Ethics in Appeals[1]

Ethical rules for Texas lawyers are provided in the Texas Rules of Disciplinary Conduct and the comments to those rules. The Texas Supreme Court and Texas Court of Criminal Appeals have also adopted Standards for Appellate Conduct. 62 Tex. B.J. 399 (1999). In federal courts, ethical issues are complicated by the lack of a single federal common law of legal ethics. *See* Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts through Federal Common Law*, 16 Rev. of Litig. 537, 540ff (1997). When ethical issues arise in federal courts the attorney should consult the American Bar Association's Model Rules and *Restatement (3d) of the Law Governing Attorneys*. All of these sources of ethical rules are discussed in this paper.

I. Competent Representation

A lawyer may have little or no experience with appeals, but have a client with a case that is, or should be, appealed. Must the lawyer refer the case to another lawyer?

This is the Texas Disciplinary Rule regarding attorney competence:

> Rule 1.01 Competent and Diligent Representation
> **(a)** A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
> **(1)** another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
> **(2)** the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.
> Tex. Disciplinary Rules of Prof'l Conduct R.1.01.

Similarly, the ABA Model Rule states that "[C]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rule 1.1.

The comments to the Texas rule explain that "competent" representation means "appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable

[1] Thanks are due to my law partner, Roger Hughes, who has previously researched and written on many of the topics discussed in this paper, and whose work greatly contributed to this paper.

attentiveness to the responsibilities owed to the client." Tex. Disciplinary Rules of Prof'l Conduct R.1.01 cmt. 1. This seems to contemplate that "study and analysis" can, to some extent, compensate for a lack of existing knowledge and familiarity. Indeed, the comments also say " the appropriate proficiency in many instances is that of a general practitioner," and "a lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar." Tex. Disciplinary Rules of Prof'l Conduct R.1.01 cmt. 3. The Comments also acknowledge that the "preparation and study the lawyer will be able to give the matter" may bring the matter within the lawyer's competence. Tex. Disciplinary Rules of Prof'l Conduct R.1.01 cmt. 2. Another factor contemplated in the comments is "whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question." *Id*. Some clients may not have the resources to pay for another lawyer. Fortunately, the Disciplinary Rules anticipate such situations.

The Comments also note that "[P]erhaps no professional shortcoming is more widely resented than procrastination." Tex. Disciplinary Rules of Prof'l Conduct R.1.01 cmt. 6. The dangers of procrastination are not unique to inexperienced appellate practitioners. Indeed, experienced appellate practitioners may become too comfortable, and too reliant, on the relatively liberal policies of Texas appellate courts[2] with regard to extensions of time. Inexperienced appellate attorneys, diligently focused on the deadlines stated in the rules, could be more prompt and punctual than more experienced colleagues.

II. Conflicts of Interest

A. The General Rule

The general rule regarding conflicts of interest in the Texas Disciplinary Rules states:

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 persons interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

[2] It should be noted that federal appellate courts have a reputation for being much stricter regarding deadlines and extensions of time.

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firms own interests.
(c) A lawyer may represent a client in the circumstances described in (b) if:
(1) the lawyer reasonably believes the representation of each client will not be materially affected; and
(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.
(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Similarly, ABA Model Rule 1.7(a) and the *Restatement (3d)* sections 121 and 122 prohibit representation of one client that is directly adverse to representation of another client or that creates a significant risk of materially limiting representation of another client. The lawyer may represent both clients only if (1) the lawyer reasonably believes he or she can provide competent and diligent representation to both; (2) the representation will not involve one client's making a claim against the other; and (3) the clients give informed consent confirmed in writing.

Many of the conflict of interest issues addressed by these ethical rules are common to all kinds of law practice. Issues of particular concern for appellate lawyers are positional conflicts and issues arising when the lawyer's fee is paid by a party other than the client.

B. Positional Conflicts

Appellate lawyers have a unique problem: positional conflicts. Appellate lawyers may argue for case law that will adversely affect other clients. The Comments to the Texas Disciplinary Rules acknowledge that impermissible conflict may develop where clients

have incompatible positions. Tex. Disciplinary Rules of Prof'l Conduct R.1.06 cmt. 3. The *Restatement* section 128, comment (f), requires the lawyer to consider whether a substantial risk exists that the actions in one case will adversely affect the other, whether the issues are procedural or substantive, the client's reasonable expectations in retaining the lawyers, and the practical significance on each client's immediate and long term interests.

Federal courts have held that class counsel can be disqualified for positional conflicts. *See*, *e.g.*, *Fiandaca v. Cunningham*, 827 F.2d 825, 829–31 (1st Cir. 1987) (conflict found where lawyer argued a remedy for one client that precluded remedy sought by other client). Some have argued that a conflict in antagonistic values between existing clientele and the potential client may be sharp enough to trigger a duty to disclose to the client. J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L. J. 677, 691 (1989). Clients covet their lawyer's loyalties and may view representing rival interests as a violation of that loyalty. *Id.* However, the *Restatement* section 129, comment (f), recognizes that law firms may take inconsistent positions in different courts at different times—a contrary rule would force law firms to specialize in one side of the docket. If a positional conflict is perceived, the lawyer must consult with and obtain client consent. The lawyer may permissibly ask the client to limit representation to avoid a conflict, for example to eliminate legal arguments that would directly affect the other client. Medina at 690.

C. Third-Party Payment Conflicts

The most frequent third-party payment problem arises when the client's insurer retains the appellate lawyer. The same problem arises anytime a third party pays the legal fees, for example, when one party indemnifies another, a parent pays attorney fees for a child, or a public interest group pays for the client's legal services. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 Rev. of Litig. 585, 602–18 (1997). There are three main problems: determining who is the client, preserving client confidentiality, and determining who will ultimately control the case.

1. Who is the client?

The Comments to the Texas Disciplinary Rules say "[a] lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." Tex. Disciplinary Rules of Prof'l Conduct R.1.06 cmt. 12. Written disclosure and consent are not required, but are described as "prudent." Tex. Disciplinary Rules of Prof'l Conduct R.1.06 cmt. 8. The Comments expressly permit a corporation to provide counsel for its

directors or employees, so long as the clients consent after consultation and the arrangement ensures the lawyer's professional independence. Tex. Disciplinary Rules of Prof'l Conduct R.1.06 cmt. 12.

