

ETHICS IN CLIENT RELATIONS

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BIOGRAPHICAL INFORMATION

EDUCATION

Summa Cum Laude from Texas A&M with a B.A. degree
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PROFESSIONAL ACTIVITIES & AWARDS

Appointed by State Bar President to the Commission for Lawyer Discipline 2005-2011
Appointed as the Chair of the Commission for Lawyer Discipline for 2006-2010
President of the Texas Criminal Defense Lawyers Association 2001-2002
Chairman of the Criminal Justice Section of the State Bar of Texas, 2001
Governor George Bush's Appointee to rewrite the Code of Criminal Procedure, 1996
Governor Ann Richard's Appointee to the Texas Punishment Standard's Commission to rewrite the Penal Code, 1994
Past Chairman of the Criminal Law & Procedure Section of the Travis County Bar
Past President and Founding Member of the Austin Criminal Defense Lawyers
Penal Code Committee of the State Bar of Texas
Legislative Chairman for the Texas Criminal Defense Lawyers Association, 1991
Voted Best Criminal Lawyer in Austin by the Austin Chronicle, 1994
Voted Best Trial Lawyer in Austin by the Travis County Women Lawyer's
Association, 1992
Committee for Indigent Representations in Criminal Matters for the State Bar of Texas
Presidential Award of Merit - TCDLA 1990, 1992, 1993, 1994
Ambassador Award, Austin Criminal Defense Lawyers Association, 1994
Super Lawyer by Texas Monthly and Texas Lawyer, 2007

LAW RELATED PUBLICATIONS

7, Co-author with Judge Tom Blackwell and Judge Michael McCormick of Texas Practice Volume
7A and 8, published by West Publishing Co.
Author/speaker for the State Bar of Texas Advanced Criminal Law, Criminal Law Boot Camp,
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Author/speaker for Texas Criminal Defense Lawyers Association, 1993- 2005
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ETHICS IN CLIENT RELATIONS

On the average for the last ten years the State Bar of Texas has received approximately 8700 complaints about lawyer misconduct. Over 2/3 are dismissed because the complaint does not describe or allege a violation of the Texas Disciplinary Rules of Professional Conduct. Approximately 3200 are sustained complaints which proceed as a grievance against the attorney. The following is a discussion of the most common complaints that result in a sanction by the State Bar of Texas and how to avoid them.

NEGLECT

Neglect is the number one complaint filed against attorneys and the number one reason attorneys are sanctioned by the State bar.

Rule 1.01(b)(1)

A Lawyer shall not neglect a legal matter entrusted to him or frequently fail to carry out completely the obligations that the lawyer owes.

Santos v. Commission for Lawyer Discipline, 140 S.W.3d 397 (Tex. App. Hous 2004). The lawyer was sanctioned for the conscious disregard of a legal matter. He had been paid for an immigration matter and though told of the court date, the lawyer failed to appear. A lawyer who acts in good faith is not subject to discipline, under this provision for isolated inadvertent or unskilled act or omission, tactical error, or error of judgment.

Malpractice is not always a violation of the Rule of Ethics and ineffective assistance is not necessarily a violation of the Rule of Ethics. The duty to investigate, is part of the effectiveness standard. A lawyer must make a reasonable effort to investigate the case or after discussions with the client, make a reasonable determination that investigation is not necessary. *Strickland v. Washington*, 462 U.S. 1105 (1984). *Wiggins v. Smith* 539 U.S. 510, 123 S.Ct. 527 (2003). Failure to investigate a case may not rise to the level of neglecting a case in violation of the Disciplinary Rules of Professional Conduct. Malpractice can occur when a lawyer gives bad legal advice. However, that does not meet the definition of neglect to cause the lawyer to be sanctioned by the State Bar.

Complaints with the state bar may be filed by anyone. This complaint does not have to be filed by the client. There does not have to be an attorney client relationship for the person to file a complaint with the State Bar. *Hines v. Commission for Lawyer Discipline*, 2003 WL 21710589 (Tex. App. Hous 14th) The Father of the client filed the complaint and the respondent attorney's theory was that there could be no sanction because he represented the son. The Court made it clear that anyone can bring to the attention of the bar a rule

violation. In addition, any alleged misconduct does not have to be in the course of an attorney client relationship for the State Bar to prosecute a violation under Rule 804(a)(3) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *Walter v. Commission for Lawyer Discipline*, 2005 WL 1039970 (Tex. App. Dallas). For example, a lawyer can be disciplined for actions taken as the executor of an estate, even though the lawyer may have no attorney client relationship with the beneficiaries of the will.

Rule 803 (a) requires a lawyer having knowledge that another lawyer has committed professional misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, to inform the Chief Disciplinary Counsel's office (CDC). The only exception is for mental illness or chemical impairment in which the lawyer can report the conduct to the Lawyer Assistant Program or the information is protected by confidentiality under Rule 1.05 or is obtained through counseling programs. Rule 1.05 is Confidential information includes both privileged information and unprivileged client information which a lawyer shall not reveal except if provided by the rules.

Texas Lawyers Assistance Program's director is Ann Foster and her number is 1-800-204-2222 ext. 1460 or email is afoster@texasbar.com. Conversations are confidential and referrals are available for help with mental illness, substance abuse or impairment by physical illness. The goal is to rehabilitate lawyers and help them resume practicing law.

SECOND MOST COMMON COMPLAINT IS THE FAILURE TO COMMUNICATE

Rule 1.03 (a)

A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. 1.03 (b) States that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision.

In reference to a criminal case the Rules require a lawyer shall promptly inform the client of the substance of any proffered plea bargain. Failure to do so has been held to be ineffective assistance of counsel. *Ex Parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987). The lawyer is allowed to withhold information if believes the clients would react imprudently or if the client is under a disability.

Failure to communicate is alleged in close to half of all grievances filed. The duty is an affirmative obligation and it not dependent on a client's request for information. It must only be reasonable and failing to advise a client of an adverse development in a case would be a violation.

A lawyer must respond to reasonable requests for information.

FEE DISPUTES

Fee disputes constitute a large number of complaints. Those complaints are first referred to the client attorney assistant program (CAAP) and to the local fee dispute committees of local bar associations. CAAP's stated purpose is to try and work out a settlement so that the case does not proceed to a grievance. Their number is 1-800-204-2222 ext. 1777. If a reasonable settlement can not be obtained, the case is referred by the Chief Disciplinary Counsel's office to be filed as a grievance. Returning a phone call from CAAP at 1-800-204-2222 ext. 1777 could save a trip to the grievance committee.

Rule 1.04 (a)

A lawyer shall not charge or collect an illegal or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

Consider: 1. Time and labor required including difficulty

2. preclude other employment
3. fee charged
4. time limitations imposed by client
5. amount involved and results
6. nature of the relationship with client
7. experience and ability of the lawyer
8. whether fee is fixed or contingent.

A lawyer may not charge a contingent fee in a criminal case. Rule 1.04 (e).

Rule 1.04(c)

When the lawyer has not regularly represented the client, the basis or the rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. The Rule strongly recommends that a lawyer get a contract and use a contract.

Many lawyers put in their contracts that the fee is a non-refundable retainer fee. The thought is that this would prevent the client for asking for a refund and prevent the client from being able to pursue a grievance if no refund was made.

Cluck v. Commission for Lawyer Discipline, 214 S.W.3d 736 (Tex. App. Austin 2007) made it clear that simply calling a fee non-refundable does not make it so.

Calling the fee a retainer fee does not change an advance fee into a retainer fee. In that case there was a fee of \$15,000.00 that the lawyer then billed against. By billing an hourly rate against the fee collected, the lawyer was demonstrating that in fact it was an advanced fee, not

a retainer. Because it was an advance fee for services in the future and it had not been earned at the time of the payment, the fee was required to be placed into a trust. Because the lawyer did not place the money into a trust account, the sanction imposed by the State Bar was appropriate.

TRUST ACCOUNT VIOLATIONS

Rule 1.14(a):

A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in the lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a trust or escrow account. Complete records of such account funds shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

DUTY UPON TERMINATION

Rule 1.15(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

The Texas Rule is that the file belongs to the client. Upon request and/or termination, the file must be returned to the client. If the lawyer wishes to make a copy and retain one for himself, he is responsible for making the copy. This section also results in a lot of sustained grievances against lawyers who mistakenly believe that they can hold the file hostage for payment of attorney's fees. In order to prove an ethical violation, there must be evidence that the retained file prejudiced the client in the subject matter of the representation. *Weiss v. CFLD*. 981 S.W.2d 8 (Tex. App.- San Antonio 1998).

PERJURY

Rule 3.03(a)

A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;

- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
- (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
- (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (5) offer or use evidence that the lawyer knows to be false.

A lawyer must refuse to offer evidence that he knows to be false. If it comes from the client, the lawyer is justified in seeking to withdraw from the case. If the lawyer does not withdraw or is not allowed to withdraw, he must advise the client that he can not offer the false evidence and he must advise the client of the steps the lawyer will take if the false evidence is offered. If the lawyer discovers the false evidence after its use, the lawyer must seek to persuade the client to correct the false testimony and if that is ineffective, the lawyer is allowed to reveal confidential information under Rule 1.05 (f) which states a lawyer shall reveal confidential information when required to do so by Rule 3.03 (a)(2), 3.03(b) or by Rule 4.01(b).

PERJURY BY THE CRIMINAL DEFENDANT

Dealing with the possibility of perjury by a criminal defendant is complicated by a number of legal issues. The defendant has a due process right guaranteed in the 5th amendment of the U.S. Constitution to present his defense and he has the absolute right to testify, if he chooses. The rules recognize that these rights are attached to the criminal defendant in Rule 1.02(a) (3) which states in a criminal case, the lawyer shall abide by a client decision as to a plea to be entered, whether to waive jury trial and whether the client will testify. If the lawyer learns of the proposed perjury prior to trial, and he is unable to dissuade the client from doing so, the lawyer must withdraw from the representation. Rule 1.15.

However, Rule 1.15(c) overrides the ability to withdraw in many criminal cases. It states when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Three possible resolutions have been recognized in the United States. The first would allow the defendant to testify by narrative without any guidance from the lawyer. The second proposal would excuse the lawyer completely from any duty to reveal perjury if the perjury is that of the client. Texas has specifically rejected this option.

The rules in Texas require that the lawyer take reasonable remedial measures which can include disclosing the perjury. A defendant has the right to assistance of counsel, the right to testify and the right of confidential communication. However, the client does not have the right to assistance of counsel in committing perjury. The lawyer is to try and dissuade the client from committing perjury or if it has already occurred, the lawyer must try to get the client to correct the false testimony. This needs to be done in the present of another attorney to documents the lawyers efforts.

Then the lawyer must file a motion to withdraw under Rule 1.15 (a) (1) alleging the representation will result in the violation of the rules of professional conduct or other law. In the motion, the lawyer should state Rule 1.15(b) (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent; 1.15(b)(3) the client has used the lawyer's services to perpetrate a crime or fraud or 1.15(b)(7) other good cause for withdrawal exists, including vague ethical considerations.

If the motion to withdraw is denied, the lawyer is permitted to reveal the perjury. 3.03(b) if the efforts are unsuccessful, the lawyer shall take the steps to remedy including disclosing the true facts. This should be done to the tribunal and then the lawyer must abide by the decision of the court. *Helton v. State*, 670 S.W2d 644 (Tex. Crim. App. 1984) ruled that the lawyer was excused from the rules of confidentiality and he could reveal potential perjury to the court in order to prevent a fraud on the court.

Nix v. Whiteside, 106 S.Ct. 988 (1986) involved a murder defendant who complained that his lawyer threatened to withdraw and inform the court, if he took the stand and committed perjury. On appeal he alleged ineffective assistance of counsel and a denial of his 6th amendment right to counsel. The Supreme Court held that the attorney had acted properly in threatening both to withdraw and to disclose the perjury, as the right to testify does not include the right to testify falsely and the right to counsel does not include the assistance of counseling committing perjury. The Court specifically found that there was no breach of the lawyer's professional responsibility.

ADVISING A WITNESS TO AVOID A SUBPOENA

A lawyer can not advise a lawfully subpoenaed witness to not appear in court. Rule 3.04 states that a lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence....or counsel or assist another to do any such act.

- (b) falsify evidence, counsel or assist a witness to testify falsely.....
- (e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interest will not adversely affected by refraining from giving such information.

Rule 3.04(c)(5) states that in representing a client before a tribunal the lawyer shall not engage in conduct intended to disrupt the proceedings.

§36.05 of the Texas Penal Code, Tampering with a witness: A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding or coerces a witness or prospective witness in an official proceeding:

- (1) to testify falsely;
- (2) to withhold any testimony, information, document or thing,
- (3) to elude legal process summoning him to testify or supply evidence;
- (4) to absent himself from an official proceeding to which he has been legally summoned; or
- (5) to abstain from, discontinue, or delay the prosecution of another.

Article 24.04 of the Code of Criminal Procedure sets out how a subpoena can be served:

- (1) reading the subpoena in the hearing of the witness;
- (2) delivering a copy of the subpoena to the witness;
- (3) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or
- (4) mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness.

It is both unethical and under the above circumstances illegal for an attorney to advise a subpoenaed witness not to appear in court. Rule 8.04(a) A lawyer shall not (4) engage in conduct constituting obstruction of justice.

The comments to the Rules of Disciplinary Procedures discuss that fair competition in the adversary system is secured by prohibitions against improperly influencing witnesses.

Rule 5.05 Unauthorized Practice of law

Another area of frequent complaints to the State Bar, is that a lawyer is practicing law while administrative suspended. Rule 5.05 a lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitute the unauthorized practice of law.

Rule 8.04 Misconduct

- (a) A lawyer shall not:
 - (11) engage in the practice of law when the lawyer is on inactive statute or when the lawyers right to practice has been suspended, or terminated, including but not limited to situations where a lawyers right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education. Failure to pay the occupation tax can cause a lawyer to be sanctioned if he continues to practice.

A lawyer can be convicted of the crime of falsely holding oneself out as a lawyer under §38.122 of the Penal Code when his law license has been administratively suspended and he continues to practice. *Satterwhite v. State*, 979 S.W.2d 626 (Tex. Crim. App. 1998). The offense is a third degree felony and final conviction is a serious crime for all purposes under the State Bar Rules. Rule 8.04(a)(2) A lawyer shall not commit a serious crime or commit any other criminal act that reflect adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects. Serious crime is defined as barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy or solicitation of another to commit any of the foregoing crimes. Possession of cocaine, is not a serious crime for which a lawyer can receive a compulsory discipline based upon the sentence alone of probation, deferred adjudication, or a final conviction. *In re Lock*, 54 S.W.3d 305 (Tex. S.Ct. 2001).

During compulsory discipline proceedings, the Board of Disciplinary Appeals decides if a lawyer has been convicted or placed on deferred adjudication for an intentional crime, which is defined as a serious crime in 8.04(b). The Board shall disbar the lawyer unless the Board suspends the license during the term of probation. Rule 8.05 and 8.06 of the Texas Rules of Disciplinary Procedure.

DUTY OF A PROSECUTOR

Rule 3.09

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

The Court cannot disqualify the elected District Attorney on the basis of a violation of the disciplinary rules so mandamus was not available. *State ex rel. Young v. 6th Dist. Court of Appeals*, 236 S.W.3d 207 (Tex. Crim. App. 2007).

INDIGENT'S RIGHT TO APPOINTED COUNSEL AND PROSECUTOR'S DUTIES

New procedures for advising defendants about their right to counsel, right to court appointed counsel and for obtaining a waiver of the right to counsel go into effect September 1, 2007 as Article 1.051 of the Code of Criminal Procedure was amended. If an indigent defendant who has refused appointed counsel in order to retain private counsel appears without counsel after having been given an opportunity to retain counsel, the court, after giving the defendant a reasonable opportunity to request appointment of counsel, or, if the defendant elects not to request appointment of counsel, after obtaining a waiver of the right to counsel, following the procedures set out below may proceed with the matter with 10 days notice to the defendant of a dispositive setting.

WAIVER OF ATTORNEY AND RIGHT TO SELF-REPRESENTATION

A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Article 1.051 of the Code of Criminal Procedures is presumed **invalid**. In any adversarial judicial proceeding that may result in a punishment by confinement, the attorney representing the state may not:

- (1) initiate or encourage an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel; or
- (2) communicate with a defendant who has requested the appointment of counsel, unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:
 - (A) has been given a reasonable opportunity to retain and has failed to retain private counsel; or
 - (B) waives or has waived the opportunity to retain private counsel.

In any adversarial judicial proceeding that may result in punishment by confinement, the Court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. If the defendant has requested appointed counsel, the Court may not direct or encourage the defendant to communicate with the attorney representing the State unless the Court or the Court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) has been given a reasonable opportunity to retain and has failed to retain private counsel; or
- (2) waives or has waived the opportunity to retain private counsel.

Rule 3.07 Trial Publicity

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

adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

- (b) A lawyer ordinarily will violate paragraph (a) and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:
- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;
 - (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;
 - (3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;
 - (4) an opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
 - (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

This rule adopts the standard set out in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991) which reversed a sanction against a lawyer for stating that his client was innocent when he was arrested. The Supreme court held that the attorney must make a statement that would have a substantial likelihood of materially prejudicing the trial otherwise the rule prohibiting trial publicity violates the First Amendment. The State can not use its power to regulate lawyers to violate the attorney's right to free association and freedom of expression. *NAACP v. Button*, 83 S.Ct. 328 (1963).

CONFLICTS OF INTEREST

Rule 1.06 Conflict of Interest: General Rule

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - (1) involves a substantially related matter in which that person's interest are materially and

directly adverse to the interest of another client of the lawyer or the lawyer's firm; or

- (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interest.
- (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.
- (e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

Comment 2 to Rule 1.06 gives guidance as to the meaning of conflict of interest. The term opposing parties as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless the client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interest.

Comment 3 recommends that ordinarily a lawyer should decline to represent multiple defendants in a criminal case due to the grave potential for conflict of interest. Comment 8 on fully informed consent recommends that the disclosure of the conflict of interest and the consent be in writing, though it is not required. It would be prudent, the rules states, for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

Violations of the Rules of Professional Conduct do not affect the admissibility of evidence or cause a criminal case to be reversed. *Keen v. State*, 85 S.W.3d 405 (Tex. App. Tyler 2002). The defendant must show that the conflict of interest actually affected the adequacy of the representation to prove a 6th Amendment violation. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

FAILURE TO RESPOND TO THE GRIEVANCE

Rule 8.04 Misconduct

- (a) A lawyer shall not:
- (8) fail to timely furnish to the Chief Disciplinary Counsels office or a district grievance committee a response or other information as required by the Texas Rules of disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so.

Rule 8.01(b)

A lawyer, in a disciplinary matter, shall not fail to respond to a lawful demand for information from a disciplinary authority.

