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Ethical Concepts in American Jurisprudence: A Study of Texas Cases

Pojęcia etyczne w prawoznawstwie amerykańskim:
studium procesów sądowych w Teksasie

> It is not a trivial question.
> What we are talking about
> is how one should live.
> – *Socrates*

At the outset, it is important to remember that the concept of an ethics "update" forces us to some point of reference from which we "update". Generally speaking such a point is the enactment of the first set of rules to govern our profession, the old Canons. These evolved into the *Code of Professional Responsibility* and, more recently, the *Texas Disciplinary Rules of Professional Conduct* (1989). What I should like to suggest, however, is that the starting point actually extends much farther into the past than that. Our ethics actually are not distinct from the entire discipline of ethics dating from the time of Plato, Aristotle, Cicero, and Marcus Aurelius.

Lest you panic at the thought that I am going to flog you for the next few minutes with a lesson that repeats much of what you probably

learned in college, let me hasten to reassure you. The reason why it is appropriate for us to acknowledge those roots is that we need to remember that our profession is grounded in the search for Truth and Justice. Such concepts are in themselves timeless, yet they are constantly being elaborated upon by each generation. As lawyers, it is vital for us to recognize that the judicial process of which we are a part cannot function in a vacuum. It must have at its root Truth and Justice as essential qualities brought forward and applied in modern factual situations. In this way, we can maintain continuity with our cultural antecedents such as The Constitution without ignoring the realities of the present day. If, as Holmes said, the law is a "seamless web", then that part of our law that deals with the principles of ethical conduct in its practice must inevitably connect us as lawyers to the "seamless web" that is the very fabric of our culture.

Ethical conduct on the part of attorneys in such a case is not merely an objective... it is an imperative. The failure of an attorney to recognize this relationship, in my opinion, probably is what creates problems, and the failure of the profession to respond appropriately creates a gap between lawyers and the community of which lawyer bashing may be a symptom.

Perhaps the most interesting recent example of this failure occurs in the case of *Board of Law Examiners of the State of Texas v. Stevens*.[1] Mr. Stevens, a member of the Mississippi Bar, had applied for membership in the State Bar of Texas. In his application, he disclosed two unsatisfied civil judgments. Further "investigation" revealed that he had a third unsatisfied judgment and had failed to file several years' worth of federal income tax returns or pay some taxes due. The Board, after a hearing, denied Mr. Stevens' application on the grounds that he lacked "good moral character". Stevens appealed to the district court, and it reversed and remanded to the Board on the grounds of a lack of substantial evidence. The Board appealed to the Austin Court of Appeals, and it affirmed the trial court.

The Austin Court noted that the Legislature had ordered the Board to certify to the "good moral character" of the applicants for the Bar. Unfortunately, the Supreme Court of the United States had held the

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[1] 850 S.W.2d 558 (Tex. App.– Austin, 1992) [hereinafter cited as *Stevens I*], reversed *sub nom. Board of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994) [hereinafter cited as *Stevens II*].

standard of "good moral character" to be a "vague qualification...a dangerous instrument for arbitrary and discriminatory denial of the right to practice law". *Konigsberg v. State Bar of California.*[2] The legal issue thus becomes one of a "demonstrable relationship to the protection of future clients or the administration of Justice". See *Stevens I* at 560 and Tex. Govt. Code §82.028(c)(1). The court proceeded to ignore the unsatisfied civil judgments, there being some evidence of financial inability. It acknowledged, however, "Stevens' failure to file federal income tax returns presents a closer question regarding his lack of good character... We agree that Stevens' disregard for his tax obligations is deplorable and fails to set a good example of respect for the legal system". *Stevens I* at 563. The court also notes that *Disciplinary Rule 8.04(a)(2)* is violated when a lawyer commits a "serious crime" or any other *criminal* act that reflects adversely on the lawyer's honesty, trustworthiness or fitness in other respects. For all of the authority that would seem contrary the Austin court found that Stevens had committed no serious crime or other criminal act. In a helpful spirit, the court suggests that the Board by rule define "good moral character" in such a way as to prevent a repetition of the vagueness problem.

The purpose of this discussion is not to pillory the Austin Court of Appeals, Mr. Stevens, or even the Supreme Court of the United States. It is instead to point out the gap between common sense and legalities that makes the law appear, as Dickens said, to be "a ass". If an applicant's conduct should be "deplorable" and reflects "[a lack of] respect for the legal system", is the profession obligated to lower itself to that level? I think not. Likewise, Western culture, however, does not require that Mr. Stevens remain in outer darkness for his failure to file a tax return (or several, as the decision would imply). The court could just as easily have required that Mr. Stevens pay his taxes as a precondition to the clearance of his application by the Board, while at the same time suggesting that the Board amplify its definition. In that way, the law insures that its practitioners both appear to be, and are in fact, subject to it. Such a result would be legally just as well as ethically sound and a guide for all attorneys. There is nothing outrageous about expecting lawyers to obey the law, even in their personal lives.

The Texas Supreme Court, in an unanimous opinion, reversed the Austin Court, essentially on the grounds that the substantial evidence

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[2] 353 U.S. 252, 263, 77 S.Ct. 722, 728, 1 L. Ed.2d 810 (1957).

rule had not been applied to this case, at least not correctly. Although this provided the Court with the opportunity to dodge the issue of fitness, it did allow for a discussion of the new *Disciplinary Rules* and their intent as to various of them. Quoting from the opinion of the Supreme Court of the United States in *Schware v. Board of Bar Examiners,* 353 U.S. 232, 247, 77 S.Ct. 752, 760, 1 L.Ed.2d 796 (1957), the Court noted:

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society.*** A consequent obligation of lawyers is to maintain the *highest standards of ethical conduct.*" [Emphasis of the author.] *Stevens II* at 775.

