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AN ETHICAL STROLL THROUGH THE GOVERNMENTAL MINEFIELD

Though it is certainly not a universal given, governmental litigation tends to attract attention. With that as at least a qualified given, the realities of high-profile representation are likely to confront you if you stay in this line of work long enough. So it is that the movie analogies to this area of concern are almost too easy.

Regardless of whether your name makes it to the marquee or the top of page one of the newspapers, when you handle a significant governmental case, you will do well to be aware that “in extremely high-profile cases with great public interest, professional responsibilities of counsel also include representation ‘in the court of public opinion.’” Charles W. Peckham & Melissa Barloco, *Lawyers and the Media in High Profile Cases: The Press Calls for an Interview, Do I Say “No Comment”?*, 36 Hous. Law. 18, 20 (1998) (quoting *United States v. McVeigh*, 955 F.Supp. 1281, 1282 (D. Colo. 1997)). Another commentator agrees, explaining that lawyers are called upon to "defend a client not only against formal charges made in court but also against the frequently more debilitating innuendo and unsubstantiated charges made in the media. This is necessarily so because high-profile cases are tried in two places — the courtroom and the public arena. Frequently, this public trial takes place before actual trial even begins." Karlene S. Dunn, *When Can an Attorney Ask: "What Were You Thinking?" — Regulation of Attorney Post-Trial Communication with Jurors after Commission for Lawyer Discipline v. Benton*, 40 S. Tex. L. Rev. 1069, 1076-77 (1999). Even the United States Supreme Court has weighed in on the issue, stating, "[a]n attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991). The high court further recognized that "an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of" litigation against the client, especially in the face of a case "deemed unjust or commenced with improper motives." *Id.*, 501 U.S. at 1043, 111 S.Ct. at 2728-29. Some of the more common ethical and pragmatic issues presented by these cases are examined here.

High-profile cases, of course, are not the sole province of government lawyers. Lawyers of all stripes often find themselves confronted by inquiring reporters, curmudgeonly editorials and columns and public speculation about their cases. Indeed, as our own United States Court of Appeals for the Fifth Circuit has aptly observed, “virtually every case of any consequence will be the subject of some press attention”. *United States v. Lipscomb*, 299 F.3d 303, 344 (5th Cir. 2002). Representation of the government and its officials, however, tends to sharpen the focus. From the perspective of the reporter, this is quite understandable.[1] Some of the more diligent reporters in Amarillo regularly call those of us who handle governmental cases in an effort to sniff out a case or story of interest and “scoop” their peers.[2] Media interest in government officials and lawyers flows from their public status in and of itself, as well as a perceived accessibility. Legal levers such as the First Amendment and the Public Information Act contribute significantly to that perception, but it also may be a function of the frequent interaction that reporters often have with government officials. Seasoned, professional journalists also recognize and seek to cultivate a symbiotic relationship with lawyers who handle cases of intense public interest. As one respected reporter puts it:

> We're all trying to whittle down information to what is relevant. I have a news hole that's a certain size. If you're a clever litigator, you're going to fill my news hole with something that helps your client or doesn't hurt him as much as something that might otherwise be there. But you know you're going to get coverage.

Scott Armstrong, Panel Discussion: Mass Media’s Impact on Litigation, Lawyers, and Judges: What to Do When Your Case Is Front Page News (Feb. 24, 1995), *in* 14 Rev. Litig. 595, 606 (1995). Weighing against this public relations construct is the general disapproval with which the Disciplinary Rules of Professional Conduct regard pretrial publicity. *See* Tex. Disciplinary R. Prof’l Conduct 3.07(a), (b), *reprinted in* Tex. Gov’t Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9),[3] as

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[1] The author was a reporter, news editor and, eventually, editor-in-chief of *The University Daily* (now the *Daily Toreador*) at Texas Tech, as well as a reporter for the *Lubbock Avalanche-Journal*, before pursuing a career in governmental entity law.

[2] In journalistic parlance, to “scoop” other reporters is to be the first to develop and publish or air a particular story.

[3] Subsequent citations to the Disciplinary Rules will be simply to “Tex. Disciplinary R. Prof’l Conduct,” together with the appropriate rule or comment number.

well as other sources of ethical mischief that arise when a case becomes a matter of widespread attention, as cases involving the government seem almost destined to do.

1. Getting Burned Without Screaming Profanity — Who's Really Watching?

A case that fosters a media frenzy can take on a life of its own, such that the lawyer handling the case may be overcome with "a degree of frustration about the hysteria created in the community ... and in the media about this issue," and conclude that "no one care[s] about the facts", but rather, "[w]hat is the fair, right thing to do." Jim Moye & C. Keith Harrison, *Who Can a "Baller" Trust? Analyzing Public University Response to Alleged Student-Athlete Misconduct in a Commercial and Confusing Environment*, 3 Tex. Rev. Entm't & Sports L. 1, 14 (2002) (quoting Amy Shipley, *"It's Embarrassing"' As Fla. St. Wins, Image Takes a Beating*, Wash. Post, November 13, 1999, at D01). Often when a case is docketed in the court of public opinion, spin and frustration are inevitable. This is particularly true when the lawyer on the other side already is enjoying significant face time in the media, leveling accusations of malice and irresponsibility against the police, the state, your client or you.

While our opponents "are under the same media guidelines as we are," it has been noted that, "as a practical matter there is no one to enforce these guidelines most of the time. The … courts seldom get involved." Ronald J. Sievert, The Real Prosecution Ethic v. The Myth of 60 Minutes, Larry King, and Alan Dershowitz, Address to the Univ. of Tex. School of Law (Mar. 31, 1999), *in* 26 Am. J. Crim. L. 317, 324 (1999). But can we trust that such a *laissez faire* approach will obtain if we decide to fight fire with fire? Since skepticism is safer than optimism, we proceed from the presumption that government lawyers can expect no leniency if "open fire" is the order of the day.

From an objective viewpoint, it is relatively simple to discern ethical issues in high-profile cases and prognosticate about how those issues should be resolved. Most of us are familiar with this "objective viewpoint," since being nostril deep in the ethical labyrinth of a media-rich case exists in a different time zone from sitting through a misdemeanor plea, a bail bond board meeting or reviewing prevailing wage statistics for a public works contract. But that can change in the short time it takes for an officer to fire a service weapon or for a team of officers to execute a search warrant or grand jury subpoena for records of the tax assessor-collector. When the cadre of reporters and camerapersons arrive at your office, some issues like permissible pre-trial publicity should be immediately perceptible. Others may not be.

2. Just Our Dirty Little Secrets: Conflict of Interest and Confidentiality

Why not begin with the flagship of problems in legal ethics? Conflict is certainly fact-specific, and perhaps that explains the scarcity of authority defining precisely what a conflict of interest is. Indeed, the judicial approach often has seemed to be a callback to Justice Stewart's famous observation about the definition of hard-core pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). With that in mind, it may be fruitful to focus less on a definition of conflict and more on the circumstances that may propagate it. Perhaps the greatest potential for conflict of interest, in governmental practice, lies in civil advice and advocacy services provided to governmental clients.

Abraham Lincoln famously quipped that a lawyer's time and advice make up his stock in trade. So, on the surface, doling out routine advice might not seem to implicate core concerns of Rules 1.06 and 1.09 of the Disciplinary Rules of Professional Conduct; specifically, representing clients in a substantially related matter in which the clients' interests are materially and directly adverse. *See* Tex. Disciplinary R. Prof'l Conduct 1.06(b)(1), 1.09(a)(3). However, a look at the concerns addressed by the rules can give one reason for pause. As is so often the case with the Disciplinary Rules, there is significant overlap between the rule at issue and other basic rules. Here, the focus of the conflict of interest rules and the confidentiality rule touch upon each other. *See* Tex. Disciplinary R. Prof'l Conduct 1.05. Hence, matters are "substantially related" within the meaning of the conflict rules when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar. *In re EPIC Holdings, Inc*., 985 S.W.2d 41, 51 (Tex. 1998) (orig. proceeding).

This "substantial relationship" test is a product of the common law and predates the disciplinary rules for lawyers. *Landers v. State*, 229 S.W.3d 532, 535 (Tex. App.—Texarkana 2007, no pet.). Concurrently, "adversity" is a product of the likelihood of the risk that a lawsuit poses to a person's interest and the seriousness of its consequences. *In re EPIC Holdings*, 985 S.W.3d at 50. Parties are "directly adverse" within this context if the lawyer's independent judgment on behalf of the client or the lawyer's ability or

willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, another. Tex. Disciplinary R. Prof'l Conduct 1.06, cmt. 6. Additionally, a "directly adverse" representational scenario may play out if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. *Id*. On the other hand, generalized adverse interests, "such as competing economic interests," do not constitute the representation of directly adverse interests. *Id*. When these concepts are integrated, it is reasonable to envision a situation in which advice is provided under the statutory directive, or representation is provided as discussed below, that later proves sufficiently inconsistent with allegations supporting a removal petition to give rise to the specter of conflict under the Disciplinary Rules.

The obligation to advise, of course, does not require representation of a disgruntled public official in a suit against his or her employing governmental entity. *See*, *e.g.*, Tex. Loc. Gov't Code Ann. §§ 157.9015(a) (county-provided or –funded defense applicable if official or employee is "sued by any entity, other than the county with which the official or employee serves"), 180.002(b) (defense of peace officer, fire fighter or emergency medical services employee by municipality or special purpose district applicable for employee to "defend … against a suit for damages by a party other than a governmental entity") (Vernon 2008). As something of an exclamation point to this principle, for example, in the absence of an alleged violation of the Public Information Act,[4] there is no authorization for a district or county attorney to bring suit against the county or its commissioners court members in their official capacities without an order or request from the commissioners court, even if requested or demanded by a grand jury. *See*, *e.g.*, *Ward County v. King*, 454 S.W.2d 239, 240-41 (Tex. