

**ETHICAL INTRICACIES OF THE ATTORNEY/JUDGE  
RELATIONSHIP:  
WHAT'S O.K. AND WHAT'S NOT\***

*Moderators*

**HON. KAREN GREN JOHNSON**

Judge, 95<sup>TH</sup> District Court

**HON. LAMAR MCCORKLE**

Judge, 133<sup>RD</sup> District Court

*Panelists*

**BERYL P. CROWLEY**, *Austin*

Executive Director

Texas Center for Legal Ethics & Professionalism

**WILLIAM FRED HAGANS**, *Houston*

Hagans, Bobb & Burdine

**JAMES H. BLACKIE HOLMES, III**, *Dallas*

Burford & Ryburn

**DAWN MILLER**

Chief Disciplinary Counsel

State Bar of Texas

**SEANA WILLING**

Interim Executive Director

State Commission on Judicial Conduct

State Bar of Texas

**26<sup>TH</sup> ANNUAL ADVANCED CIVIL TRIAL COURSE**

August 27-29, 2003 - *Austin*

October 8-10, 2003 - *Dallas*

November 5-7, 2003 – *Houston*

**CHAPTER 20**

\*This is a restructured and modified version of a paper distributed on May 2, 2003 at the Dallas Bar Association CLE program on "The Ethics of Lawyer-Judge Interactions" presented by The Honorable Catharina Haynes, The Honorable Karen Johnson, The Honorable Jeff Kaplan, and James L. Mitchell, Jr., Esq.



## **Karen Gren Johnson**

Karen Johnson is the Judge of the 95<sup>th</sup> District Court of Dallas County, Texas. Prior to her election as judge in 2000, she was a litigation partner at Andrews & Kurth, LLP and before that, Strasburger & Price LLP, practicing civil litigation for over 18 years. She received her bachelor of arts from Rice University in 1979 and juris doctor from Cornell University Law School in 1982. Judge Johnson is a member of the Executive Committee of the Cornell Law Association and the Council of Litigation for the State Bar of Texas.

Judge Johnson is very involved with the Dallas nonprofit community, having served on many charitable boards. She currently serves on the executive board for Special Camps for Special Kids – Camp John Marc and on the advisory board of Victims Outreach. She previously served on the board of directors of the Dallas Women's Foundation and Literacy Instruction for Texas ("LIFT"). She is a past co-chair of Attorneys Serving the Community and served on the Member Advisory Board for the Tom Landry/Baylor Fitness Center.

Judge Johnson is a prominent contributor to the Asian American community. She was born in Tokyo, Japan, and is the first Asian American elected judge in Dallas County. She received the 2001 DFW Asian American Citizens Council Role Model Award for "outstanding public and community service" and serves on the Council's Honorary Advisory Board. She is on the board of directors of the Asian American Forum and is also an active member of both the Greater Dallas Asian American Chamber of Commerce and the Dallas Asian American Bar Association. She currently serves on the National Asian Pacific American Bar Association Judicial Council.

Judge Johnson is a Leadership Dallas graduate and a member of The Dallas Assembly. She is a frequent speaker and moderator for many organizations on a wide variety of topics, including legal ethics. She has been married to her husband Mark G. Johnson since 1982, and together, they are raising three sons, Alex, Nate and Jack.



LAMAR McCORKLE was elected in 1986 as the Judge of the 133rd Judicial District of Texas. Judge McCorkle has been active in numerous continuing legal education programs as author, presenter, or course director, including those for the National Judicial College, Texas Center for the Judiciary, National Institute for Trial Advocacy, State Bar of Texas, Houston Bar, and for law schools in Texas. He teaches litigation courses annually as an adjunct faculty member at both South Texas College of Law and the University of Houston. Prior to his election, he was briefing attorney to former Chief Justice Tom F. Coleman, First Court of Appeals, and a trial attorney concentrating in the area of business litigation.

Actively involved in professional activities, Judge McCorkle served on the Advisory Committee on Professionalism for the Supreme Court of Texas, and is a Past Chair of the State Bar Professionalism Committee, the Judicial Section of the State Bar of Texas, and the Texas Center for the Judiciary. He currently serves on the Board of Trustees of the Texas Center for Legal Ethics and Professionalism. He is Managing Editor of the Texas Code of Judicial Conduct Annotated, the Harris County Bench Book, and the Assigned Judges Bench Book.



**BERYL P. CROWLEY**  
Executive Director  
Texas Center for Legal Ethics and Professionalism  
P.O. Box 12487/Austin, Texas 78711-2487  
512 463 1477/fax 512 463 1459  
e-mail bcrowley@txethics.org

### **BIOGRAPHICAL INFORMATION**

#### **EDUCATION**

B.A., Mills College, 1968  
J.D., University of Texas, 1971

#### **PROFESSIONAL ACTIVITIES**

**Washington County Bar Association** (1972-74), Secretary-Treasurer and President. **State Bar of Texas** (1972-present): CLE Committee (1978-1981); Planning Committee, Advanced Real Estate Course (1979, 1980 and 1982); Task Force, Women in the Bar (1977-1978); Effective Participation of Women in the Bar Committee (1978-1980); Women in the Law Section (1980-present), Council (1980-1985); Legislative Subcommittee Chair (1980-1981); Secretary (1981-1982), TYLA Liaison (1982-1985); Legal Forms Committee (1980-1983); Committee for a More Effective State Bar (1980-1981); Annual Meeting Committee (1982 and 1994); Alternate Methods of Dispute Resolution Committee (1981-1983, 1992-1993); Real Estate, Probate and Trust Law Section (1975-1995); Director (1983-1986), Liaison Director to several Board Committees, Executive Committee, Fact Finding Committee; Long Range Planning Committee (1988-1994), Vice Chairman (1939-1991), Chairman (1991-1992); Strategic Planning Committee (1992), James C. Watson Inn (1983-Present), Chairman (1991-92); Membership Involvement Committee, Co-Chairman, 1991-94; Professionalism Committee, Chairman (1994-1999). **Travis County Bar Association** (1974-present): Judicial Screening Committee (1993-1994), Bench Bar Committee Co-Chairman, (1994-1995), Director (1995-1997). **Austin Young Lawyers Association** (1974-1986): Director (1977-1981), Chairman of various committees. **Austin Lawyers Care**: Founder and Director (1981-1983). **Texas Young Lawyers Association**: Director (1979-1982), various committee chairmanships; Outstanding Director (1982), Treasurer (1982-1983), President (1984-1985). **American Bar Association** (1972-present): Real Estate, Probate and Trust Law Section (1971-1994), Young Lawyers Division (1972-1985), House of Delegates, State Bar of Texas (1996-1998). **American Bar Foundation** (1991-Present). **Texas Lawyers Auxiliary** (1984-present). **Travis County Women Lawyers Association** (1975-present). **Texas Bar Foundation**: Sustaining Life Fellow, Trustee (1988-1991), Secretary (1988-1989), Vice Chairman (1989-1990), Chairman (1990-1991), Chairman, Fellows of the Texas Bar Foundation (1994-1995). **State Bar College**. **Texas Center for Legal Ethics and Professionalism**: Trustee (1990-1995). **Robert L. Calvert Inn of Court/Austin** (1994-1996). **Gender Bias Task Force Implementation Committee** (1994-1997). **ADR Certification**. **Presidential Citation, State Bar of Texas**, 1995 and 1996. **Certificate of Merit, State Bar of Texas**, 1996.

#### **LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS**

Author/Speaker/Lecturer for the State Bar of Texas PDP, TADC, various local bar associations, Texas Association of Railroad Attorneys, Association of Immigration Lawyers, University of Texas CLE events, UT law school classes, various symposia and courses of the Texas Center for Legal Ethics and Professionalism; editor *A Guide to the Basics of Law Practice* (1994-1999). Developer of Ethics Jeopardy, an interactive way to learn ethics and professionalism.





Fred Hagans,  
Hagans, Bobb & Burdine P.C.,  
3200 Travis, Fourth Floor, Houston, TX 77006.  
(713) 222-2700  
[www.hbb-law.com](http://www.hbb-law.com)

Fred has been trying cases for plaintiffs and defendants since 1972. He began his career with the Houston-based firm of Bracewell & Patterson, L.L.P. after attending the University of Texas in Austin, then went on to form his own firm. Fred is Board Certified in Personal Injury Trial Law and in Civil Trial Law and is a member of several organizations of trial attorneys including the American Board of Trial Advocates and the National Board of Trial Advocacy. He has served on several committees for the State Bar of Texas and the Houston Bar Association. They include the District 4-B Grievance Committee, the Supreme Court on Professionalism Committee, the Texas Lawyers Creed Committee, and the Texas Supreme Court Task Force Committee for the revision of the Texas Rules of Civil Procedure. He has served as Special Assistant in the State Bar of Texas Disciplinary Counsel Program. He has given many speeches and his writings have been made part of numerous publications pertaining to various issues in trial law. In addition to serving in these bar-related activities, Fred has served as president of the Gulf Coast Chapter of the Juvenile Diabetes Research Foundation.

**Practice Areas:** Commercial Litigation; Professional Liability; Personal Injury.

**Admitted:** 1972, Texas; 1973, U.S. Court of Appeals, Fifth Circuit and U.S. District Court, Southern, Eastern and Northern Districts of Texas; 1976, U.S. Supreme Court; 1981, U.S. Claims Court

**Law School:** University of Texas, J.D., 1972.

**College:** University of Texas, B.A., 1969.

**Member:** Houston and American Bar Associations; State Bar of Texas (Member, Texas Lawyers Creed Committee, 1994-1995; Professionalism Committee, 2000-2003); Texas Trial Lawyers Association; The Association of Trial Lawyers of America; Houston Trial Lawyers Association; American Board of Trial Advocates; National Board of Trial Advocates; The Supreme Court Historical Society

**Biography:** Speaker: "Insurance Company Liability for Coverage and Bad Faith Cases Involving Mold and Mold Exposure," 15th Annual Construction Law Conference San Antonio, TX, State Bar of Texas, 2002; "Ethical Considerations and Malpractice Prevention in Civil Litigation," March, 2002; Texas Mortgage Bankers Association, MOLD-Ballard Case & Mold Related Litigation, Dallas, April, 2002; "Daubert/Frye: The Critical Hurdle in this Evolving Area Perspectives from Both Sides of the Aisle," Mealey's Mold Litigation Conference, May, 2002; "Ballard vs. Farmers-Mold," ATLA Bad Faith Seminar, Atlanta, GA, July 2002; "Ethical Considerations and Malpractice Prevention in Business Litigation," Advanced Business Litigation, University of Houston Law Foundation, Sept. 1996, Oct. 1997 and Sept.-Oct. 1998; "Ethical Considerations in the Discovery and Trial of a Business Case," Advanced Business Litigation, University of Houston, Sept. 1995. Chairman: Texas Young Lawyers Association Mock Trial Competition Committee, 1978; Houston Lawyer Referral Service Committee, 1983; State Bar of Texas Grievance Committee 4-B, 1986-1988. Plaintiffs' Liaison Counsel, Glomar Java Sea Disaster Litigation, Houston, Texas, 1983-1986. Member, Federal Court Advisory Council, 1986-1992. Vice-Chair, Houston Bar Association, Litigation Section, 1993-1994. President, Juvenile Diabetes Foundation, Gulf Coast Chapter, 1999. Advisory Council, The Texas Center for Legal Ethics and Professionalism, 2000-2002. Member: Planning Committee, South Texas College of Law Center for Responsibility; State Bar of Texas Special Assistant Disciplinary Counsel Program, 1993-1994; Administration of Justice Committee, Houston Bar Association, 1992-1993; Professional Committee of the State Bar of Texas Rules of Civil Procedure, 1991-1993. Member, Supreme Court Task Force Committee for Revision of Texas Rules of Civil Procedure, 1991-1993. Co-Chairman, Texas Supreme Court Committee on Professionalism, 1989-1991. Member, State Bar of Texas Professionalism Committee, 2000-2003; Member, Advisory Council, The Texas Center for Legal Ethics and Professionalism, 2000-2002. Fellow: Texas Bar Foundation; Houston Bar Foundation. (Board Certified, Personal Injury Trial Law and Civil Trial Law, Texas Board of Legal Specialization.



## **James H. "Blackie" Holmes, III**

Member Burford & Ryburn, L.L.P. 3100 Lincoln Plaza, 500 North Akard Dallas, Texas 75201-6697 (Dallas Co.) Telephone: 214-740-3100 Fax: 214-740-3125

**Practice Areas:** Tort Defense; Premises Liability; Legal Malpractice; Medical Malpractice; Products Liability.

**Admitted:** 1959, Texas

**Law School:** Southern Methodist University, LL.B., 1959.

**College:** Southern Methodist University, B.B.A., 1957.

**Member:** Dallas and American Bar Associations; State Bar of Texas; International Association of Defense Counsel; Association of Defense Trial Attorneys; Defense Research Institute (Dallas Area Chairman, 1989-1993; Texas State Chairman, 1994-1995); Texas Association of Defense Counsel (Vice President, 1984-1985; Director, 1985-1990; Executive Vice-President, 1990-1991; President Elect, 1991-1992; President, 1992-1993); Dallas Association of Defense Counsel (Chairman, 1975-1976); American Inns of Court, Patrick E. Higginbotham Inn (Master, 1988-1996) Fellow: American College of Trial Lawyers; Texas Bar Foundation. Advocate, American Board of Trial Advocates (President, Dallas Chapter, 2000).

**Biography:** Phi Alpha Delta.

**Born:** Birmingham, Alabama, September 10, 1935.



## **Biography**

### **DAWN MILLER**

Dawn Miller received her law degree from the University of Texas in 1981 and a Bachelor of Arts cum laude from Southwestern University in history and government in 1975. She has been with the State Bar of Texas since April of 1987, serving since April of 2000 as Chief Disciplinary Counsel. Prior to that time she served as Acting General Counsel/Chief Disciplinary Counsel, First Assistant General Counsel, and Assistant General Counsel, handling disciplinary litigation on a statewide basis as well as original proceedings before the Board of Disciplinary Appeals.

She was in private practice in Huntsville, Texas, from 1981-1987, practicing in the areas of family law, personal injury, banking law, probate, and real estate.



## **BIOGRAPHY**

**SEANA WILLING**, General Counsel for the State Commission on Judicial Conduct, has recently been appointed Interim Executive Director for the agency following the departure of Margaret J. Reaves, who retired from that position in June 2003.

Ms. Willing received a B.A. in Economics from Holy Cross College in Worcester, Massachusetts, in 1985, and a J.D. from St. Mary's University School of Law in San Antonio, Texas, in 1993. Ms. Willing was licensed to practice law in Texas in November 1993, and admitted to practice before the United States District Court for the Western District of Texas in May 1994. In July 2001, Ms. Willing was admitted to practice before the United States Supreme Court.

After graduating from law school, Ms. Willing worked for the law firm of B. Thomas Hallstead, P.C., in San Antonio, where she practiced primarily in the area of business litigation from November 1993 until March 1998. In March 1998, Ms. Willing became an attorney for the San Antonio Regional Office of the Chief Disciplinary Counsel for the State Bar of Texas, where she prosecuted disciplinary actions against attorneys throughout the region. In September 1999, Ms. Willing began working as a staff attorney for the State Commission on Judicial Conduct where she investigated and prosecuted disciplinary actions against judges. The following year, she was promoted to Senior Commission Counsel. In May 2001, Ms. Willing became General Counsel for the Commission. On June 13, 2003, Ms. Willing was appointed by the Commission to act as Interim Executive Director of the agency.

Ms. Willing has been a guest speaker on the topic of ethics, professional responsibility, and judicial conduct at various seminars and judicial conferences, including events sponsored by the Texas Justice Court Training Center, the Texas Municipal Courts Education Center, and the Texas Center for the Judiciary.





## Table of Contents

<b>I. MAINTAINING THE DIGNITY AND INTEGRITY OF THE COURT</b>	1
A. Texas Lawyer's Creed	1
B. TDRPC Rule 8.02 "Judicial and Legal Officials"	1
C. TCJC	1
1. <u>Canon 1: "Upholding the Integrity and Independence of the Judiciary"</u>	1
2. <u>Canon 2: "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities"</u>	2
<b>II. LAWYER'S DUTY NOT TO LEAD JUDGE ASTRAY</b>	2
A. Texas Lawyer's Creed	2
B. TDRPC Rule 8.04 "Misconduct"	2
<b>III. LAWYERS DUTY TO AVOID IMPROPER INFLUENCE</b>	3
A. Texas Lawyer's Creed	3
B. TDRPC Rule 8.04 "Misconduct"	3
C. TCJC Canon 4: "Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations"	3
<b>IV. LAWYER'S DUTY NOT TO COMMUNICATE WITH THE COURT IMPROPERLY</b>	4
A. Texas Lawyer's Creed	4
B. TDRPC Rule 3.05: "Maintaining Impartiality of Tribunal"	5
C. TCJC Canon 3B: "Performing the Duties of Judicial Office Impartially and Diligently"	5
D. Discriminatory Communications	6
1. <u>TDRPC Rule 5.08: "Prohibited Discriminatory Activities"</u>	6
2. <u>TCJC Canon 3B: "Performing the Duties of Judicial Office Impartially and Diligently"</u>	6
<b>V. LAWYER'S DUTY TO PLAY FAIR AND BE CANDID WITH THE COURT</b>	6
A. Texas Lawyer's Creed	6
B. TDRPC	7
1. <u>Rule 3.03: "Candor Toward the Tribunal"</u>	7
2. <u>TDRPC Rule 3.04: "Fairness in Adjudicatory Proceedings"</u>	7
<b>VI. LAWYER'S DUTY NOT TO DELAY</b>	9
A. Texas Lawyer's Creed	9
B. TDRPC Rule 3.02: "Minimizing the Burdens and Delays of Litigation"	9
C. TCJC Canon 3B "Performing the Duties of Judicial Office Impartially and Diligently –Adjudicative Responsibilities"	9
<b>VII. LAWYER'S DUTY TO SUPERVISE</b>	10
A. Texas Lawyer's Creed	10
B. TDRPC	10
1. <u>Rule 5.01: "Responsibilities of a Partner or Supervisory Lawyer"</u>	10
2. <u>Rule 5.02: "Responsibilities of a Supervised Lawyer"</u>	10
3. <u>Rule 5.03: "Responsibilities Regarding Nonlawyer Assistants"</u>	10
<b>VIII. LAWYER'S DUTY OF PUBLIC SERVICE</b>	10
A. Texas Lawyer's Creed	10
B. TDRPC Rule 6.01: "Accepting Appointments by Tribunal"	10
<b>IX. CONCLUSION</b>	10



## ETHICAL INTRICACIES OF THE ATTORNEY/JUDGE RELATIONSHIP: WHAT'S O.K. AND WHAT'S NOT<sup>1</sup>

"We Judge ourselves by our best intentions, our most noble acts, and our most virtuous habits. We are judged by our last, worst act."  
~Michael Josephson~

"Be the change you want to see."  
~Gandhi~

"Lawyers occupy a singularly lofty position in the political and judicial fabric of the United States. And with good reason. This is, after all, a nation of laws." *Contico Int'l, Inc. v. Alvarez*, 910 S.W.2d 29, 33 (Tex. App. – El Paso 1995), *mandamus granted on other grounds sub nom. Mendoza v. Eighth Court of Appeals*, 917 S.W.2d 787 (Tex. 1996). "An honest and ethical lawyer has long been part of the foundation for the historically elevated and well-deserved role lawyers have played in our culture. . . . The lawyer must be steadfastly committed both to the client and, more importantly, to the law itself." 910 S.W.2d at 33. "In a civilized society, members of the judiciary are significant public figures . . . [who] serve as the collective guidon of the banner representing fairness and impartiality in our state. It is for that reason, plus others, that the judiciary must nurture and maintain respect for their decisions, as well as the judiciary of the State of Texas as a whole." *In re Barr*, 13 S.W.3d 525, 532 (Tex. Rev. Trib. 1998, no appeal).