Under the ABA Model Rules, if a third party pays the legal fees, a lawyer cannot accept the representation unless the client gives informed consent, the arrangement will not interfere with the lawyers' independent professional judgment or the lawyer-client relationship, and the lawyer can adequately protect the client's confidential information. ABA Model Rule 1.8(f). The ABA Model Rule requires consent to be confirmed in writing. ABA Model Rule 1.7(b)(4).

Under the *Restatement*, whether the insurer is a client depends on the parties' agreement. *Restatement (3d)* §§14, 134 cmt. (f); Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 Rev. of Litig. 585, 591 (1997). The lawyer cannot accept the representation unless the client consents to the limitations of any conflict and knows of the conditions under which the lawyer is being paid. *Restatement (3d)* §134(1). The lawyer also cannot accept third party direction unless the client consents to it, the direction will not interfere with the lawyer's independent professional judgment, and the direction is reasonable in scope, reflecting the duties assumed by the third party. *Id.* §134(2). The client must be informed of the interests of the other party, the courses of action that may be foreclosed or impaired, the effect on maintaining confidentiality, any reservations the lawyer may have, and the consequences to the client if the lawyer must withdraw should consent be withheld. *Id.* at §122 cmt. (c)(1). If there are insurance coverage issues, an informative letter at the outset of the representation may suffice. *Id.* at §134 cmt. (f).

The Comments to the Texas Disciplinary Rule say when an insurer hires special counsel for its insured, the "arrangement should assure the special counsel's professional independence," particularly where the insurer and its insured have conflicting interests. Tex. Disciplinary Rules of Prof'l Conduct R.1.06 cmt. 12. However, there is a (minority) view that the insured and insurer are both clients. Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 Tex. L. Rev. 1583 (1994); *see, e.g.*, *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001) (lawyer may owe direct duty to insurer if no conflict exists between insured and insurer). Under this view, the insurer has a right of control equal to that of the insured, giving it a direct right to be kept informed.

Where these rules require that the client give informed consent, this burden probably falls on the appellate lawyer if that lawyer is taking over the case. The appellate lawyer should consider drafting a letter setting out who retained the lawyer and who will pay the

lawyer's fees. The letter should include any pertinent information about billing guidelines, and should confirm the insured's knowledge of any reservation-of-rights letters.

2. Preserving client confidences

All insurers require communications from the appellate lawyer such as case reports and evaluations. Other types of third-party payers also want to be kept informed. Such communications are usually considered privileged. Nevertheless, the *Restatement* states that consent to allowing the insurer to hire the lawyer is not necessarily consent to reveal confidential information. *Restatement (3d)* §134 cmt. (e). As part of obtaining consent to waive any conflict of interest, the client must be informed about disclosures to the insurer. *Id.* §§60 cmt. (l), 122.

This becomes a problem under two circumstances. The first is when the insurer requires the lawyer to give confidential information to a third party, for example, bills audited by an outside auditor, or reports forwarded to coverage counsel. Some states have concluded that bills cannot be forwarded to third party auditors without the client's informed consent. David Klein, *An Ethics Opinion on Auditing of Attorneys' Bills*, For The Defense, pp. 4–5 (June 1998); Douglas Richmond, *Of Legal Audits and Legal Ethics*, Defense Couns. J., p. 512 (Oct. 1998). For much the same reason, the insurer's coverage counsel may not entitled to receive reports unless the client consents.

The second problem arises when the insured demands that the lawyer not inform the insurer about confidences regarding coverage issues, extra-contractual claims, or a sweetheart deal. The lawyer must respect the request and not communicate the information to the insurer. ABA Model Rule 1.6(a); *Restatement (3d)* §§60 cmt. (l), 134 cmt. (f). Conceivably, the lawyer may be prevented from revealing adverse information concerning coverage issues under any circumstance. *Restatement (3d)* §134 cmt. (f). Depending on the nature of the information, the lawyer may be required to advise the insurer that an irreconcilable conflict exists, and to then withdraw without disclosing the information. *Id*.

3. Control of the representation

Conflicts of interest over controlling the appeal can arise in several ways.
First, some insurers have billing guidelines. The appellate lawyer must determine whether any of these guidelines may constrain professional judgment. If so, the client must be advised and must approve continued representation. ABA Model Rule 1.7(b); *Restatement (3d)* §122, 134(1). Both the Texas Rule and the ABA Model Rule require

the lawyer to decline representation of a person if it reasonably appears that the lawyer's responsibilities to that client will be limited by responsibilities to a third person. Tex. Disciplinary Rules of Prof'l Conduct R.1.06(b)(2); ABA Model Rule 1.7(a). Comment 8 to Model Rule 1.7 clarifies that the rule applies "if a significant risk exists that the lawyer will not be able to consider, recommend, or carry out appropriate courses of action for one client because of the lawyer's responsibility to others." The rule condemns this conflict because it forecloses alternatives that would ordinarily be available to the client.

Restrictions in billing guidelines on research may interfere with the lawyer's ability to provide competent representation. A requirement to obtain advance approval of all legal research may discourage necessary legal research on all but the most pressing issues. However, the lawyer's duty is controlled by the Rules of Professional Conduct and not the billing guidelines. Ron Mallen, *Guidelines or Landmines*?, For The Defense, p. 6 (Aug. 1998). The duties to be competent, act diligently, and exercise independent judgment supersede any guidelines; overly restrictive guidelines threaten to make ethical rules irrelevant and to require the lawyer to disregard them. Douglas Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 Georgetown J. of Legal Ethics 533 (1996); John Tollefson, *The Law Shall Not Permit a Person Who Pays the Lawyer to Render Legal Services to Direct or Regulate the Lawyer's Professional Judgment*, 8 Coverage 19 (Sept. 1998).

Another conflict over control can arise when there is a dispute about strategy for covered claims and uncovered claims. The Model Rules require the lawyer to abide by the client's decisions concerning the objectives of representation and to consult on the means. ABA Model Rule 1.2(a)(1). ABA Model Rule 1.2 does not resolve whose decision controls if the lawyer and client disagree over the means to accomplish the goals. The *Restatement* gives ultimate authority to the client, subject to the lawyer's duties to third parties and the tribunal. *Restatement (3d)* §21. If valid grounds exist to challenge claims covered by the insurance policy, a disagreement between the insured and the insurer over asserting them triggers a conflict that may require the lawyer to withdraw. *Id.* §134 cmt. (f).

Yet another conflict arises if the insured strikes a sweetheart deal with the plaintiff. The insured may then ask the appellate lawyer to end the appeal in a way that maximizes the value of extra-contractual claims against the insurer. Again, this may trigger a conflict that will require the lawyer to withdraw rather than comply. *Id.* §§60 cmt. (l), 134 cmt. (f).

III. Successive Government and Private Employment

Generally, a person who moves between private practice and employment with an appellate court should not participate in the representation or adjudication of a matter in which the person was previously involved. Those moving from private practice to a court should refrain from participation in matters where the lawyer had represented a party in private practice. Tex. Disciplinary Rules of Prof'l Conduct R.1.10(e)(1). Also, a lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional function on behalf of public authority. Tex. Disciplinary Rules of Prof'l Conduct R.1.10 cmt. 3. When the lawyer has moved from government service to private practice, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. *Id*.

In *In re de Brittingham*, 319 S.W.3d 95 (Tex. App.--San Antonio 2010, orig. proc.) a former appellate court justice represented a party in an appeal from a probate proceeding. This probate case had generated thirteen prior appeals, and the former appellate justice had served on a panel for one of those appeals. The court interpreted the term "matter" in Disciplinary Rule 1.10 to mean "a similar, particular transaction involving a specific party or parties," which, in this case, referred to the entire probate proceeding, not each discrete appeal or original proceeding. 319 S.W.3d at 99. The former justice argued the opposing party had agreed to the representation by declining to oppose a Motion for Substitution of Counsel, but the court held this was neither sufficient "disclosure" nor "consent" for the subsequent representation. *Id.* at 100. The court held that the appellate justice, and her firm, were disqualified from the representation. *Id*. at 101.

More complicated issues arise when the individual may not have worked on the particular matter, but the firm or court with which the person was previously affiliated did handle the matter. The Texas Disciplinary Rules allow a private firm to handle such a case only if the former court lawyer is screened from participation in the case, the lawyer is apportioned no fee from the case, and the court is informed with reasonable promptness. Tex. Disciplinary Rules of Prof'l Conduct R.1.10(b). This rule does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, rather, it prohibits directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified. Tex. Disciplinary Rules of Prof'l Conduct R.1.10 cmt. 4.

Similarly, ABA Model Rule 1.11(a) disqualifies a lawyer who served with a governmental agency from representing a client on a matter on which the attorney substantially and personally participated as a public employee, absent informed written consent from the agency. That lawyer's firm is also disqualified unless the firm screens

the attorney from participating in the case and the fees and gives written notice to the agency. ABA Model Rule 1.11(b). ABA Model Rule 1.12(a) disqualifies an attorney from representing a client on a matter on which, as a former judge or law clerk, the attorney personally and substantially participated, absent written informed consent from all parties. Also, an attorney who knows confidential governmental information about one person gained from counsel's public employment is disqualified from representing a client with adverse interests that could benefit from that information. ABA Model Rule 1.11(c).

The Texas Disciplinary Rules also prohibit a lawyer affiliated with a court from negotiating for private employment with any person who is involved as a party or attorney in a matter in which the lawyer is participating personally and substantially. Tex. Disciplinary Rules of Prof'l Conduct R.1.10(e)(2). The ABA Model Rules extend this prohibition to judges, but allow law clerks to negotiate for employment with such persons or firms with notice to the judge or adjudicative officer. ABA Model Rule 1.12.(a), (b). Counsel should also be mindful not to accept employment that is intended to disqualify or recuse the presiding judge. The Eleventh Circuit upheld an order disqualifying counsel who was hired by defendants in a class action to deliberately to trigger a recusal of the presiding district judge, who was the new counsel's uncle. *In re Bellsouth Corp.*, 334 F.3d 941 (11th Cir. 2003).

IV. Fee Agreements

A. Contract Construction

Texas follows the general rule that fee contracts are subject to the same rule of construction as other contracts. *Stern v. Wonzer*, 846 S.W.2d 939, 944 (Tex. Civ. App.-Houston [1st Dist.] 1993, no writ); *Howell v. Kelly*, 534 S.W.2d 737, 739 (Tex. Civ. App.-Houston [1st Dist.] 1976, no writ). Generally, the goal of contract construction is to effect the intent of the parties as revealed by the contract language. *Forbau v Aetna Life Ins. Co*., 876 S.W.2d 132 (Tex. 1994).

However, the *Restatement,* section 18(2) provides that "[a] tribunal shall construe an agreement between client and lawyer as a reasonable person in the circumstances of the client would have construed it." Section 18, comment (h) notes three reasons for this rule. First, lawyers always draft fee agreements, invoking the rule that the agreement is interpreted against the author. Second, attorneys are more able than clients to detect omissions in the agreement. Third, lawyers have a fiduciary obligation to inform clients of the risks of representation. The Texas Standards for Appellate Conduct also require

attorneys to "explain the fee agreement and cost expectations to their clients." Tex. Standards for App. Conduct, Lawyers' Duties to Clients Standard 2.

There is a decided preference for express fee agreements, preferably in writing. Texas Disciplinary Rule 1.04(d) requires contingent fee agreements to be in writing. *Restatement* section 38(1) provides:

> Before or within a reasonable time after beginning to represent a client in a matter, a lawyer must communicate to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented the client on the same basis or at the same rate.

Fee agreements signed after representation has begun are suspect because they are a transaction with one with whom the lawyer has a fiduciary obligation. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). Section 18(1) of the *Restatement* prescribes that an agreement between a lawyer and client modifying an existing agreement may be enforced by either party if the agreement meets other applicable requirements, except that:

> (a) if a contract or modification is made after a reasonable time after the lawyers begin to represent the client in the matter . . . the client may avoid it unless the lawyer shows the agreement and the circumstances of its formation were fair and reasonable to the client; and
>
> (b) if the contract is made after the lawyer has finished providing services, the client may avoid it if the client was not informed of facts needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the agreement.

Section 18, comment (e) provides that the lawyer's burden to prove fairness and reasonableness encompasses two elements. First, that the client is adequately aware of the circumstances showing a need for modification and of all of the disadvantages and effects of the agreement. Second, the lawyer must show that the client was not pressured to agree to the modification to avoid alienating the lawyer or succumbing to the problems of changing counsel.

B. Unconscionability

As a general rule, the court has no authority to determine what fee a litigant should pay counsel, that being a matter of contract. *Thomas v. Anderson*, 861 S.W.2d 58, 62

(Tex.App.-El Paso 1993, no writ); *In Re: Polybutylene Plumbing Litigation*, 23 S.W.3d 428, 436 (Tex. App.-Houston [1st Dist.] 2000, pet. dism'd). When the language in the attorney's fee contract is plain and unambiguous, it is enforced as written. *Stern*, 846 S.W.2d at 944. If the contract was valid when made and the parties are mentally competent, it is enforced without court review of the reasonableness of the fees agreed upon. *Polybutylene Plumbing*, 23 S.W.3d at 436; *Parker v. Boyles*, 197 S.W.2d 842, 849 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.).

There are two recognized exceptions to enforcement once the attorney has performed: (1) fraud and breach of fiduciary duty; *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999); *Archer*, 390 S.W.2d at 740; and, (2) cases involving minors and incompetents. *Polybutylene Plumbing*, 23 S.W.3d at 437.

ABA Model Rules of Prof. Conduct, Rule 1.5(a) provides that "[a] lawyer's fees shall be reasonable." Section 34 of the *Restatement* also adopts the 'reasonableness' standard. It prohibits a lawyer from charging a fee larger than "reasonable" under the circumstances.

However, the Texas rule imposes a higher standard for what is "unconscionable," stating that a fee is unconscionable "if a competent lawyer could not form a reasonable belief that the fee is reasonable." Tex. Disciplinary Rules of Prof'l Conduct R. 1.04(a). Comment (7) notes that the Texas rule recognizes that fee agreements are struck at the beginning of the relationship when many uncertainties and contingencies exist. Therefore, "unconscionable" adopts a perspective to bring the lawyer the benefit of the doubt of the uncertainties at the outset.

The Disciplinary Rules are frequently a source consulted by the courts to determine if a contract violates a public policy and, therefore, is not enforceable. *See, e.g.*, *Bond v. Crill*, 906 S.W.2d 103, 106 (Tex. App.-Dallas 1995, no writ); *Pollard & Cook v. Lehman*, 832 S.W.2d 729, 736 (Tex. App.-Houston [1st Dist.] 1992, writ denied). Therefore, unconscionability under Rule 1.04(a) may be a standard that the courts use as an affirmative defense to enforcement.

The possibility that an excessive fee alone may breach a fiduciary duty is foreshadowed in *Lopez*. The majority finessed the issue by construing Lopez to assert only breach of contract. *Lopez v. Munoz, Hockema, & Reed*, 22 S.W.3d 857, 862 (Tex. 2000). The majority noted Lopez did not claim that (1) a 45% contingent fee was excessive when the contract was made, (2) an additional 5% fee for the appeal was excessive, or (3) the attorney manipulated the process to trigger the basis to charge the extra fee. *Id.* That the court borrowed from Rule 1.04 indicates that the court is inclined to consider some level

of excessiveness as a breach of fiduciary duty. The dissent left no doubt it believed collecting an unconscionable fee violates a fiduciary duty. 22 S.W.3d at 867. The dissent holds that even if the contract entitles the lawyer to it, the lawyer has a fiduciary duty to decline. *Id*. at 868. As standards for "unconscionable," the dissent quotes Rule 1.04(a) and sections 46 and 47 of the *Restatement*. However, the dissent goes a step further, saying that a fee is unreasonable if it is grossly disproportionate to the work and risks. *Id*. The lawyer may breach the duty if he provides "little or no services" and collect a substantial part of the recovery. *Id*. at 868. The dissent cites *General Motors v. Bloyd*, 916 S.W.2d 949, 960 (Tex. 1996), which discusses the "lodestar" method for calculating attorney fees in class actions. *Id*. at 867. The suggests that the ultimate litmus test for unconscionable under Rule 1.04 should be a comparison of the lawyer's time and effort with the fee and the results.

C. Contingent Fees

1. Propriety of contingent fee agreements

Contingent fee agreements do not *per se* violate public policy. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 846 (Tex. 1969); *Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854, 857 (Tex. Civ. App.-Texarkana 1981, writ ref. n.r.e.). Rule 1.04(d) of the Texas Disciplinary Rules says the fee may be contingent on the outcome of matter for which services are rendered, except to the extent prohibited by law. Attorney contingent fees serve several purposes:

> 1. They are the only means by which some plaintiffs can afford to pay for legal services;
> 2. Success creates a source of funds with which to pay fees;
> 3. The potentially greater fee compensates the attorney for the risk that the attorney may receive not fee whatsoever. *Arthur Anderson & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 818 (Tex. 1997*); In Re: Polybutylene Plumbing*, 23 S.W3d at 436 ; *Kuhn*, 614 S.W.2d at 857.

The ABA has suggested contingent fees may be appropriate even when the client could afford to pay an hourly rate because a contingent fee frees up the client's income pending the outcome of the case. See, ABA Formal Opinion, 94-389 (Dec. 5, 1994).

Contingent fees are prohibited or strongly advised against in certain situations. Texas Discpilinary Rule 1.04(e) prohibits contingent fees in criminal cases, and Rule 1.04(a) strongly counsels against contingent fees in "family law matters." Such agreements are thought to promote divorce and discourage reconciliation. However, this has been held

inapplicable to a contingent fee for a percentage of money properly awarded in a suit to establish a common law marriage. *Ballesteros v. Jones*, 985 S.W.2d 485, 397 (Tex.App.-San Antonio 1998, pet. denied) (en banc).

