes in light of the needs and interests of the children and the relationship to other family members. In so doing, the matrimonial lawyer is not only advising the client to adhere to applicable substantive law, but is also reminding the client that the family relationship continues. The Comment suggests that parents should subordinate their own interests to those of their children. Matrimonial lawyers and parents should collaboratively seek parenting arrangements that eliminate fractious contact between parents, minimize transition or transportation difficulties and preserve stability for the children. This Comment also encourages the attorney to caution and advise the client against involving the children in the divorce by talking to them about the issues, and against participating in multiple psychological evaluations of the children in order to find the “right” expert. Finally, there is encouragement in sending the parties to a neutral mental health care expert.

2. **Section 6.2**
   
   An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness.

   As family lawyers we have all seen instances where in answer to a child support enforcement action or a request by the primary conservator to relocate the
response is a petition seeking a change in managing conservatorship. Each of us should carefully consider the client’s motivation in making such requests and no good reasons exist, decline representation. In other words, do not use the children as pawns.

3. **Section 6.3**

When issues in a representation affect the welfare of a minor child, an attorney should not initiate communication with the child, except in the presence of the child’s lawyer or guardian ad litem, with court permission, or as necessary to verify facts in motions and pleadings.

In many Texas jurisdictions all or most suits concerning children involve a guardian ad litem for the child. Thought should be given not only to the parent’s lawyer declining any contact with the child other than casual greetings without the presence or permission of the child’s lawyer, but to advising the client about having conversations with the child concerning issues involved in the suit. Even if the child is not represented advice to or manipulation of the child is unwarranted and has no place in representation of a parent.

4. **Section 6.4**

An attorney should not bring a child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interests of the child.

Most children want no involvement in the problems of their parents. Most children sincerely wish parents would remain together and that life should go on in a normal fashion. Most children have no desire, for whatever reason, to express an opinion or preference in custody disputes.

However, some children do want their views expressed. In such instances, everyone involved should carefully consider how this can best be accomplished with the least exposure amount of stress and trauma to the child.

If the child has information relevant to the issues involved and necessary to a proper result careful consideration should be given to exploring whether any way exists to get those facts in evidence short of testimony by the child.

TFC § 153.009 mandates the judge in a bench trial conduct an in-chambers interview with a child age 12 or above and permits it with younger children. Experience has shown that in many instances any information, expressions, desires or opinions gleaned in such an interview are entirely cumulative of what has occurred in trial. Consideration should be given to advising a parent that while available, requests for an interview are usually best avoided.

Retired 7th Court of Appeals Chief Justice John T. Boyd explained his refusal to interview a young child declaring that he did not want a child thinking, consciously or subconsciously, that she contributed to the decision of which parent was appointed her managing conservator. In re Marriage of Stockett, 570 S.W. 2d 151, 153 (Tex.Civ.App.-Amarillo 1978, no writ).

5. **Section 6.5**

An attorney should disclose information relating to a client or former client to the extent the lawyer reasonably believes necessary to prevent substantial physical or sexual abuse of a child.

TFC § 261.101 controls the obligation to report suspected abuse in Texas and requires a person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report to authorities. The section also makes clear that requirement to report applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney. Failure to report is criminalized as a Class B misdemeanor.

A person acting in good faith who reports alleged child abuse or neglect is immune from civil or criminal liability. However, self-reporting by a perpetrator is not immunized. TFC § 261.106

6. **Section 6.6**

An attorney should not make or assist a client in making an allegation of child abuse unless there is a reasonable basis and evidence to believe it is true.

Clients looking for an edge in trial should be made aware that an offense is committed if, with the intent to deceive, a person knowingly makes a false report. A finding by a court in a suit affecting the parent-child relationship that a report was false or lacking factual foundation may be grounds for the court to modify possession of or access to the child who was the subject of the report by restricting further access to the child, as well as liability for attorney fees to the falsely accused and a $1000 civil penalty to the state. TFC § 261.107

E. **Chapter 7. Professional Cooperation and the Administration of Justice**

Consider this chapter to be comparable to the Texas Lawyer’s Creed. It points to the fact that candor, courtesy and cooperation are especially important in matrimonial matters where a high emotional level can engulf the attorneys, the court and the parties. Allowing the adverse emotional climate to infect the relations between the attorneys and parties inevitably harms everyone, including the clients, their children and other family members. Although lawyers cannot ensure that justice is achieved, they can help facilitate the administration of justice.
Combative, discourteous, abrasive, "hard ball" conduct by matrimonial lawyers is inconsistent with both their obligation to effectively represent their clients and their role as problem-solvers. Good matrimonial lawyers can be cordial and friendly without diminishing effective advocacy on behalf of their clients. In fact, the three C’s: candor, courtesy and cooperation: (1) facilitate faster, less costly and mutually-accepted resolution of disputes; (2) reduce stress for lawyers, staff and clients; (3) reduce waste of judicial time; and (4) generate respect for the court system, the individual attorney and the profession as a whole.

1. Section 7.1
An attorney should strive to lower the emotional level of marital disputes by treating counsel and the parties with respect. Some clients expect and want the matrimonial lawyer to reflect the highly emotional, vengeful relationship between the spouses. The attorney should explain to the client that discourteous or uncivil conduct is inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise.

Ideally, the relationship between counsel is that of colleagues using constructive problem-solving techniques to settle their respective clients’ disputes consistent with the realistic objectives of each client. In the Comment following this section, examples of appropriate measures of respect are discussed.

2. Remainder of Chapter 7
The remaining sections of this chapter are all very similar to the Texas Lawyer’s Creed. They deal with subjects as not abusing discovery; scheduling with cooperation between lawyers; not inducing mistakes or using things mistakenly provided.

F. Chapters 8 & 9. The Attorney as a Mediator or Arbitrator
The last two Chapters set forth goals for attorneys who act as mediators or arbitrators in family law cases. These bear reviewing if that is your role.

IV. CONCLUSION
It is wonderful that family lawyers have taken the initiative to create a separate *Bounds of Advocacy* for ourselves to hold ourselves to an even higher standard in family law cases than lawyers who practice in other areas of law. We should be proud that we have acknowledged the difference in being family law attorneys, due to the difference in the very nature of family law cases. Everyone who practices family law is highly encouraged to obtain a copy of the *Bounds of Advocacy*, keep it handy, and refer to it often.

Success without honor is an unseasoned dish; it will satisfy your hunger, but it won't taste good. ~ Joe Paterno
Always do right. This will gratify some people and astonish the rest. ~ Mark Twain
Be nice to people on your way up because you’ll meet them on your way down. ~ Wilson Mizner