For those who may not realize it, this is part of the opening section of the Preamble to the *Disciplinary Rules*. The Court went on to point out that "[I]t would be small comfort to the public if the only ethical standard for admission to the Texas Bar were an *absence* of convictions involving serious crimes and crimes of moral turpitude." *Stevens II* at 776, emphasis supplied. Further, in a model of clarity, the Court both declines to create a laundry list of offenses that will result in the denial of a license, and then establishes the "clear and rational connection" test as applied to the facts at hand, in relation to the standard of "good moral character." There is little mistaking the intent of the Supreme Court that this test could become a very broad set of criteria when balanced against the public interest. In short, the practitioner should not be misled into thinking that there will be much argument over substantial evidence or such. This despite the fact that, in this case, there were letters of recommendation from a member of the Mississippi Board of Bar Commissioners, the president of the Mississippi State Bar Association, a district judge, former members of the Mississippi legislature (where Mr. Stevens had served for four years), and a former member of the Federal Energy Regulatory Commission. The case would seem to stand for the proposition that the Supreme Court will indeed take a strict view of "fitness" and "good moral character" issues relative to the practice of law.

Counter to this trend may be the case of *Kilpatrick v. State Bar of Texas*.[3] In this case, the attorney was disbarred allegedly for having committed barratry within the meaning of Tex. Penal Code §38.12. The Court held that, "While an attorney may be disciplined for an act which

[3] 869 S.W.2d 361 (Tex. App. – Houston [14th], 1993) [hereinafter cited as *Kilpatrick I*].

constitutes an offense under the Penal Code, the disciplinary rules and not the Penal Code provide the basis for discipline... Here, Kilpatrick could have been prosecuted for barratry and then the State Bar could have used that conviction in this disciplinary proceeding." *Kilpatrick* at 365. It is not my intention to discuss the barratry statute from a constitutional point of view, but the implication of the decision is that criminal activity is not the issue *per se*. Indeed, in the end, since the attorney "was not convicted of a crime... did not misappropriate, commingle, or embezzle client funds; fail or refuse to return client property; forge a document; or lie to a court, grievance committee or client," the Court found disbarment an abuse of discretion and remanded the case for a new trial.

The Supreme Court, in *State Bar of Texas v. Kilpatrick* expressly rejected this reasoning and affirmed the trial court judgment of disbarment.[4] *Kilpatrick II* at 659. What is significant about this is that if an attorney should be accused of a criminal offense, the burden of proof for the loss of a license may be substantially less than that for the loss of freedom. *Quaere*: Is there a constitutional issue that needs to be addressed in such a case, as it is undoubtedly state action that results in a deprivation, potentially in violation of the Fourteenth Amendment?

Somewhere between "fitness" and "moral turpitude" lies that area reserved for those attorneys who are either too busy or too naive to form the necessary *mens rea* to be disbarred, yet who end up in trouble anyway. Such a case is *The State Bar v. Gailey*.[5] In this instance, Mr. Gailey put his client's money in his trust account, just as the *Rules* require. In the usual course of his practice, the balance in the trust account fell below the level that would have covered the amount of this particular client's funds. What had happened was that the bank did not give credit to the deposit fast enough to compensate for checks that were presented. A grievance was brought under *DR 9-102(A)* . The Bar argued that Texas should adopt a rule of strict liability on the attorney. *Gailey* at 520. The Court responded that, although several jurisdictions had done so, Texas should not subject attorneys to the slings and arrows of the business practices and procedures of other entities with which we must interact. *Gailey* at 521.

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[4] 874 S.W.2d 656 (Tex. 1994)[hereinafter cited as *Kilpatrick II*].

[5] 889 S.W.2d 519 (Tex.App. – Houston [14th Dist.], 1994, no writ) [hereinafter cited as *Gailey*].

In the borderline-barratry context, the case of *Gonzalez v. State Bar of Texas* adds detail to the *Kilpatrick* picture in that letters to prospective clients, even though technically advertising, are subject to the limitations contained in Rule 7.01 (a)(1) of the *Disciplinary Rules.*[6] *Gonzalez*, at 825. The problem in that case was a representation in a solicitation letter about fees to be charged by the attorney. The defendant argued that his established practice did not include quotations about fees prior to the start of representation. The Court stated that the prior practice was not the issue, because the attorney was required to adhere to the rules anyway. *Gonzalez*, at 827. The result was affirmance of a judgment of public reprimand and costs. The apparent trend against a seemingly growing practice of borderline barratry is reinforced by the remarks of Hon. David. J. Beck, President of the State Bar of Texas in announcing a six point program to try to bring an end to this unprofessional and embarrassing practice.[7]

"Fitness" was an issue in the case of *State Bar of Texas v. Lerner.*[8] Here the defendant attorney did not contest that she had failed to comply with the terms of a settlement letter, failed to return money to a client, had a client attend hearings needlessly, misled the client into believing that the case had been settled, and failed to inform the client that she was not settling the case after all. The trial court declined to find that this conduct was dishonest, fraudulent, or deceitful within the meaning of *DR 1-102 (A)(4)* because there was no intent. The same allegations, however, as a "fitness" issue under *DR 1-102 (A)(6)* do not require intent. As it happened, the Court of Appeals concluded that "the trial judge could have reasonably found that Lerner's conduct did not reflect adversely on her fitness to practice law." *Lerner* at 500. Again, under the analysis presented in *Stevens II*, the likelihood of *Lerner's* reaching the same result if appealed further would not be promising. The facts of these cases speak for themselves. The other side of the coin, of course, is that of reinstatement of a license that was lost for one reason or other.

The recent case of *State Bar of Texas v. McDevitt* is reflective of this trend.[9] Mr. McDevitt had been convicted of conspiracy to defraud the government by impeding the Internal Revenue Service. This had led

[6] 904 S.W.2d 823 (Tex.App. – San Antonio, 1995, no writ)[hereinafter cited as *Gonzalez*].

[7] 58 Tex.B.J. 10 (November 1995) at 1006, 1008.

[8] 859 S.W.2d 496 (Tex. App. – Houston [1st], 1993, no writ).