Section 35(1) of the *Restatement* prohibits contingent fee arrangements in which the size of payment is: (1) contingent on the success in prosecuting/defending a criminal proceeding; or (2) contingent on a specified result in divorce or child custody proceedings. Comment (b) states that such contingent fee arrangements induce the lawyer to disserve the client's interest and other public interests.

Finally, several courts have condemned an attorney taking a portion of "media rights" (e.g., percentage of copy rights, book royalties, film royalties, etc.) In high visibility cases. *Betts v. Scott*, 65 F.3d 1258, 1273 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1995). Texas Disciplinary Rule 1.08 prohibits a lawyer from negotiating an agreement to acquire literary or media rights to the portrayal or an account based in substantial part on the information related to the representation. Comment (4) to Rule 1.08 agrees with *Betts* that this creates a conflict of interest which may cause the lawyer to slant trial tactics to increase the value of the media rights rather than serve the client's interests.

2. Voidable contingent fee contracts

Section 82.065(a) of the Texas Government Code requires that a contingent fee agreement be in writing and signed by both the attorney and client. Section 82.065(b) provides that the contract is voidable by the client if it is procured as a result of conduct that violates either the laws of the state or the Disciplinary Rules of the State Bar of Texas regarding barratry. If the client does not sign the contract, an oral contingency fee agreement is voidable by the client. *Sanes v. Clark*, 25 S.W.3d 800, 804 (Tex. App.-Waco 2000, pet. denied). However, it may be necessary for the client to notify counsel that the agreement is terminated before the case is settled. *Id.* at 805. Courts have split over whether the client can void the contract if the attorney fails to sign. *Compare Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App.-Austin 1994, no writ) *and Law Office of Thomas J. Henry v. Cavanaugh*, No. 05-17-00849-CV, 2018 Tex. App. LEXIS 3182 at *11(Tex. App.--Dallas May 7, 2018, orig. proc.) (attorney's failure to sign agreement did not bar enforcement or no complaint raised until after case settled); and *In re Godt*, 28 S.W.3d at 732, 738 (Tex. App.--Corpus Christi 2000, orig. proc.) (attorney's failure to sign contract barred enforcement of arbitration when a client sued attorney for malpractice).

The type of grounds upon which a client may seize to avoid the contract under section 82.065(b) may be broad. *See, e.g., Sanes*, 25 S.W.3d at 805. In *Sanes*, the contingent fee

contract contained a clause authorizing the counsel to file suit, settle the claim, and sign the client's name to releases. The Waco Court concluded this clause violated Disciplinary Rule 1.02(a)(2), which requires the attorney accept the client's decisions regarding settlement. Citing section 82.065(b), the court concluded that the clients were entitled to void the contracts because the contracts violated Rule 1.02(a).

3. "Reverse" contingent fees

"Reverse" contingent fees have become increasingly popular. Under this kind of fee agreement, the lawyer is compensated based on a percentage of the amount the client is saved or the amount by which the client's liability or indebtedness is reduced.

The ABA has concluded that reverse contingent fee agreements can be valid and enforceable under the rules. ABA Formal Opinion 93-373 (April 1993); ABA Formal Opinion 94-389. (Dec. 1994). The Houston Court of Appeals enforced a reverse contingent fee agreement in *Chapman v. Hootman*, 999 S.W.2d 118 (Tex. App.-Houston [14th Dist.] 1999, no pet.). There, Chapman quit paying his mortgage when he discovered the seller had failed to deliver good title. 999 S.W.2d at 120. Expecting collection suits, Chapman retained attorney Hootman. The fee agreement had two clauses: if Hootman obtained no cash recovery but reduced the note's balance, his fee was 10% of the reduction; if Hootman obtained a cash recovery and reduced the note, he received 50% of the recovery and 10% of the reduction. *Id*. at 120-21. Chapman eventually settled the resulting lawsuits obtaining only a release of the mortgage. *Id*. Chapman refused to pay Hootman; he claimed that only the second clause applied and, because there was no recovery, the contingency (recovery and reduction) failed to occur . *Id*. at 122. The Houston Court of Appeals affirmed a summary judgment for the attorney, reasoning that the first clause applied, *i.e*., the clause providing only 10% of the amount of reduction if there was no recovery. *Id*. at 123.

D. Fee Splitting and Multiple Fees

Texas Disciplinary Rule 1.04 permits a fee splitting agreement unless some other provision of the rule makes it invalid. *Chachere v. Drake*, 941 S.W.2d 193, 196 (Tex.App.-Corpus Christi 1996, writ denied). Under Rule 1.04, attorneys may split fees with referring or forwarding attorneys, provided the client knows of the agreement and has no objection. *Chachere*, 941 S.W.2d at 196; *Bond*, 906 S.W.2d at 106. The burden of proof is on the party claiming the agreement violates Rule 1.04 or violates public policy. *Bond*, 906 S.W.2d at 106; *Matlock v. Kittleman*, 865 S.W.2d 543 (Tex. App.-Corpus Christi 1993, no writ).

Comment 10 to Rule 1.04 provides a substantial exception to the rule that the client must have some awareness of the fee splitting agreement. In pertinent part, it provides:

> Because the association of additional counsel normally will result in a further disclosure of client confidences and have a financial impact on a client, advance disclosure of the existence of that proposed association and client consent generally are required. Where those consequences will not arise, however, disclosure is not mandated by this Rule. For example, if a lawyer hires a second lawyer for consultation and advice on a specialized aspect of a matter and that consultation will not necessitate the disclosure of confidential information and the hiring lawyer both absorbs the entire cost of the second lawyer's fees and assumes all responsibility for the advice ultimately given the client, a division of fees within the meaning of this Rule is not involved.

Consequently, some courts have concluded if the agreement does not increase the fees or expenses to the client and will not require the disclosure of client confidences to the new attorney, there is no need for disclosure. *Matlock*, 865 S.W.2d at 545; *Bond*, 906 S.W.2d at 106.

Finally, the misconduct of counsel may estop that lawyer from claiming the fee sharing agreement is unenforceable. *See Chachere*, 941 S.W.2d at 196. In *Chachere*, the client had jointly consulted two attorneys; the attorneys orally agreed to split the referral fee and send the case to a trial specialist. However, because one of the lawyers had a poor relationship with the specialist, the two lawyers agreed to conceal that lawyer's involvement in the case. The fee sharing agreement with the specialist named only one of the lawyers as sharing in the fee. When the case settled, that lawyer repudiated the oral agreement. Nevertheless, the court upheld the fee-splitting agreement. Because there was no breach of client confidence or increased fees, the lawyer's fraud prevented him from asserting illegality as a defense. 941 S.W.2d at 196.

The amount of the division or percentage to go to the referring attorney should be expressly set out. *See, e.g. Sourignavong v. Methodist Hosp. Health Care Sys. of San Antonio, Ltd.*, 977 S.W.2d 382, 285 (Tex. App.-Amarillo 1998, no writ). There, the client's contingency fee contract jointly hired two different lawyers for a single 45% fee; the contract provided no division of the 45% between the two lawyers, nor did they have a separate written or oral agreement on the division. The evidence at trial showed the first attorney did nearly all of the case work-up and representation, while the second attorney merely advanced some expenses. The Amarillo court upheld an award which gave nearly all of the 45% fee to the first attorney, awarding only expenses to the second.

977 S.W.2d at 385. The Amarillo court concluded that quantum meruit principals would apply, even though the second attorney provided no services directly to the first attorney, a key element of quantum meruit. *Id*. The court analogized this to a joint venture where the parties agree in advance that they will not contribute in equal shares to the venture.

Likewise, problems arise when the fee splitting agreement is separate from the original contingent fee agreement. In *Silverthorn v. Mosley*, 929 S.W.2d 680, 683 (Tex. App.-Austin 1996, writ denied), the Austin court concluded that a separate agreement to divide the original contingency fee did not constitute an assignment to the second lawyer of any part of the recovery. Thus, the defendant's agreement to give the plaintiff 20% of the fees collected on a case was neither a legal nor an equitable assignment of any interest in the recovery, once the client received one. 929 S.W.2d at 683. Therefore, the plaintiff had no equitable or legal rights in the client's recovery, which could be enforced against the client. *Id*. Rather, his remedy was solely to collect the money as an ordinary debt from the defendant. *Id*. at 684.

Another problem is the reasonableness of fees when the client has multiple contingent fee contracts with different law firms. The courts seem inclined to the view that "excessiveness" will be determined by aggregating percentages under all contingent fee contracts. *See, e.g.*, *Smith v. McCleskey, Harriger, Brazill & Graf*, 15 S.W.3d 644 (Tex. App.-Eastland 2000, no pet.); *Curtis v. Comm. For Lawyer Discipline*, 20 S.W.3d 227 (Tex.App.-Houston [14th Dist.] 2000, no pet.). *Smith* arose out of an oil and gas class action. The named plaintiff formed Toshi Petroleum, Inc. to solicit class members to participate. 15 S.W.3d at 646. The class representative hired the McCleskey firm to send proposed contingent fee agreements to class members, permitting them to assign 1/3 of their recovery to Toshi in return for prosecuting the class action. *Id*. The class action resulted in a $15 million settlement; from the common fund, $3.75 million was allocated to the McCleskey law firm. Checks from the remaining $12.25 million were issued jointly to class members and Toshi. The Eastland court reversed a summary judgment for the McCleskey law firm. *Id*. at 647. The class members argued McCleskey had surreptitiously charged them two unconscionable fees for handling the class action. The court concluded that, because class counsel has a fiduciary relation with the class members, the facts arguably stated a duty not to cause the client to incur excessive, multiple legal fees. *Id.* at 647.

In *Curtis*, two clients had retained Chadderdon to prosecute sexual a harassment case; Chadderdon took the case on a 30% contingent fee, 40% if the case went to trial. 20 S.W.3d at 230. Chadderdon then hired Curtis, a separate attorney, to assist on the case. Unknown to Chadderdon, Curtis caused the clients to also sign a contingent fee with Curtis also providing for a 40% fee, 45% if the case went to trial. *Id*. at 233. The clients

attempted to withdraw their files from Curtis, but she demanded they reimburse her over $27,000.00 for time and expenses. *Id*. at 230, 233. A grievance was filed against Curtis, and the Houston court upheld findings that the second contingent fee was unconscionable and excessive. *Id*. at 233. Because the contingent fees under both contracts were far in excess of what was reasonable and customary, the second contingency fee was unconscionable. *Id*.

V. Conduct Before the Appellate Court

A. Representations Regarding the Record and Disclosing Adverse Authority

Texas Disciplinary Rule 3.03 regarding "Candor Toward the Tribunal" provides:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal;
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
> (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
> (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (5) offer or use evidence that the lawyer knows to be false.
> (b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
> (c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Perhaps the subsection most pertinent for appellate lawyers, and the most ethically demanding, is principle embodied in subsection (a)(4) of the Texas rule, requiring the confession of controlling, adverse authority, even if opposing counsel apparently has not found it. Should a lawyer really be punished for being a more diligent researcher than opposing counsel? The Disciplinary Rules apparently think attorneys should.

Similarly, ABA Model Rule 3.3(a)(1) prohibits any false statement of material fact or law. ABA Model Rule 3.3(a)(2) required the lawyer to disclose directly adverse legal

authority in the controlling jurisdiction even when opposing counsel does not disclose it. Section 111(2) of the *Restatement* adopts the same standard. Section 111, comment (c), defines legal authority to include case law, statutes, regulations, and ordinances. It includes decisions directly on point, but not *dicta*.