As these opinions demonstrate, our system of justice depends, in large part, on the integrity of the judges and lawyers who participate in the system. Under the Texas Lawyer's Creed and the Texas Disciplinary Rules of Professional Conduct ("TDRPC"), lawyers have certain duties to the court. Under the Texas Lawyer's Creed and the Texas Code of Judicial Conduct ("TCJC"), judges have certain obligations to the court process. Where the members of the bench and bar meet in daily life is the

subject of this paper. Life experience is a great educator. Where appropriate, examples are included in this paper, together with ethics opinions governing lawyers ("Professional Ethics Opinions") and those governing Texas state judges ("Judicial Ethics Opinions").

### I. MAINTAINING THE DIGNITY AND INTEGRITY OF THE COURT

#### A. Texas Lawyer's Creed

##### I: OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
2. I will always be conscious of my duty to the judicial system.

##### IV: LAWYER AND JUDGE

*Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.*

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.

#### B. TDRPC Rule 8.02 "Judicial and Legal Officials"

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . .

#### C. TCJC

##### 1. Canon 1: "Upholding the Integrity and Independence of the Judiciary"

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

<sup>1</sup> AUTHOR'S NOTE: This is a restructured and modified version of a paper prepared by the Hon. Catharina Hayes, the Hon. Karen Johnson, and the Hon. Jeff Kaplan. Nothing herein should be construed to suggest how Judge Haynes, Judge Johnson, Judge McCorkle, or any other judge or court might rule upon a question specifically presented to that court. Special appreciation is expressed to both Judge Haynes for her permission to use portions of a paper she prepared and SMU Law student Stephen Romero, intern to the 191<sup>st</sup> District Court for his efforts on the original paper. Judge McCorkle expresses appreciation to attorney Mitra Battan, Texas Southern University student Cynthia Audain, an intern for the 133<sup>rd</sup> District Court, and University of Houston English student Althea Borck, an intern for the Harris County District Courts for their assistance in the preparation of this paper.

2. Canon 2: "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities"

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

*Judicial Ethics Opinion 198 (1996): "Judge as Subject of a Roast at a Fund Raiser."* Opinion 198 states that a sitting state district court judge may not be the subject of a "roast." Participation in the "roast" by the judge would not maintain the high standards and integrity of judicial office.

*Judicial Ethics Opinion 209 (1997): "Judge's Response to Negative Publicity."* Opinion 209 addresses whether a senior judge may respond to unfair criticism of his actions in a pending case because the judge fears the litigation may not be concluded during his lifetime. The Opinion states that it would be improper for the judge to respond to such criticism. A senior judge who accepts judicial assignments is required to comply with the Code of Judicial Conduct. As such, a response would go beyond the exception for judicial statements explaining the court's procedures and would cast doubt on his impartiality. It is an open question whether this opinion would be different as a result of the holding in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), discussed below.

*Judicial Ethics Opinions 262 (2000) and 276(2001): Attending Private Law Firm Functions.* These opinions contend that a judge should not attend or speak at a private law firm function that is open only to the firm and its clients. Judges may speak at bar association or law school events.

*Political Activity.* It is beyond the scope of this paper to discuss political activity by judges in detail. Because they are elected, Texas state judges may engage in political activity under certain conditions. See TCJC Canon 5. The extent to which Texas state judges may express their views on controversial issues is now a more complicated question under the recent United States Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765. Before that decision (and the corresponding changes to TCJC Canon 5), judges were very limited in their ability to express their opinions in campaign speeches. The *White* decision abolished the absolute proscription on such speech, leaving open many questions about the parameters of judicial political speech. From the standpoint of lawyers, they may express their views about judges and

judicial candidates, but must not misrepresent the qualifications of those people by making statements which are either known to be false or made with reckless disregard as to their truth or falsity.

*Professional Ethics Opinion 328 (1966).* Opinion 328 states that contributing to a judicial campaign is appropriate, "so long as there is no improper motivation. . . . [Financial] support could be improperly motivated for the purpose of currying favor. . . . The impropriety, however, would lie in the motive and the mere possibility of such an improper motive is not a sufficient basis for withholding from lawyers generally the right to give financial support to judicial candidates."

## **II. LAWYER'S DUTY NOT TO LEAD JUDGE ASTRAY**

### **A. Texas Lawyer's Creed**

#### **I: OUR LEGAL SYSTEM**

*A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.*

...

*5. I will always be conscious of my duty to the judicial system.*

#### **IV: LAWYER AND JUDGE**

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

### **B. TDRPC Rule 8.04 "Misconduct":**

(a) A lawyer shall not:

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Although a judge always has the duty to comply with the applicable code of conduct, TDRPC Rule 8.04 makes it clear that the lawyer cannot lead a judge into temptation. In order to avoid inadvertently putting a judge in a position to violate the judicial canons, lawyers should be familiar with the judicial conduct codes and act in a way that avoids placing a judge in an inappropriate situation. See also TDRPC Rule 8.03 (lawyer's duties regarding reporting professional misconduct of lawyers and judges); TCJC Canon 3D (Texas state judge's duties regarding reporting professional misconduct of lawyers and other judges).

### III. LAWYERS DUTY TO AVOID IMPROPER INFLUENCE

#### A. Texas Lawyer's Creed

##### I: OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

...

5. I will always be conscious of my duty to the judicial system.

##### IV: LAWYER AND JUDGE

*Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.*

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

...

5. I will not engage in any conduct, which offends the dignity and decorum of proceedings.

#### B. TDRPC Rule 8.04 "Misconduct"

- (a) A lawyer shall not:
- (5) state or imply an ability to influence improperly a government agency or official;

#### C. TCJC Canon 4: "Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations":

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or
- (2) interfere with the proper performance of judicial duties.

...

##### D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that . . . involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for

appropriate campaign or officeholder expenses as permitted by state law.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

- (a) a judge may accept a gift incident to a public testimonial to the judge;
- (b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; . . .
- (d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

...

*Professional Ethics Opinion 206 (1960).* Opinion 206 addressed whether the giving of a "fish fry" by an individual attorney in honor of a district judge violated the Canons of Ethics (the predecessor to the current Disciplinary Rules). The Opinion states that it was an open question that turned entirely on the intent of the lawyer and the circumstances surrounding the relationship between the judge and the lawyer. If the "fish fry" is intended to place the lawyer in a "better standing" with the judge, it would violate previous Canon 3. However, if other circumstances, including the relationship and customary practice in the community, indicated that the "fish fry" did not constitute unusual attention and hospitality, no Canons would be violated.

*Judicial Ethics Opinion 194(1996): "Acceptance of Holiday Gifts by Judge and Staff."* Opinion 194 states that it is a violation of Canon 4D(4) for a judge and judicial staff to accept holiday or seasonal gifts from a lawyer who is not a friend of the judge or from a law firm. Where there is a friendship, the gifts must be commensurate with the occasion and the judge should be mindful to avoid the impression that the friend is in a position to improperly influence the judge. In addition, the Opinion states that judges may attend law firm parties so long as that party is open to people other than judges and court personnel. Again, the judge must be mindful to avoid the impression of any improper influence.

*Judicial Ethics Opinion 139(1991): "Judge as an Expert Witness."* Opinion 139 addresses whether a judge may testify as an expert witness in a lawsuit in which the

defendant-lawyer is accused of malpractice in a previous trial at which the judge presided. The Opinion states that the judge may testify only if the judge is subpoenaed and required to testify. A judge should not be permitted to cooperate with a party because such cooperation would create the appearance of using the prestige of judicial office for the benefit of the party and would create the appearance of compromising the judge's independence.

*Judicial Ethics Opinion 140 (1991):* "Acceptance by Court Staff of Favors." Opinion 140 states that it is improper for a district judge to allow a court administrator to participate in a weekend trip that is sponsored, organized, and paid for by an attorney who practices before the judge. If the court administrator paid all of the expenses involved, the judge may allow participation if it does not reflect on the independence or impartiality of the court and its staff, or create the impression of impropriety.

*Judicial Ethics Opinions 215/216 (1997):* Addressing Gifts and Hospitality to Judge. Opinion 215 addresses whether a judge who has suffered a catastrophic loss could accept gifts of money from individuals who work in the courthouse or practice in the judge's court. The Opinion states that Canon 4D(4)(c) would not allow gifts from anyone whose interests have come or are likely to come before the judge. However, the judge could accept gifts from friends and acquaintances who happen to work at the court house and who have no interest that has or might come before the court.

#### **IV. LAWYER'S DUTY NOT TO COMMUNICATE WITH THE COURT IMPROPERLY**

Perhaps the biggest minefield in the area of lawyer-judge interactions is that of ex parte and other improper communications between the two. In addition to strict rules governing communications, there are many ethics opinions and cases. The best rule may be, "when in doubt, don't say it."

##### **A. Texas Lawyer's Creed**

#### **III: LAWYER TO LAWYER**

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
- ...
4. I will attempt to prepare documents, which correctly reflect the agreement of the parties. I will not include provisions that have not been

agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

...

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

...

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

...

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

#### **IV: LAWYER AND JUDGE**

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, witnesses, the Court, and members of the Court staff with courtesy and civility and will not manifest by words or conduct bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation.
- ...
5. I will not engage in any conduct that offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

**B. TDRPC Rule 3.05: “Maintaining Impartiality of Tribunal”**

A lawyer shall not:

- (a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;
- (b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:
  - (1) in the course of official proceedings in the cause;
  - (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
  - (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
- (c) For purposes of this rule:
  - (1) “Matter” has the meanings ascribed by it in Rule 1.10f of these Rules;
  - (2) A matter is “pending” before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected.

*In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ). In this case, an attorney allegedly engaged in an improper ex parte communication with a member of the court’s staff in an effort to determine what were the attorney’s “chances” and whether he should “settle” the pending case. The El Paso Court of Appeals stated that these allegations, if true, would raise, “substantial question[s] as to [the attorney’s] honesty, trustworthiness, and fitness as a lawyer.” The court found that the duties of the Code of Judicial Conduct regarding reporting attorney misconduct were mandatory and ordered a copy of the opinion to be sent to the General Counsel of the State Bar of Texas for investigation. The court made no findings of fact regarding the alleged impropriety.

**C. TCJC Canon 3B: “Performing the Duties of Judicial Office Impartially and Diligently”**

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an

attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge’s direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
- (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
- ...
- (e) considering an ex parte communication expressly authorized by law.

*Judicial Ethics Opinion 154 (1993): “Ex Parte Communications from Litigants.”* Opinion 154 addresses the question of what a judge’s ethical obligation is upon receiving a letter from a litigant which attempts to communicate privately with the judge. The opinion states that a judge shall not permit or consider ex parte or other private communications concerning a pending or “impending” judicial proceeding. “Judges may comply with [the Canons] by doing the following: (1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk’s file. (2) Send a copy of the letter to all opposing counsel and pro se litigants. (3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge’s letter to all opposing counsel and pro se litigants stating . . . that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants.”

*Judicial Ethics Opinion 183 (1995): “Ex Parte Hearing Concerning Hiring of Experts to Assist Indigent Criminal Defendants.”* Opinion 183 addresses whether a judge may ethically conduct an ex parte hearing with appointed defense counsel representing an indigent client on the subject of expert witnesses. The opinion deals with a situation where the defendant is charged with capital murder and the State is seeking the death penalty. The appointed counsel seeks judicial authorization to employ experts for assistance but does not want the prosecutor to know the relief requested, the reason urged in support, or the relief granted. The opinion notes that other states allow such a hearing but expresses no opinion on whether such a hearing is constitutionally required. The opinion states that a judge holding such a hearing would not violate Canon 3B(8), assuming the judge believed that it was expressly authorized by law.

*In re Thoma*, 873 S.W.2d 477 (Tex. Rev. Trib. 1994, no appeal). In this case, the Review Tribunal of the Texas Supreme Court was asked to review the removal and prohibition from holding judicial office of a judge in Galveston County. A Special Master had found, among other improprieties, that the judge had engaged in ex parte communications with criminal defendants. For example, the record showed that the judge had engaged in conversations, some of which were tape recorded, with a probationer on several occasions during which only the judge, the probationer, and one other person were present in an effort to extort money from the probationer. The judge argued that he was statutorily authorized to modify or alter conditions of probation at any time and place to the exclusion of all other parties. The Review Tribunal strongly disagreed, holding that the communications were not authorized by law. Allowing such ex parte proceedings “undermines the integrity of the courts, breeds skepticism and distrust, and thwarts the principles on which the judicial system is based.” 873 S.W.2d at 499.

*Spigener v. Wallis*, 80 S.W.3d 174 (Tex. App.—Waco 2002, no pet.). In *Spigener*, the appellant tried to win a reversal claiming due process violations based upon alleged ex parte communications by the judge at two hearings she did not attend. The two hearings she challenged were found not to be “ex parte” because the merits were not considered. As an additional argument, appellant claimed that, because she could not hear what the judge said at a hearing where she *was* present, the communication was ex parte. According to appellant’s witness, appellee’s counsel approached the bench to hand the judge papers to sign. The witness saw the judge’s lips move but could not hear what was said. However, because the communications were made in appellant’s presence and in open court, the Waco Court of Appeals found that they were not ex parte communications. (Moral of the story: when your opponent goes up to the bench at a hearing, go with him or her.)