[9] 857 S.W.2d 88 (Tex. App. – Fort Worth, 1993, no writ) [hereinafter cited as *McDevitt*].

to his resignation from the practice of law in 1985. Upon his discharge from probation in September, 1987, the "five year rule" began to run. On January 9, 1991, he applied for reinstatement of his license. The Court ruled that, since the rule period had not yet run, there was no application pending when the new procedural rules went into effect on May 1, 1992. Since he would not be eligible for reinstatement until September 17, 1992, the filing had been premature, and therefore was not appropriate. Again, though, the practitioner should not be misled by what appears to be a procedural issue. The Court hinted at the attitude that it might have if the case should return from remand when it stated, "We do not believe that the transitional paragraph in rule 1.04 of the new rules could reasonably have been intended by its framers to allow one to receive the benefits of the old rules by prematurely filing an application for reinstatement..." *McDevitt* at 89. The cases of *Stevens II* and *McDevitt* should be good news to a profession that is attempting to regulate itself (rather than let someone else do it), even though some individuals may find this a less than happy trend. An example of this is a recently tried case of an attorney who had pleaded out to a felony charge of bigamy. Not surprisingly, the State Bar of Texas sought his license. The State's case prevailed. *Quaere*: If the defendant had been an applicant for a law license or for reinstatement of a license, would this have been sufficient to deny the application under the present standards?

I suggest that these cases present a picture of a system that prides itself on providing the opportunity for adversarial discourse to lead to the Truth while being fatally flawed at the outset by having provided only vague definitions from which the discourse is to originate. As attorneys, we should ask two questions: first, how should the definitions be changed, and second, would I want to practice law with any person who engaged in the conduct mentioned above?

A growing problem for attorneys that is often expressed in ethical terms is that of confidentiality of client information. In part the problem both inheres in our adversary system and is a result of increased mobility in our profession. Obviously, it is difficult, if not impossible, for a young associate who has an attractive offer elsewhere to set aside whatever has been learned in the representation of a client and ignore that knowledge while representing an opponent. Until recently these matters were governed by *DR 4–101(A)*, which focused on the attorney–client privilege as a principal component of the definition of confidentiality. In effect,

this standard required a dual determination as to whether the Code had been violated. First, the matter had to fall within the attorney–client privilege, and that itself evolved by way of the case law. Otherwise, as a "secret" the information had to be such that its disclosure would be "embarrassing or would likely be detrimental to the client". If the matter were not privileged, it might be a "secret", but in either case, it was a very tedious matter to sort out in the midst of litigation as part of a motion to disqualify. The standard defense was that the new employer would erect a "Chinese Wall" around the new associate to shield both the firm and the associate from contamination by each other. No one bothered to note that, historically, the Chinese Wall never kept anyone out. Under the Code, the lead case toward the end of the Code period was *Petroleum Wholesale v. Marshall.*[10] In that case the motion to disqualify succeeded and was upheld with the result that an attorney who fails to check out thoroughly who the new firm represents may become a sort of "Typhoid Mary" who "infects" the new firm and forces its disqualification.

The rule of *Petroleum Wholesale*, and certainly its spirit, is embraced in the new *Disciplinary Rule 1.09*. In effect, this rule combines the old concept of confidentiality, tears down any "Chinese Wall" idea, and integrates them both into the idea of a conflict of interest. The case of *Clarke v. Ruffino* represents the first in–depth discussion of the problem under the new *Rules.*[11] The key to understanding the decision and the operation of *Rule 1.09* and *1.05* together is contained in the first three words... "without prior consent". The burden is on the attorney to disclose to everyone involved what is about to occur in terms of a shift of representation. That means that the soon–to–be former firm, the new firm, the soon–to–be former clients, and the new clients. Why the new clients? Simple. Because there is no realistic chance of a "Chinese Wall", there may be instances in which the new clients may have to find other representation, and they are probably entitled to know that much. That threat arises in *Rule 1.09(a)(1)* in which a "substantially related" matter might come into being months later.

An interesting sidelight to the issue of "concurrent representation" that arises in cases involving a corporate entity that may have one law firm representing it in one case, yet representing an adverse party in

[10] 751 S.W.2d 295 (Tex. App.– Dallas, 1988) [hereinafter cited as *Petroleum Wholesale*].

[11] 829 S.W.2d 947 (Tex. App.– Houston [14th Dist.], 1991) [hereinafter cited as *Clarke*].

another case. The Waco Court in the case of *Wasserman v. Black* held that a city attorney was disqualified from the continued representation of city officials who were defendants in a suit brought by another, former city official, when all of them were defendants in a suit brought by a former city employee.[12] It was held that when the two cases arose from a common set of facts, the city attorney would, by definition, be involved in a series of conflicts that could not be resolved without his withdrawal in accordance with *Rule 1.09(a)(2)*. In direct contrast to the decision in Wasserman, in *Delta Air Lines, Inc. v. Cooke,* a writ of mandamus was sought to compel the disqualification of the law firm in the second case.[13] The appellate court denied leave to file for the writ, and in a rare instance the dissenting opinion of Justice Vance is what was published. Although as a dissenting opinion it has no precedential value, it is instructive as to what might occur in a subsequent case. The opinion notes that there are some forty-five states in the United States, in addition to the Fifth Circuit, that prohibit concurrent representation as a way to avoid potential conflicts.[14] In light of this split of authority within one court, is possible that there is no clear authority in Texas at the present time on the problems associated with "concurrent representation".

The "substantially related" part of the rule was discussed at some length in *Centerline Industries*, Inc. v. Knize.[15] Centerline had been represented by the firm of Rader, Campbell, Fisher, & Pike in a suit, and soon after the completion of that case, the Rader firm took on the representation of Bryce Anderson. Mr. Anderson sued Centerline, and the company move the court to disqualify the Rader firm because the matters were "substantially related". The focus of the decision is on the "threat" of disclosure as indicated in the Comment to the Rule, rather than any actual information transfer. *Centerline* at 875. The Court agreed, and the disqualification was ordered. See also *Grant v. Thirteenth Court of Appeals,* below. The correlative problem of infection of a firm by a newly hired associate was illustrated most directly in *Henderson v. Floyd.*[16] In that case the focus was on the "simple fact" that the relator's former lawyer is now associated with his opponent's lawyer. The Court opined that "Rule 1.09 does not permit such representation." *Floyd* at

[12] 910 S.W.2d 564 (Tex.App. – Waco, 1995).

[13] 908 S.W.2d 632 (Tex.App. – Waco, 1995).

[14] *In re Dresser Industries, Inc.,* 972 F.2d 540 (5th Cir. 1992).

[15] 894 S.W.2d 874 (Tex.App. – Waco, 1995, no writ) [hereinafter cited as *Centerline*].

[16] 891 S.W.2d 252 (Tex. 1995) [hereinafter cited as *Floyd*].

254. Rather interestingly, the trial court was found to have abused its discretion by *not* disqualifying the attorney. Certainly in personnel shifts among large firms that is a distinct possibility the potential of which has to be considered. Indeed, it would appear that the courts are applying the "Csar's Wife" Rule in such cases, and personnel managers should be wary of the thoroughness of conflicts checks.

Subsection (a)(3) of *Rule 1.09* brings into focus the relationship between confidentiality and conflict of interest in a way in which it was not explicit before. Now it is clear that a conflict of interest sufficient to disqualify a new firm arises if the attorney who is involved is representing the client personally and such representation "in reasonable probability" would result in a violation of *Rule 1.05* confidentiality. The recently decided case of *Phoenix Founders, Inc., **et al.** v. Marshall*, provides an interesting view of the problem as it might apply to legal assistants.[17] In this case, a law firm hired a legal assistant from a firm to which it was opposed in a pending suit. The legal assistant was not from the trial section of the former firm. After three weeks at the second firm, the legal assistant quit and returned to the former firm. The evidence was that the legal assistant had been asked at the second firm to look at the crucial file for a particular document, a task that required 0.6 hours of billing. Of course, there were many other details, but the mobility of the legal assistant, who was in fact later fired by the former firm in an effort to avoid the problem, was central to the argument. The question was whether, in light of the opinion in *Petroleum Wholesale*, the former firm had to be disqualified? The answer supplied by the Supreme Court was that the trial court should conduct a separate hearing to determine the level of involvement of the legal assistant or other staff member.

This principle was applied the same day in the case of *Grant v. Thirteenth Court of Appeals*.[18] In that instance, it was a legal secretary who was involved in the problem, and the trial court had conducted an evidentiary hearing to determine the level of contamination. The Court, in adopting a test of "genuine *threat* of disclosure, not an actual materialized disclosure" [italics in original], in effect laid down a standard that will be very difficult, if not impossible, to rebut, since the threat is always there.

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[17] 887 S.W.2d 831 (Tex.1994).

[18] 888 S.W.2d 466 (Tex. 1994) [hereinafter cited as *Grant*].

It is also significant in this case that the Supreme Court takes the opportunity to announce a waiver standard as well, to cut off tactical use of the challenge. Citing to *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622 (Tex. App. – Austin, 1992, writ denied) and *Spears v. Fourth Court of Appeals,* 797 S.W.2d 654 (Tex. 1990), the Court stated that a party that fails to seek disqualification in a timely manner will be held to have waived it on grounds of "suspicion that the motion is being used as a tactical weapon." *Grant* at 468. It would appear from this group of cases that the trend is to prohibit multiple representation of clients, at least on opposite sides of the docket. The implications of this could be considerable, because of the mobility of attorneys and their support staffs in the modern day, and the negative effect that such an approach could have on that mobility.

Frankly, it is difficult to see how a party could successfully resist a motion to disqualify under *Rule 1.09* if one had hired an opponent's associates or legal assistants. The level of disclosure required to obtain a valid consent from client from the new clients, and the former client's firms would likely be so high that it would never be reached, with the result that there is almost an irrebuttable presumption of a conflict of interest arising from a breach of confidentiality. See *Clarke* at 951.

The only basis for resisting a motion for disqualification that has emerged as anything resembling "ironclad" is illustrated by *Vaughan v. Walther.*[19] In that case, when a conflict of interest was raised, the attorney denied having ever had contact with the client in the former representation (a potentially dangerous admission). On that basis, coupled with a six and one half month delay in raising the issue, the Supreme Court found that there was an abuse of discretion in ordering the disqualification. *Vaughan* at 691. Waiver was the turning point, but I would suggest that the better practice is to avoid the situation at the threshold by not undertaking to represent more than one member of the same family.

In dramatic contrast to the rule in civil courts, it would appear that there is no conflict perceived in having a prosecutor testify in a criminal case.[20] In that instance two prosecutors testified as to the defendant's character, despite the fact that such testimony was clearly based upon specific information and put the prosecutor in the position of testifying

[19] 875 S.W.2d 690 (Tex. 1994).

[20] *House v. State,* 909 S.W.2d 214 (Tex. App. – Houston [14th Dist.], 1995).

on behalf of his own client, the State. The court opined that this was permissible, because the defendant had testified in his own defense, thus opening the door to this type of testimony.

Again, this is a matter in which we as a profession have an obligation to demonstrate by how we do business internally that all of our actions are subject to the same rules as anyone else's. If we do not insist upon strict adherence to this standard, then the willingness of our clients to tell us everything we really need to know to represent them will be eroded. Under the Rule, confidentiality minus conflict of interest equals confidence. What more can ethics demand of us?

The answer to that question lies in part in what "confidences" we as attorneys *must* disclose. The best known of these is the fraud/crime exception to Tex.R.Civ.Evid. Rule 503 on attorney–client privilege. This is mirrored in *Disciplinary Rule 1.05 (c)(7)* in which the attorney is under a duty to disclose confidential client information if by so doing the attorney is aiding in the prevention of a "criminal or fraudulent act". The burden on the movant probably is to set forth a *prima facie* case of fraud or the crime in issue. In that way, a party seeking discovery of the possible complicity of an attorney in the commission of a fraud or criminal act will have a basis for getting around *Rule 1.05(a)*. Of course, the catch, particularly in civil proceedings, is the definition of "fraud". A particularly instructive, not to say "pointed", discussion of this issue is contained in Volcanic *Garden Management Co., Inc. v. Paxson.*[21]

In that case, an attorney who had been discharged by his plaintiff–client, apparently after learning of a significant amendment to the pleadings, furnished information about his client's true condition to the defendant. The defendant sought the former attorney's deposition, and the plaintiff resisted, without success. The court upheld both the actions of the attorney and the privilege by requiring an *in camera* inspection of the materials in issue prior to the deposition. The soundness of this decision should be self–evident when one considers that, as officers of the court, we should neither abuse nor defraud it. To that extent, I would submit, those who assert that the duty of an officer of the court supersedes that to one's client may be correct in certain instances.

In a gray area under the new *Rules* is what happens when the attorney takes the stand as a witness. The rather convoluted case of *Anderson*

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[21] 847 S.W.2d 343 (Tex. App.– El Paso, 1993, no writ) at 347.

Producing, Inc. v. Koch Oil Company.[22] In this case, the attorney for Anderson took the stand and testified in material matters both as a fact witness and as an expert. The Beaumont Court of Appeals [883 S.W.2d 784] in a carefully reasoned opinion condemned the actions of the attorney, noting that this placed the opposing party at a serious disadvantage in the proceedings. What it did not address, however, is the equally dangerous situation that the attorney, on cross-examination, might be held to have waived the attorney-client privilege, to his client's detriment. The decision of the Supreme Court in this matter should be most interesting.

On the criminal side of this problem is the case of ***In the Matter of James M. Duncan*** consolidated with *Duncan v. Board of Disciplinary Appeals.*[23] In this instance, a proceeding was initiated by the State Bar to disbar Mr. Duncan for misconduct based upon misprision of a felony, and that that involved moral turpitude *per se.* The Supreme Court held that the conviction for misprision could conceivably be based upon the legitimate refusal of an attorney to disclose privileged matters, and that does not involve moral turpitude *per se.* The Board was limited in its ability to review the criminal matter, and rather than inject it into a sort of appellate role, the Supreme Court indicated that the better action was to allow the OCDC to initiate a conventional disciplinary proceeding to review the underlying conduct.

In the gray areas between civil and criminal matters are those cases that involve attorney misconduct that does not happen in open court, yet influences what happens there. Such an activity is *ex parte* communications from the attorney to the judge. These occur when the attorney for one side attempts to communicate with the judge without having opposing counsel present. A direct outgrowth of the adversarial process, it is apparent that this could lead to all sorts of mischief in the system if it were not prohibited. Such a case is presented in *Bradt v. State Bar of Texas.*[24] In that case, an attorney had directed a letter directly to the judge concerning a contempt judgment. The opposing counsel filed a grievance with the State Bar against his opponent and the judge. Although the case turns on procedural matters that are very complex and involve the Supreme Court of Texas, the principle is clear that *ex parte* com-

[22] 38 Tex.Sup.Ct.J. 580 (Writ granted), 94-1198 (argued September 19, 1995).

[23] 38 Tex.Sup.Ct.J. 269, 94-0161 and 94-0162 (1994).

[24] 905 S.W.2d 756 (Tex.App. – Houston [14th Dist.], 1995).

munications can form the basis for complaints against the attorney who sends them and the judge who might act upon them in violation of *Rule 3.05.* It should be noted that the decision to allow the grievance against both attorney and judge was upheld by the Supreme Court.

A recent case that would seem to support the need for attorneys to be sensitive to their role as officers of the court is *Susman Godfrey v. Marshall.*[25] In this case, defendant's attorney was aware of direct contact between his client and the opponent before it occurred, and he did nothing to prevent or to encourage it. Further, the attorney for the defendant sent a letter to the Attorney General of Texas suggesting the initiation of a *quo warranto* proceeding against the plaintiff, a hospital. An allegedly false affidavit by the client was filed in support of defendant's motion for summary judgment.

The plaintiff responded with a motion for contempt and one under Rule 13, Texas Rules of Civil Procedure. The Rule 13 motion sought sanctions against the defendant for filing a false affidavit. More pertinent to our discussion, however, was the allegation that the conduct of the attorney violated *Rules 3.07(a)* and *4.04 (b)(1).* After an extensive hearing, the motion was granted, and sanctions were ordered. The client respondent was found in contempt of court, and he was sentenced to six months in jail and a $500 fine. The attorney and his client were found jointly and severally liable to the plaintiff in the amount of $25,000, which had been found to approximate the attorneys' fees generated by having to counter these actions. The sanctions were upheld (though the contempt judgment was later withdrawn by the trial court), and mandamus was denied.

Two things stand out about this decision that make it worth reading. First of all, the court takes great pains to draw a line for purposes of Rule 13 between the conduct of the client and that of the attorney. This is terribly significant if you should suspect that the opposing attorney and client are attempting a two–front assault on your case, but you just can't quite prove conspiracy. By taking them in sequence and learning what each one knew about the other's conduct as it was unfolding, there may be an opportunity to reveal by inference the image of what is taking place in fact. Following this procedure to its logical conclusion makes it possible to request appropriate sanctions against each offending party without necessarily having them overlap and thus confuse the issues.

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[25] 832 S.W.2d 105 (Tex.App. – Dallas, 1992, no writ) [hereinafter cited as *Susman Godfrey*].

Also, one need never really leave the umbrella of Rule 13, because it allows the full range of sanctions under Rule 215. That, of course, engrafts the rule of *Transamerican Natural Gas v. Powell*, 811 S.W.2d 913 (Tex. 1991) onto Rule 13, but does no violence to the *Susman Godfrey* analysis. See also, ***Ex parte** Conway*, 843 S.W.2d 765 (Tex.App. – Houston [14th Dist.], 1992, no writ).

The second characteristic of the decision that makes it worthwhile is more subtle, yet of immense importance. In effect, the decision sweeps away the need for litigants to go through the grievance process and allows a direct action against the opposing counsel for violation of the *Disciplinary Rules* during the course of the litigation. While that might not be a basis for disqualifying the opponent's attorney, there can be little doubt how distracting such an event could be if one were the target. All of the previous case authority that indicated that the Code did not confer a "private cause of action" would seem to have been seriously diluted, at least to the extent of allowing recovery of attorney's fees expended as a proximate result of the violation and, possibly, contempt. A cautionary note should be injected, however. If contempt should be sought against the opposing attorney, the trial judge should be reminded to have someone else hear the matter, and there may be a requirement for a jury trial. The latter, of course, is highly problematical, and, if the conduct were egregious, should be avoided.