In a proceeding such as a mandamus, ABA Model Rule 3.3(d) requires disclosure of all material facts known to the lawyer that would enable the court to make an informed decision, whether or not those facts are adverse to the client. See also *Restatement (3d)* §112. However, the Texas rule is less demanding, requiring only that a Petition in an original proceeding "state concisely and without argument the facts pertinent to the issues or points presented." TEX. R. APP. P. 52(g). Generally, appellate courts expect any application for emergency relief to contain a complete and accurate statement of all facts that may affect the ruling. J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L. J. 677, 700-01 (1989). The court may even sanction counsel who refuses to send emergency or *ex parte* motions to opposing counsel by fax or courier when the rules require immediate notice or it is requested. *See In re Terminix Int'l Co., L.P.*, 131 S.W.3d 651, 653–54 (Tex. App.--Corpus Christi 2004) (orig. proc.) (sanctioning relator's counsel who mailed emergency motion for stay relief to opponent and refused to fax a copy to opposing counsel when the latter requested it). The Thirteenth Court of Appeals has also sanctioned an attorney for mischaracterizing the nature of an appeal as interlocutory, thereby requiring the court to unnecessarily accelerate the appeal. *Sossi v. Willette & Guerra*, 139 S.W.3d 85, 90 (Tex. App.--Corpus Christi 2004, no pet.).

The Texas Fourteenth Court of Appeals has sanctioned a lawyer for citing evidence outside the record and for failing "to recognize or even mention" crucial factual issues. *Schlafy v. Schlafy*, 33 S.W.3d 863, 873 (Tex. App.--Houston [14th Dist.] 2000, pet. denied). The lawyer was challenging the division of a marital estate, but failed to mention the debts assessed against each party's share of the estate. *Id*. In *Stafford v. Stafford*, No. 07-04-262-CV, 2004 Tex. App. LEXIS 8291 at *8-9 (Tex. App.--Amarillo Sept. 10, 2004, pet. dism'd) appellate counsel was sanctioned for failing to mention that an earlier opinion of the court had resolved the issue presented by the instant appeal.

The upside of confessing adverse facts or authority is the benefits that flow from such candor. First, the court will appreciate when counsel has done the court's work for it by finding controlling authority that can be cited in the court's opinion. But of even greater significance, counsel will be established as A Lawyer Who Can Be Trusted. Chances are good that from this date forth that attorney's briefs will be read first, because the court will trust that attorney will present a fair description of the case. This is an enormous

advantage, and one readily to be seized when the only downside is admitting contrary authority that the court almost certainly would have eventually found on its own.

B. Frivolous Appeals

Under ABA Model Rule 3.1, a lawyer must have a reasonable basis for bringing or defending a proceeding, which can include a good faith argument for extending, modifying, or reversing existing law. Comment 2 makes clear that the test is not whether the lawyer believes that the client will ultimately win or lose rather, the tests are whether the lawyer lacks a good faith argument about changing the law, or whether the client's main purpose is to harass or injure the opponent. Section 110(1) of the *Restatement* sets the same standard; comment (d) to section 110 makes it clear that good faith is an objective standard. But comment (c) to section 110 recognizes that nearly every jurisdiction has adopted some version of Federal Rule of Appellate Procedure 38, and that this rule set a higher standard than both section 110 and ABA Model Rule 3.1. Federal Rule of Appellate Procedure 38 allows an appellate court to award damages and single or double costs when the appellate court determines that an appeal is frivolous. Texas Rules of Appellate Procedure 45 and 62 allow Texas appellate courts to award "just damages" for a frivolous appeal.

To determine whether an appeal is frivolous, courts review the record from the viewpoint of the advocate and decide whether the advocate had reasonable grounds to believe the case could be reversed. *Glassman v. Goodfriend*, 522 S.W.3d 669, 673 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Texas appellate courts have recognized four factors which tend to indicate an appeal is frivolous: (1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant's unexplained failure to appear at oral argument. *American Paging of Tex., Inc. v. El Paso Paging, Inc.*, 9 S.W.3d 237, 241 (Tex. App.--El Paso 1999, pet. denied). A "frivolous appeal" finding does not require a finding of bad faith, although the presence of bad faith could be relevant to the court's sanction. *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.--Houston [1st Dist.] 2001, pet. denied). In assessing what sanction is "just," the court may consider the extent to which the frivolous appeal has needlessly caused the appellee to incur attorney fees. *Glassman*, 522 S.W.3d at 674. Also, where the record shows the appellant had been previously sanctioned, the court may consider whether the previous sanctions were sufficient to deter future misconduct. *Smith*, 51 S.W.3d at 381.

When an attorney is court-appointed for an appeal but finds no legitimate grounds for an appeal, the attorney should file a brief with the appellate court stating that the attorney

has diligently reviewed the record in the case and the law applicable thereto, and there are no grounds of error upon which an appeal can be predicated. *See Anders v. California*, 386 U.S. 738, 744-45 (1967). The brief should discuss *why* there are no grounds of error. *Id.* at 744. The attorney should provide the client with a copy of the brief, the appellate record, and the applicable appellate rules, and inform the client of the right to file a pro se response. *Id*. These standards apply both in criminal appeals and family law appeals where an attorney has been appointed. *See, e.g., Porter v. Tex. Dep't of Protective & Regulatory Servs.*, 105 S.W.3d 52, 56 (Tex. App.--Corpus Christi 2003, no pet.).

The standards for frivolous appeal and the threat of sanctions can be a potent weapon to deal with a recalcitrant client who wants to appeal as a matter of principle or spite. Stephen Groves, Sr., *Appellate Ethics*, ABA TPI Appellate Advocacy Comm. News, p. 5 (Fall 1999). If the lawyer concludes that the appeal ultimately lacks merit, appealing out of principle can be construed as harassment. *Id*.

C. Civility and Professionalism

The Texas Standards for Appellate Conduct instruct that "[n]egative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process." Tex. Standards for App. Conduct, Lawyer's Duties to Clients Standard 7. Counsel should also advise their clients of proper behavior, including that civility and courtesy are expected. Tex. Standards for App. Conduct, Lawyer's Duties to Clients Standard 9.

Unsubstantiated attacks on judges can result in sanctions. *In Re Grimes*, 364 F.2d 654, 656 (10th Cir. 1966) (unsubstantiated claims that state judges accepted bribes justified suspensions); Rhesa H. Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S. Car. L. Rev. 573, 574–76 (1999). So can personal attacks on opposing counsel. Barksdale, at 574–75; Wayne Schiess, *Ethical Legal Writing*, 21 Rev. of Litig. 527, 539, 543 (2002). The Fifth Circuit has held that insulting sarcasm is both sanctionable and indefensible. *See In Re First City Bancorp. Of Texas, Inc.*, 282 F.3d 864 (5th Cir. 2002). There, the court upheld a bankruptcy court's $25,000 sanction against class counsel in a securities case against a bank. *Id*. at 867. In various proceedings, the class counsel: (1) referred to an assistant U.S. attorney as a stooge, mentally dead, inept, and a graduate of a 29th tier law school; (2) referred to the bank's chairman as a hayseed and a washed-up has-been; (3) referred to one opposing counsel as a stooge of his co-counsel; and (4) accused opposing counsel as using his client as a private piggy bank. *Id.* at 866. The bankruptcy judge twice cautioned class counsel to refrain from personal attacks. *Id.* Class counsel then disregarded a ruling about the scope of a deposition, intimidated the deponent by threatening to indict him, and accused the lawyer defending the deposition of being fired from a law firm. *Id*. The bank's counsel moved to sanction class counsel. The

bankruptcy court fined him $22,500, disbarred him from the court, and fined him another $2,500 for filing a frivolous motion to lift the sanctions. *Id*. at 865, 867. The Fifth Circuit rejected "truth" as a defense to these remarks because they were obvious hyperbole. *Id.* at 867. The court also rejected class counsel's argument that his behavior was acceptable because it helps him get more money for his clients. *Id.* at 865.

Courts have also punished lawyers for cheating on the rules governing briefs. Examples of this sort of unprofessional behavior include failure to cite the record at all, making false statements of the record, and evading page limitations, for example, putting text and arguments in footnotes, incorporating arguments in attached exhibits, shrinking fonts, and adjusting margins. *In re Boucher*, 837 F.2d 869, 876 (9th Cir.), *modified*, 850 F.2d 597, 598 (9th Cir. 1988) (misquoting the record justifies public censure); *Williams v. Leach*, 938 F.2d 769, 773 (7th Cir. 1991) (false factual statements and failure to comply with rules on citing the record justified suspension and $1,000 fine); *In re Beck*, 902 F.2d 5, 6 (5th Cir. 1990) (failure to discuss record or summarize facts coupled with failure to discuss alternative grounds for lower court's ruling justified suspension); Schiess, at 539–42. A brief that does not comply with the briefing rules may be stricken by the court. *See, e.g., Mendoza v. Fiesta Mart, Inc.*, No. 02-12-00324-CV, 2013 Tex. App. LEXIS 671 at *2-3 (Tex. App.--Fort Worth January 24, 2013, pet. denied).

D. Dealing with Unrepresented Person

When faced with a pro se opponent, be mindful of the strictures of Texas Disciplinary Rule 4.03:

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

The Comment to the Rule instructs that "the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." Of course, in most cases, if pro se litigants could obtain counsel, they would have done so already. But it is good advice to periodically remind pro se parties that an opposing attorney does not represent their interests.

VI. Duty to Report Professional Misconduct

The Texas Disciplinary Rule requires lawyers to report professional misconduct when the lawyer has "knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer." Tex. Disciplinary Rules of Prof'l Conduct R. 8.03. ABA Model Rule 8.3 and section 5(3) of the *Restatement* contain essentially the same language. Comment 2 to the Texas Rule clarifies that this rule does not require reporting every violation of the disciplinary rules; rather, the obligation is to report "those offenses that a self-regulating profession must vigorously endeavor to prevent." Also, Comment 3 includes the caveat that a lawyer need not report misconduct where doing so would require the lawyer to improperly divulge confidential information.

This rule is of particular concern for appellate lawyers when the appellate lawyer's review of the case reveals professional misconduct by the trial lawyer. When such a situation arises, the appellate lawyer should carefully compare the conduct at issue to the Disciplinary Rules and the standard in Rule 8.3 for reporting violations of the rules. Depending on the circumstances, such violations of the Disciplinary Rules might also implicate the appellate lawyer's obligations discussed above about avoiding false statements of material fact or law.

VII. Ways Honest, Cordial Conduct Helps Your Clients

In a profession in which credibility, candor, and honesty are valued attributes, lawyers should be mindful of the reputational and professional damage that can occur from disregarding rules prescribing ethical conduct. Justice Gina Benavides & Joshua J. Caldwell, *The Texas Standards for Appellate Conduct: An Annotated Guide and Commentary*, 8 St. Mary's J. Legal Mal. & Ethics 225, 228 (2018). Aside from staying on the safe side of the disciplinary rules, there are other reasons an attorney benefits from ethical conduct. Below are five ways that honest, cordial behavior actually helps the attorney and the attorney's clients.

A) Saves Time.

When you conduct yourself honestly, you don't have to spend time covering for dishonest behavior. Also, when you have a reputation for conducting yourself honestly, opposing counsel feels less compelled to scrutinize and quibble over everything you do.

B) Encourages Honesty and Cordial Conduct Among Opponents.

Humans are an imitative species. Non-lawyer clients especially will take their cues on how to behave in a lawsuit from their attorneys. If you treat opposing counsel and

opposing parties well, they will often treat you well, or at least treat you better than they would have if you were a jerk.

C) Ingratiates You to Courts

Lawyers with reputations for ethical behavior are appreciated by the courts. This kind of appreciation may yield more sympathy for your side of the case. It may also make the court more likely to use your brief as the initial basis for its understanding of the case.

D) Makes Settlement More Likely

People that can't get along are less likely to reach an agreement to resolve their case. People that can talk cordially about their differences are more likely to settle. This should be self-evident, but it bears repeating.

E) Encourages Narrowing of Issues

Narrowing issues saves time and makes settlement more likely. When both sides admit the areas where the other side is right, there is less to fight about. If your side is right on the ultimate issues, narrowing superfluous issues, even those that go against you, can help make the strength of your case on the ultimate issues more apparent.