*Erskine v. Baker*, 22 S.W.3d 537 (Tex. App.—El Paso 2000, pet. denied). In *Erskine*, appellant had sought a mistrial on two separate occasions based on two separate allegations of ex parte communications: one involved a conversation between the judge and counsel and the other, a private telephone conversation between the judge and a witness. During the trial, outside the presence of opposing counsel, the judge told one counsel to mention a certain fact during closing. Later, the judge called a witness in the case on the telephone and asked about an exhibit, without notifying the parties. Although a judge is allowed some discretion in expressing himself in controlling a trial, the appellate court found these contacts improper. However, the court also held that a judgment should not be reversed unless there was a showing not only of impropriety, but also of prejudice and an improper verdict. Upon review of the entire record, the court found that the appellant was not harmed by the trial court’s impropriety nor did appellant demonstrate the manner in which the judge’s comments

resulted in an improper verdict. Therefore, the appellate point was overruled.

#### **D. Discriminatory Communications**

##### **1. TDRPC Rule 5.08: “Prohibited Discriminatory Activities”**

- (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.
- (b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a),(b). . . .

##### **2. TCJC Canon 3B: “Performing the Duties of Judicial Office Impartially and Diligently**

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . .

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. . . .

*In re Barr*, 13 S.W.3d 525, 536 (Tex. Rev. Trib. 1998, no appeal). This judge was removed from the bench for numerous and repeated violations of the Canons including violations relating to repeated sexually offensive conduct such as making sexually suggestive remarks to attorneys and calling female prosecutors “babe.” “[W]e find [the judge’s] sexist manner in addressing female Assistant District Attorneys in his court as ‘babes’ to be inappropriate because it undermines an attorney’s role in the judicial process by indicating that she is not to be taken seriously and thus jeopardizes the proper administration of justice by hindering the female attorney from properly representing her client . . . .”

#### **V. LAWYER’S DUTY TO PLAY FAIR AND BE CANDID WITH THE COURT**

##### **A. Texas Lawyer’s Creed**

##### **I: OUR LEGAL SYSTEM**

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

...

5. I will always be conscious of my duty to the judicial system.



**II: LAWYER TO CLIENT**

...A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives.

...

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration.

...

9. I will advise my client that we will not pursue any course of action, which is without merit.

**III: LAWYER TO LAWYER**

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

...

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

...

4. I will attempt to prepare document which correctly reflect the agreement of the parties.

...

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

...

9. I can disagree without being disagreeable.

...

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

...

**IV: LAWYER AND JUDGE**

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

...

2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.

...

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

...

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

**B. TDRPC**

**1. Rule 3.03: "Candor Toward the Tribunal"**

(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.

...

**2. TDRPC Rule 3.04: "Fairness in Adjudicatory Proceedings"**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.
- (b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. . . .
- (c) except as stated in paragraph (d), in representing a client before a tribunal: (1) habitually violate an established rule of procedure or of evidence; (2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness; . . . or (5) engage in conduct intended to disrupt the proceedings.

- (d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

...

An attorney's duty to zealously represent his client does not permit misrepresentations to the court. Decisions based upon fraudulent documents or false testimony undermine the integrity of the justice system and court process. Though less dramatic, failing to bring adverse authority to the Court's attention may result in an incorrect decision. An appeal that would not have been necessary if the authority were revealed may then follow costing time and money and unnecessarily burdening the appellate court.

Appellate courts do not take this rule lightly. *See, e.g., Ibarra v. State*, 782 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1989, no writ) (attorney violated code by submitting a brief identical to a previously losing brief; counsel was put on notice that further similar conduct would be referred to the State Bar); *Grogen v. State*, 745 S.W.2d 450 (Tex. App.—Houston [1st Dist.] 1988, no writ) (appellate court submitted attorney's conduct of omitting important facts and misstating case holdings in his brief to the State Bar of Texas). While a judge should do his or her utmost to find all relevant cases, that fact does not excuse the attorney's compliance with this rule.

*Professional Ethics Opinion 480 (1991)*. Opinion 480 addresses whether an attorney has an obligation to disclose facts when disclosure is necessary to avoid a criminal or fraudulent act and whether an attorney is prevented by the attorney-client privilege from making such a disclosure. The Opinion sets out a hypothetical bankruptcy situation in which a defendant in an involuntary bankruptcy petition retains an attorney. At the time of trial, the attorney was unaware of the fact that funds were returned to the president and sole shareholder of defendant corporation and placed in a "Trust" for his benefit. The court denied the petition. The attorney is of the opinion that if the bankruptcy court had known of the "Trust" its decision may have been different. The Opinion examines the relevant portions of rule 3.03 and states that under rule 1.05(c)(4) an attorney is permitted to reveal information necessary to comply with rule 3.03(a). Therefore, the attorney is required to make a good faith effort to persuade the client to reveal the "Trust," and, if unsuccessful, the attorney should disclose the existence of the "Trust" to the bankruptcy court.

*Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993). In this case, attorneys representing a party to a civil dispute met with a third-party witness and interviewed her about the case. Thereafter, they prepared an affidavit for her to sign that contained additional statements she had not made but which the attorneys believed to be true. The attorneys attempted to persuade the witness to sign the

affidavit with the additional facts, but she declined. Ultimately, she signed an affidavit that she believed to be true. When these facts were brought before the trial court on a motion for sanctions by the opposing party, the trial court ruled that the attorneys had tampered with a witness by asking her to sign an affidavit containing facts she had not told them. The trial court disbarred the attorneys from practicing in the Northern District of Texas. On appeal, the Fifth Circuit addressed whether Rule 3.04 prohibited the conduct in question. Appellees argued that by including, in a draft affidavit, statements that had not been previously made and by attempting to persuade the witness to agree with their interpretation of the facts, the firm and its lawyers had urged the making of "false" statements and engaged in bad-faith conduct. In reversing the district court, the Fifth Circuit found that even though the attorneys had been aggressive in presenting their theory of the case, the attorneys had pointed out to the witness the statements in question and had made sure the witness signed the affidavit only after she agreed with its contents. Thus, this conduct did not rise to the level of "witness tampering." Nevertheless, this case points out the importance of being careful in communications with witnesses because of the possibility for overreaching and for misunderstanding of the attorney's intent.