Failure to timely respond to the State Bar grievance process can result in disbarment without any other allegations of misconduct alleged or proven. *Rangel v. State Bar of Texas*, 898 S.W.2d 1 (Tex. App. S.A. 1995) The grievance committee has broad discretion to reprimand, suspend or disbar an attorney for failing to respond.

COMPULSORY DISCIPLINE

8.01 of the Rules of Disciplinary Procedure:

When an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime with or without an adjudication of guilt, the CDC shall initiate a disciplinary action seeking compulsory discipline pursuant to this part. Proceedings are not exclusive in that an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction or probation through deferred adjudication.

Intentional crime means (1) any serious crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.

Serious Crime means barratry; any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes. *In re Locke*, 54 S.W.3d 305 (Tex. 2001) held that a conviction for possession of a controlled substance is not a serious crime and therefore the attorney is not subject to compulsory discipline.

8.05 Disbarment:

When an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an

adjudication of guilt for an Intentional crime, the attorney shall be disbarred unless the Board of Disciplinary Appeals, suspends his or her license to practice law.

8.06 Suspension

If an attorney's sentence upon conviction of a serious crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a serious crime, the attorney's license to practice law shall be suspended during the term of probation. If the probation is revoked, the attorney shall be disbarred.

THE GRIEVANCE SYSTEM

The Supreme Court of Texas has the power to regulate the practice of law as set out in the Texas Constitution. The statutory authority to regulate the practice of law is established in the State Bar Act which directs the state bar to establish disciplinary and disability procedures. The Supreme Court has adopted the Texas Disciplinary Rules of Professional Conduct (TDRPC) which are the substantive ethics rules. The Texas Rules of Disciplinary Procedure (TRDP) sets out the procedural grievance process. The Commission for Lawyer Discipline (CFLD) is a permanent committee of the State Bar comprised of 12 members, 6 attorneys and 6 public members. The CFLD is the client for all complaints not dismissed by a summary disposition panel. The Commission reviews the structure, function and effectiveness of the discipline system and reports to the Supreme Court and the Board of Directors.

CFLD monitors and evaluates the Chief Disciplinary Counsel (CDC). The CDC administers the attorney disciplinary system. The CDC reviews and screens all information relating to misconduct. It rejects all inquiries and investigates all complaints to determine just cause. CDC recommends dismissal of complaints to the Summary Disposition Panels. CDC is accountable only to the Commission for Lawyer Discipline.

The District Grievance Committees are divided into state geographic disciplinary districts. They act through panels of 2/3 attorneys and 1/3 public members. The local grievance committees conduct summary disposition dockets and evidentiary hearings.

INVESTIGATION

If the grievance is determined to be a Complaint, the Respondent (attorney) shall be provided a copy of the complaint with notice to respond in writing to the allegations. The Respondent shall deliver the response to both the CDC and the Complainant within thirty days of the receipt of the notice.

No more than sixty days after the date by which the Respondent must file a written response to the Complaint, the chief Disciplinary Counsel shall investigate the complaint and determine whether there is

Just Cause. Rule 2.12 TRDP. A Just Cause finding is made if a reasonably intelligent and prudent person would believe that an attorney has committed one or more acts of professional misconduct requiring that a sanction be imposed. If the CDC determines that Just Cause does not exist, they shall place the complaint on a Summary Disposition Panel docket. This is presented to the local grievance committee without the appearance of the Respondent (attorney) or the Complainant. There is no appeal from the Panel's determination that the complaint should be dismissed. If they fail to dismiss the complaint, it shall be placed on a hearing docket.

JUST CAUSE

Once the CDC determines Just Cause exists, they shall give the Respondent written notice of the acts and/or omissions engaged in by the Respondent and the Rule of Professional Conduct that the CDC contends has been violated.

RESPONDENT'S ELECTION

A Respondent who has been give notice of the allegations and Rule violations complained of must serve the CDC with his Election of District Court or an Evidentiary Panel of the Grievance Committee. The Election must be in writing and it must be served upon the CDC no later than twenty days after the receipt of the notice of the allegations. Failure to timely elect shall conclusively be deemed as an election to proceed before the evidentiary panel of the local grievance committee.