The point of *Susman Godfrey* should not, however, be lost in the legal ground breaking that occurred. What is expected of us as attorneys is not merely our zealous representation of our clients, but also the utmost of candor as officers of the court. Our failure to fulfill these twin duties could well result not merely in sanctions, but also in inquiry into our previous dealings with former clients and former firms with highly unpredictable, but probably unpleasant, results. Again, what is at stake here is the gap between what we as attorneys do in fact and what we are perceived to be doing by the public whom we serve. No one asks for perfection in this process, but are not we as attorneys first and foremost called upon to try?

Perhaps no area of our profession is more sensitive and fraught with emotional pitfalls as that of fees. Somehow we have allowed the impression to develop that we as a profession are parasites who feed on the misfortune of others and get wealthy in the process. Put another way, it becomes downright immoral for us to collect fees for what we do. Frankly, with only a very few exceptions, I find that impression to

be woefully erroneous, if not outright false, and certainly the conclusion that we are all wealthy is demonstrably in error. Attorneys seem to be going bankrupt or at least out of business at pretty much the same rate as other small business people. So, from whence does this idea emanate?

I suggest that the recent case of *Stern v. Wonzer* may be instructive on the point.[26] In that case, a law firm sought to receive a portion of a minor's recovery as a fee pursuant to a contract entered into with the temporary managing conservator. The contract in issue made no mention of the capacity of the TMG as "next friend", but does refer to "any and all claims for personal injuries, property damages and/or wrongful death." There was no contract that dealt with the minor's claims as distinct from those of the parent. To the outside world, the attorney is engaging in conduct that is outrageous because the attorney is claiming a right to fees pursuant to a non–existent contract. What is worse, it involves a child, and the profession looks like a collection of candy–snatchers.

In defense of the attorney involved, it must be said that such claims are routinely honored in most courts in Texas. The reason most often given is that, after all, the work to recover for the adult plaintiff is essentially the same as that for the minor. So why should the attorney not be compensated from the entire recovery? The answer, again, is an ethical one, and again the magic phrase is "conflict of interest".

When about to embark upon representation of multiple clients, it is imperative to analyze the facts surrounding each claim as if it were the only one against a given defendant. In *Stern*, the court pointed out that it was the failure of the attorney for the parents and the minor to recognize the possible impact of the parents' negligence that had created the conflict. *Stern* at 946. Once a conflict was found, the issue then became one of whether the contract, if enforced in full, would violate public policy.

On this point, it is very important to note that the admission of the *Disciplinary Rules* into evidence on the issue of whether the contract violated public policy was upheld. *Stern* at 948. In effect, the court is suggesting that if the analysis of the facts should lead to the uncovering of a conflict of interest, then the attorney can expect to have the Disciplinary Rules trotted out by the opposition to defeat the attorneys' fee recovery in whole or at least in part.

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[26] 846 S.W.2d 939 (Tex.App.– Houston [1st Dist.], 1993, no writ) [hereinafter cited as *Stern*].

The significance of this point is the linkage in the case between fees and ethics apart from those guidelines on what constitutes a "reasonable" fee. Impliedly, the case also suggests that the attorney should seek appointment of an *ad litem* for the minor once the conflict is found. That, of course, would solve all problems of this type, since the attorney cannot properly have a contractual fee relationship with a court appointed attorney's client. To be sure, there could well be a loss of some revenue, but it is unlikely that a trial court would deny an attorney recovery of actual costs invested in the case. After all, someone else knowingly benefited without a contract and accepted the benefit (albeit through the *ad litem*). Fair is fair, and the attorney should not be deprived of the recovery of costs incurred, conflict or no. Of course, it is important to discover the conflict at the earliest possible time, if not before filing, and take the initiative in seeking an *ad litem*. That way costs can be contained and allocated more clearly for the final judgment proof. Put another way, sensitivity to the ethical problem of fees versus costs versus conflict of interest should be uppermost in the minds of attorneys, especially those who routinely do personal injury work. No one quarrels with recovery of the investment, but can we risk appearing as candy–snatchers?

In the procedural handling of disciplinary matters, one of the earliest problems was bound to be whether an action based upon the old DR's tried after the new rules went into effect would be valid. *State Bar of Texas v. Dolenz* answers that question definitively in the affirmative. The key issue is "pendency" as of the effective date of the new rules, *i.e.* May 1, 1992.[27] The opinion was grounded on the *prospective* characteristic of the new rules as announced in *Rule 1.04. Dolenz* at 114. The next quagmire, predictably, arose in the conflict between the jurisdictions of the courts and the Board of Disciplinary Appeals. In an effort to clarify its emphasis on the new rules, the Supreme Court in *Board of Disciplinary Appeals v. McFall* held that a district court had no jurisdiction to enjoin the BODA from suspending an attorney.[28] Only the Supreme Court could hear appeals from the BODA, citing the new 7.11, and a district court would be interfering in that process by issuing an injunction. The remedy was a writ combining both mandamus and prohibition, the only such instance of which I am aware. This standard

[27] 893 S.W.2d 113 (Tex.App. – Dallas, 1995, writ denied) [hereinafter cited as *Dolenz*].

[28] 888 S.W.2d 471 (Tex. 1994) [hereinafter cited as *McFall*].

was applied to the relationship between a district court and the State Bar itself in *State Bar v. McGee*.[29] In that case, an attorney attempted to enjoin the State Bar from proceeding against him. The trial court granted the order, but the Court of Appeals indicated that the *McFall* precedent was the one that would govern these matters in the future. In reversing the trial court, the principle of "dominant jurisdiction" and, thus, the race to the courthouse, was rejected. Put another way, the State Bar selection of venue will prevail. The final issue in the procedural area that is of note arose over the issue of how long a suspension may last in relation to a probation of a criminal matter. In ***In the Matter of John S. Ament***, the Court held that a disciplinary suspension founded upon a criminal infraction cannot exceed the period of the probationary period assessed in the criminal court.[30] In effect, that limits the power of the BODA by the discretion of the trial court, that alternative being to put the BODA in the position of reviewing the sentencing decision of trial courts.

In the first published ruling on the new *Rules of Disciplinary Procedure* [hereinafter *Procedure Rules*] that I have found, the Supreme Court of Texas has given us a major signal about the future of legal ethical problems and the procedures for their resolution. In the case of the *State Bar of Texas v. Humphreys*, the Court in a *per curiam* order considered the procedural rules as an appellate matter.[31] The question before the Court was the mechanics of perfection an appeal from the Board of Disciplinary Appeals to the Supreme Court. The Court stated that "[because] an appeal from the Board of Disciplinary Appeals resembles that taken from a trial court to the court of appeals, similar procedures should apply". The effect of this statement is two–fold. First, the Court has put the Board in a position of being a trial court in disciplinary matters with all of the arguments about burden of proof now available to the accused. Of at least equal importance is that the Supreme Court may have put itself in the position of a court of appeals. Does this mean that the Court has limited itself to review Board decisions only as to errors of law, reviewing the facts only on insufficiency points?

In the case of *Sanchez v. Board of Disciplinary Appeals of the State Bar of Texas*, the Court provides the first clear example of what was

[29] 897 S.W.2d 437 (Tex.App. – Corpus Christi, 1995, writ dism'd).

[30] 38 Tex.Sup.Ct.J. 151 94-0456 (December 22, 1994).

[31] 880 S.W.2d 402 (Tex. 1994).

meant in *Humphreys*.[32] It would appear that the ruling of the Board was dealt with on direct appeal, and the standard applied was "sufficiency of the evidence." What is of great interest, however, is that the Court states clearly that "there is no right to a jury trial before the imposition of disciplinary sanctions against an attorney, except in connection with the criminal charges." *Sanchez* at 688. In effect, the Board is created as an appellate, yet fact-finding, court without a jury from which a direct appeal to the Supreme Court lies if there has been a jury given to the attorney in the underlying action, if any. The question that has to be asked is whether, if the underlying disciplinary action should not involve criminal activity, hence no jury, is there a right to a trial by jury before the Board? If not, then it would seem that there might be a significant tilting of the scales in favor of attorneys whose disciplinary actions arise from a criminal act. If there should be a right to a jury trial in front of the Board, then it would seem that the Board has an inherently dual, and possibly unequal, character in its procedures, and some corrections might need to be considered.

An interesting variation in this procedural picture is presented by ***In the Matter of Leslie Hazlett Thacker***.[33] In this case, an attorney was convicted of a violation of Tex. Penal Code § 25.11, and the conviction was on appeal when a disciplinary proceeding was commenced. The Board of Disciplinary Appeals found that the offense was one involving moral turpitude and held that the attorney's license should be suspended. Appeal was taken to the Supreme Court, and the State Bar moved to dismiss on the grounds that the Supreme Court lacked jurisdiction, because the order was only interlocutory. The motion was overruled on the premise that the "classification of a crime is a 'determination' subject to [the Court's] appellate review." *Thacker*, at 309. Citing to *Humphreys*, the Court noted that the issue is one of law, and, therefore, is subject to their review. The opinion then shifts to what amounts to a "finding of fact or is it a conclusion of law" that the purchase of a child is a felony involving moral turpitude because of the "far-reaching public interests involved in such conduct, as well as the potentially coercive elements inherent in such acts..." *Id.* at 310. The Court, stating that a "lawyer convicted of purchase of a child has crossed that line and forfeited her privilege to continue the practice of law", in effect combined

[32] 877 S.W.2d 751 (Tex. 1994).

[33] 881 S.W.2d 307 (Tex. 1994).

the roles of fact finder and appellate review to reach the result. *Id.* The Board decision remained intact despite a most interesting dissenting opinion. It should be noted that the conviction of Ms. Thacker was affirmed in *Thacker v. State.*[34]

The second and much more significant effect is that it places legal disciplinary matters in the mainstream of procedural handling. The referendum on the *Procedural Rules* will likely have an impact on the development of this area of the law, since the *Kilpatrick I and II* cases in part turned upon the submission of issues by the trial court. See Appendix A for the full text of the amendments to the *Procedural Rules* as passed in the referendum. Regardless of the mechanical impact on the docket of the Supreme Court, the order in *Humphreys* can be read as affirming the notion that lawyers are not above the law. See *Hanners v. State Bar of Texas*, 860 S.W.2d 903 (Tex. App. – Dallas, 1993, no writ).

The treatment of disciplinary proceedings as "mainstream" civil cases is also illustrated by *State Bar of Texas v. Tinning.*[35] The issue in this case was whether the four year statute of limitations applied to these types of proceedings. Because the burden is on the attorney to establish this defense, and because Tinning failed to do so, the summary judgment in his favor was reversed. A further basis for the reversal was that the summary judgment "affidavits" that were offered to support the motion were in fact acknowledgments. *Tinning* at 407. Again, a "no evidence" point with which we are all familiar was decisive on the issue. It would appear that, even though this case was brought originally under the old rules, the treatment of these matters will be in accord with on-going legal standards.

The problem of borderline-barratry in a procedural context is illustrated amply by *Barnes v. State Bar of Texas.*[36] The essence of the problem is that Ms. Barnes was accused of initiating lawsuit that had no merit in violation of *DR 7-102.* Procedurally the case is interesting because of its emphasis on the jury as a trier of fact in any case that is not really clear as a matter of law. In this instance, it was held that a requirement of *scienter* to hold the attorney liable "uniquely" required a jury as a trier of fact. This would seem to bridge the gap between

[34] 889 S.W.2d 380 (Tex.App. – Houston [14th], 1994).

[35] 875 S.W.2d 403 (Tex.App. – Corpus Christi, 1994, no writ).

[36] 888 S.W.2d 102 (Tex.App. – Corpus Christi, 1994, no writ) [hereinafter cited as *Barnes*].

treatment of these types of cases as "mainstream" civil cases and borderline criminal matters.

It is important in this discussion to consider that the attitude of the State Bar toward disciplinary matters is reflected not just in the grievance process, but in its results. Since the introduction of the new *Procedural Rules*, the number of grievances filed has increased from 9079 in 1992-93 to 9443 in 1994-95. The number of trials in district courts has almost doubled, from 74 to 139, in the same years. Interestingly, the nature of the sanctions has not changed significantly. In 1992-93, there were 14 (16%) disbarments, 44 (50%) suspensions, 9 (10%) forced resignations, and 20 (23%) public reprimands. In 1994-95, by comparison, there were 32 (16%) disbarments, 91 (46%) suspensions, 15 (8%) forced resignations, and 57 (29%) public reprimands.[37] It should be noted that a suspension, if not probated and extending more than a year, has the effect of destroying an attorney's law practice. The public reprimand is public only in the sense that the announcement of the actions of the attorney and the rules that he or she violated are printed in the bar journal for all the world to see. That has a negative effect on the attorney's credibility in the profession, to say the least. Disbarment is, of course, the most drastic sanction that can be imposed on an attorney. It may be either permanent or dependent upon a conviction for a criminal offense. If it should be the result of a felony conviction, then the attorney may reapply to the State Bar for his or her license five years after the completion of the jail sentence or probationary period. Even then, the Supreme Court retains the right to refuse to let an attorney have his or her license back under such circumstances.

The ultimate in "mainstream" treatment of disciplinary matters is application of "*the Law will not save the stupid* " rule to attorneys. *Rangel v. State Bar of Texas* illustrates the desire of the courts to deal with these matters expeditiously, but not without consideration for the rights of the attorneys involved.[38] In this case, the respondent did not participate in any aspect of the proceedings, from their inception through judgment. He did not even attend the hearing on the motion for continuance, with the result that no evidence was presented in his behalf. The court of appeals demonstrated is impatience with this type of conduct by affirmance of a judgment of disbarment based upon a series of

[37] Texas Commission for Lawyer Discipline, *Grievance System Update*, January 1996.

[38] 898 S.W.2d 1 (Tex.App. – San Antonio, 1995, no writ) [hereinafter cited as *Rangel*].

admitted infractions. Perhaps the lesson for attorneys in such a circumstance is summed up in the opinion where the court states, "His conduct in connection with the trial involved failure to timely and completely respond to discover, and apparently an attitude of being 'above' the whole process." *Rangel* at 4.

Finally, as an indication of the desire of the Supreme Court to treat all branches of the profession equally, the case of ***In re Thoma*** is illustrative.[39] In that instance, a sitting trial judge became the subject of a massive complaint that ultimately supported a finding that he had "entered into a conspiracy to extort money from a party in an action over which he exercised judicial authority." *Thoma* at 483. The Review Tribunal, appointed by the Supreme Court, served as a reviewer of the facts found by a special master. It then entered an extensive discussion of the procedural law as it now stands under Tex. Const. art. V, § 1-a. Finding that the respondent had suffered no deprivation of due process rights, despite the amendment of the complaint to add some 30 additional allegations shortly before the hearing, the Review Tribunal ordered that the respondent be removed from office and forever be barred from holding judicial office. *Id.* at 513. This result is consistent with *Kilpatrick II* in that the court will tend toward allowing last-minute amendments in order to have a complete record. See *Kilpatrick II* at 658.

Although the process by which a complaint against a judge is initiated is slightly different from that which applies to an attorney in private practice, the effect is the same... there is a clear intent in the rules to provide a due process hearing without entering the court system itself for every matter that involves the *Disciplinary Rules*. What we must now see is whether this shift away from the courts will result in tighter enforcement of the rules that apply to lawyers and judges alike.

From an ethical perspective that is a very significant point, because it means that the line between ethics and legal ethics has not only been blurred... it may be in the process of being erased. As a profession, it should be refreshing to think that we are moving from the ethics of legality to the convergence of ethics and law as a means to facilitate the search for Truth and Justice. If by our actions we impede this movement, as a profession and as individuals we may well deserve the fate that surely awaits us. Yet, as individual attorneys, should we not want to lead in this process? I suggest that the answer is "We must."

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[39] 873 S.W.2d 477 (Tex.Rev.Trib. 1994).

STRESZCZENIE

Celem tego opracowania jest przeanalizowanie kilku problemów, które obecnie znajdują się w centrum uwagi środowiska prawniczego USA. Orzecznictwo stanowe Teksasu zostało wybrane z kilku powodów: po pierwsze, w ostatnim czasie podjęto tu wiele decyzji, w których wiele różnych problemów było dokładnie analizowanych; po drugie, decyzje te są charakterystyczne dla całości orzecznictwa amerykańskiego; po trzecie, są one typowe, jeśli idzie o podstawy filozoficzne i raczej dosłownie stosowane w odniesieniu do prawników.

Podstawowe zagadnienia dyskusji skupiają się na konfliktach interesów oraz na nieuczciwym zachowaniu prawnika, włączając w to pieniactwo oraz wszczęcie sprawy w złej wierze. Konflikt części interesów jest być może najbardziej typowym rodzajem spraw z tego zakresu w USA, w ramach których w Teksasie stosuje się kryterium „istotnych stosunków". Ta norma – mówiąc po prostu – zabrania prawnikowi reprezentować klienta późniejszego przeciwko wcześniejszemu, bez zgody tego ostatniego. Polityczny punkt widzenia, iż takie zdarzenie nie mogłoby mieć miejsca bez złamania zaufania, jest oczywisty, chociaż pewne przypadki przynoszą fakty przerażające. Podobne reguły stosowane do nie-prawników zatrudnionych przez firmy prawnicze, obowiązujące w Teksasie, są zgodne z regułami stosowanymi gdzie indziej w USA.

W artykule przeanalizowano także problem sankcji oraz ich skutków w stosunku do prawników oraz nie-prawników zatrudnionych w firmach prawniczych, chociaż ten dział prawa jest dopiero w stanie rozwoju zarówno w Teksasie, jak i w całych Stanach Zjednoczonych. Wiadomo jednak, że tworzący się system norm będzie zawierał ścisłe i raczej surowe sankcje za naruszanie reguł etycznych.

Reasumując: wydaje się oczywiste, że środowisko prawnicze w USA zmierza na nowo w kierunku historycznych źródeł kultury zachodniej, eksponujących reguły etyczne. Dlatego też profesja prawnicza usiłuje storzyć system norm, który byłby bliższy etyce, tak jak ona jest rozumiana w szerokim świecie oraz etyce prawników.