*American Airlines, Inc. v. Mollen*, 968 F.2d 523 (5th Cir. 1992). In this case, attorneys for a party requesting a temporary restraining order filed witness declarations in support of the TRO application. Two of the declarations were filed with "/s/" and an "executed" date, despite the fact that the witnesses in question had not actually signed the declaration. The trial court issued the TRO without being told that the declarations were not signed. When the lack of signature was discovered, the trial court sanctioned the attorneys, finding that they intended to mislead the court into thinking the filed declarations were copies of original declarations that had been signed. The trial court found that the attorneys had, among other things, violated TDRPC 3.03 and 3.04. On appeal, the Fifth Circuit reversed the finding of criminal contempt for procedural deficiencies but affirmed the sanctions for misleading the court with respect to the declarations. The attorneys challenged the use of Texas disciplinary rules as a basis for sanctioning them in federal court. The Fifth Circuit stated: "This history [of the local rule in Northern District regarding attorney misconduct] does not convince us that the district court may not refer to the Texas Disciplinary Rules in part to define behavior for purposes of its own rule. In any event, counsels' behavior is unethical under any standard the district court may have chosen to judge it by." 968 F.2d at 529.

*Amelia's Automotive, Inc. v. Rodriguez*, 921 S.W.2d 767, 773 (Tex. App.—San Antonio 1996, no writ). In this case, appellant contended that appellee's counsel had engaged in improper questioning of witnesses and incurable jury argument. At trial, appellee's counsel asked the owner

of the appellant's business whether he knew that his attorney had been disbarred for filing a frivolous lawsuit. Appellant's counsel was not a witness in the case. On appeal, appellee sought to justify his remarks by arguing that they were invited and provoked. In finding that incurable prejudice had occurred, the court noted that unwarranted attacks on the credibility of opposing counsel are generally considered incurable. Further, the court stated, that if counsel gives the jury information not in evidence that was calculated to injure the opposing side and that was not in reply to the argument of opposing counsel, such conduct requires a reversal of the case. In a footnote, the court stated: "It is impossible not to consider the present distaste our society has for attorneys in general. If the members of the jury had the general impression that attorneys are cunning and dishonest, how much more would their opinions be colored once they were exposed to the childish and malicious conduct displayed by the attorneys in this case?" 921 S.W.2d at 774 n.2.

Thus, lawyers must be candid with the Court, and judges must decide the case at hand based on its merits alone, without regard to public criticism.

Lawyers should note that the obligation to refrain from knowingly making a false statement of material fact or law to a tribunal extends not only to situations where the lawyer advocates for a client but also to situations where the lawyer is himself or herself a party. *See Diaz v. Commission for Law. Discipline*, 953 S.W.2d 435, 438 (Tex. App. –Austin 1997, no writ).

## VI. LAWYER'S DUTY NOT TO DELAY

### A. Texas Lawyer's Creed

#### II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

...

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

...

8. I will advise my client that we will not pursue tactics, which are intended primarily for delay.

#### III: LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in

unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

...

4. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

#### IV: LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

...

4. I will be punctual.

...

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

### B. TDRPC Rule 3.02: "Minimizing the Burdens and Delays of Litigation"

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

The Comments to rule 3.02 address the distinction between reasonable and unreasonable delay. Actions resulting in a costly delay are not necessarily unreasonable so long as they further the legitimate interests of a client. Likewise, dilatory practices, harassing or maliciously injuring another, or actions to drive up costs to achieve some advantage would be considered unreasonable.

### C. TCJC Canon 3B "Performing the Duties of Judicial Office Impartially and Diligently – Adjudicative Responsibilities"

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

The corresponding judicial ethical rules make clear that judges share responsibility with attorneys for efficiency in the administration of justice.

**VII. LAWYER'S DUTY TO SUPERVISE****A. Texas Lawyer's Creed****I: OUR LEGAL SYSTEM**

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

...

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

**B. TDRPC**

1. Rule 5.01: "Responsibilities of a Partner or Supervisory Lawyer"

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

- (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved;

...

2. Rule 5.02: "Responsibilities of a Supervised Lawyer"

A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct.

3. Rule 5.03: "Responsibilities Regarding Nonlawyer Assistants"

With respect to a non-lawyer employed or retained by or associated with a lawyer:

- (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer; and
- (b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

- (1) the lawyer orders, encourages, or permits the conduct involved; or ...

These rules make clear that a lawyer must oversee the conduct of those he or she is supervising and cannot use other people to accomplish something that would be inappropriate for the lawyer to do himself or herself. From the standpoint of the supervised lawyer, "I was only following orders," is not a defense. The supervised lawyer

has a duty to make sure that he or she follows the ethical rules.

**VIII. LAWYER'S DUTY OF PUBLIC SERVICE****A. Texas Lawyer's Creed****I: OUR LEGAL SYSTEM**

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

...

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.

**B. TDRCP Rule 6.01: "Accepting Appointments by Tribunal"**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . .

**IX. CONCLUSION**

This chapter has touched on a few rules of standards for legal practice. It is by no means comprehensive, but it identifies some of the more important aspects of appropriate and professional conduct. When questions arise regarding an ethic issue, one of the best research sources available for Texas attorneys is maintained by the Texas Center for Legal Ethics and Professionalism, <http://www.txethics.org/>. As attorneys, we should always abide by both Texas Disciplinary Rules of Professional Conduct and the *Texas Lawyer's Creed* to maintain the highest principles of professionalism.

## Table of Authorities

### Texas Lawyer's Creed

I: Our Legal System .....	10
II: Lawyer to Client .....	9
III: Lawyer to Lawyer .....	4, 9
IV: Lawyer and Judge .....	2, 4, 9

### Texas Disciplinary Rules of Professional Conduct

Rule 3.02: "Minimizing the Burdens and Delays of Litigation" .....	9
Rule 3.03: "Candor Toward the Tribunal" .....	7
Rule 3.04: "Fairness in Adjudicatory Proceedings" .....	7
Rule 3.05: "Maintaining Impartiality of Tribunal" .....	5
Rule 5.01: "Responsibilities of a Partner or Supervisory Lawyer" .....	10
Rule 5.02: "Responsibilities of a Supervised Lawyer" .....	10
Rule 5.03: "Responsibilities Regarding Nonlawyer Assistants" .....	10
Rule 5.08: "Prohibited Discriminatory Activities" .....	6
Rule 6.01: "Accepting Appointments by Tribunal" .....	10
Rule 8.02 "Judicial and Legal Officials" .....	1
Rule 8.04 "Misconduct" .....	3

### Texas Code of Judicial Conduct

Canon 1: "Upholding the Integrity and Independence of the Judiciary" .....	1
Canon 2: "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities" .....	2
Canon 3B "Performing the Duties of Judicial Office Impartially and Diligently –Adjudicative Responsibilities" .....	9
Canon 3B: "Performing the Duties of Judicial Office Impartially and Diligently .....	6
Canon 4: "Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations" .....	3

### Professional Ethics Opinion

Professional Ethics Opinion 206 (1960) .....	3
Professional Ethics Opinion 328 (1966) .....	2
Professional Ethics Opinion 480 (1991) .....	8

### Constitutional Provisions

Judicial Ethics Opinion 139(1991): "Judge as an Expert Witness" .....	3
Judicial Ethics Opinion 140(1991): "Acceptance by Court Staff of Favors" .....	4
Judicial Ethics Opinion 154 (1993): "Ex Parte Communications from Litigants." .....	5
Judicial Ethics Opinion 183 (1995): "Ex Parte Hearing Concerning Hiring of Experts to Assist Indigent Criminal Defendants." .....	5
Judicial Ethics Opinion 194(1996): "Acceptance of Holiday Gifts by Judge and Staff" .....	3
Judicial Ethics Opinion 198(1996): "Judge as Subject of a Roast at a Fund Raiser." .....	2
Judicial Ethics Opinion 209(1997): "Judge's Response to Negative Publicity" .....	2
Judicial Ethics Opinions 215/216(1997): Addressing Gifts and Hospitality to Judge .....	4
Judicial Ethics Opinions 262(2000) and 276(2001): Attending Private Law Firm Functions .....	2

### Cases

<i>Amelia's Automotive, Inc. v. Rodriguez</i> , 921 S.W.2d 767, 773 (Tex. App.—San Antonio 1996, no writ) .....	8
<i>American Airlines, Inc. v. Mollen</i> , 968 F.2d 523 (5th Cir. 1992) .....	8
<i>Contico International, Inc. v. Alvarez</i> , 910 S.W.2d 29, 33 (Tex. App. – El Paso 1995) .....	1
<i>Erskine v. Baker</i> , 22 S.W.3d 537 (Tex. App.—El Paso 2000, pet. denied) .....	6
<i>Grogen v. State</i> , 745 S.W.2d 450 (Tex. App.—Houston [1st Dist.] 1988, no writ) .....	8
<i>Ibarra v. State</i> , 782 S.W.2d 234 (Tex. App.—Houston [14th Dist.] 1989, no writ) .....	8
<i>In re Barr</i> , 13 S.W.3d 525, 532 (Tex. Rev. Trib. 1998, no appeal) .....	1, 6
<i>In re J.B.K.</i> , 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ) .....	5
<i>In re Thoma</i> , 873 S.W.2d 477 (Tex. Rev. Trib. 1994, no appeal) .....	6
<i>Mendoza v. Eighth Court of Appeals</i> , 917 S.W.2d 787 (Tex. 1996) .....	1
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002) .....	2
<i>Resolution Trust Corp. v. Bright</i> , 6 F.3d 336 (5th Cir. 1993) .....	8
<i>Spigener v. Wallis</i> , 80 S.W.3d 174 (Tex. App.—Waco 2002, no pet.) .....	6

**Reference Materials**

Texas Center for Legal Ethics and Professionalism website: <<http://www.txethics.org/>>.

Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 232 “Advocate”, 452 “Maintaining the Integrity of the Profession” (1990).

Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., Article, *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY’S L.J. 443 (1997).

“Supervision of Non-Lawyer Employees,” 58 TEX. BUS. J. 798 (1995).

## ETHICS RESOURCE GUIDE\*

### 2003

#### Texas Center for Legal Ethics and Professionalism

To provide a permanent Center for the enhancement of legal ethics and professionalism, to offer comprehensive educational and research programs on ethics and professional values, to mobilize the resources of lawyers and citizens who are interested in improving legal ethics and restoring civility to the practice of law, and to provide various educational programs, books, and tapes.

Contact: Beryl P. Crowley, Executive Director  
Post Office Box 12487  
Austin, Texas 78711-2487  
1-800-204-2222 ext. 2161  
[www.ethics.state.tx.us](http://www.ethics.state.tx.us)

#### Lawyer's Ethics Hotline

Provides assistance to attorneys who have ethics questions.

Contact: Regional Office  
800-532-3947

#### Client-Attorney Assistance Program of the State Bar of Texas

This organization serves as an ombudsman for attorney-client disputes that have not reached the grievance process.

Contact: The Client-Attorney Assistance Program  
State Bar of Texas  
P. O. Box 12487  
Austin, Texas 78711-2487  
1-800-204-2222, Ext. 1760  
Website: [www.texasbar.com](http://www.texasbar.com)

#### Texas Lawyer's Assistance Program

Administers the program which provides identification, peer intervention, counseling, and rehabilitation for attorneys licensed to practice law in Texas whose professional performance is impaired because of physical or mental illness or abuse of drugs, including alcohol.

Contact: Ann Foster, Director  
800-343-8527

#### Grievance Information

Established to provide information about the grievance process. Calls are directed automatically to the appropriate regional office.

Contact: Dawn Miller, Chief Disciplinary Counsel  
Post Office Box 12487  
Austin, Texas 78711  
800-932-1900

\*Prepared for the 26<sup>th</sup> Annual Advanced Civil Trial Course, 2003  
by Judge Lamar McCorkle, 713-755-6266

**Commission on Judicial Conduct**

The State Commission on Judicial Conduct is the independent state agency created by amendment to the Texas Constitution in 1965. It is responsible for investigative allegations of judicial misconduct or judicial disability and for disciplining judges. Amicus curiae, a program of the Commission is a confidential assistance vehicle for judges addressing personal impairment which affects their lives and their performance on the Bench. Information regarding the program can be obtained from the program director at 512-463-8138.

Contact: Seana Willing, Interim Executive Director  
Post Office Box 12265  
Austin, Texas 77301  
512-463-5533  
877-228-7550  
[www.scjc.state.tx.us](http://www.scjc.state.tx.us)

**Committee on Judicial Ethics**

Provides written opinions for judges on judicial ethics.

Contact Chair: Justice Mack Kidd  
Judge, Third Court of Appeals  
Post Office Box 12547  
Austin, Texas 78711-2547  
512-463-1733  
512-463-1685 FAX  
[www.Mack.Kidd@3rdcoa.courts.state.tx.us](mailto:www.Mack.Kidd@3rdcoa.courts.state.tx.us)

**Amicus Curiae**

A confidential disciplinary intervention program created to identify and assist members of the Texas judiciary who have specific types of impairments, including substance abuse, addictions, or mental or emotional disorders.

Contact: Elaine Thompson, Program Manager  
P. O. Box 12265  
Austin, TX 78711  
512-463-8138  
877-228-5750  
[amicus-cjc@courts.state.tx.us](mailto:amicus-cjc@courts.state.tx.us)