GRIEVANCE COMMITTEE

If the Respondent elects or defaults by failing to timely elect, the hearing will be held in front of the local grievance committee. A Private Reprimand is only available at this proceeding and is not available if the Respondent elects a district court proceeding. The CDC must file a petition within 60 days of the election deadline. All proceedings are confidential, and the burden of proof is on the CFLD by a preponderance of the evidence. Respondent must be served with the petition by certified mail or other means permitted by the Rules of Civil Procedure. Respondent must file an answer to this petition.

The committee can dismiss and refer the matter to CAAP (Client Attorney Assistance Program). The grievance committee can find that the Respondent suffers from a disability and refer the case to BODA (Board of Disciplinary Appeals) or they can find professional misconduct and impose sanctions. There is a separate hearing on sanctions. Sanctions can include private reprimands, public reprimands, probation, suspension or disbarment. CFLD or Respondent has the right to appeal the decision to BODA, but the complainant does not. Judgment of disbarment cannot be stayed.

DISTRICT COURT PROCEEDINGS

The Texas Rules of Civil Procedure apply and the CDC files a petition on behalf of the CFLD with the Supreme Court. The Supreme Court appoints a judge who does not reside in Respondent's administrative district. The Respondent may request a jury trial, and like the Evidentiary Proceeding the Respondent once served with the petition must file an answer. If misconduct is found, the judge determines the appropriate sanction. A Private Reprimand is not available and the court retains jurisdiction to enforce its judgments. A final judgment of the district court is appealed as in any other civil case. A judgment of disbarment or order revoking probation can not be stayed.

GRIEVANCE REFERRAL PROGRAM

To participate in the program, the lawyer must meet certain eligibility criteria and agree to meet with the program administrator for an assessment of the issues that need to be addressed. The lawyer must agree in writing to complete specific terms and conditions, including restitution if appropriate, by a date certain and to pay for any costs associated with those terms and conditions. If the lawyer agrees to participate and completes the terms in a timely manner, the Office of Chief Disciplinary Counsel will recommend to the Commission for Lawyer Discipline that the underlying grievance be dismissed. If the lawyer does not fully complete the terms of the agreement in a timely manner, the underlying grievance will move forward through the usual disciplinary process.

CRITERIA FOR REFERRAL

- Respondent Attorney has not been disciplined within the prior 3 years.
- Respondent Attorney has not been disciplined for similar conduct within the prior 5 years.
- Misconduct does not involve misappropriation of funds or breach of fiduciary duties.
- Misconduct does not involve dishonesty, fraud or misrepresentation.
- Misconduct did not result in substantial harm or prejudice to client or complainant.
- Respondent Attorney maintained cooperative attitude toward the proceedings.
- Participation is likely to benefit respondent attorney and further the goal of protection of the public.
- Misconduct does not constitute a crime which would subject respondent attorney to Compulsory Discipline under Part VIII of the Texas Rules of Disciplinary Procedure.

HOW TO AVOID THE GRIEVANCE SYSTEM

1. Have a written contract
2. Return phones if only to say that there is nothing new to report
3. Communicate with clients in writing to document
4. Return files upon termination of employment
5. Keep the attorney's address current with the state bar at all times
6. Do not represent co-defendants
7. Do not advise anyone to avoid a subpoena or advise them to ignore a subpoena
8. Have a trust account for all fees that are prepaid or advance fees paid for services in the future
9. Answer the grievance!!!!

IMPORTANT NUMBERS AT THE STATE BAR:

Client Attorney Assistant Program:
1-800-204-2222 Ext. 1777

Ethics Hotline
1-800-532-3947

Law Office Management
1-512-427-4000

Lawyers Assistance Program
1-800-343-8527

Advertising Review
1-800-566-4616

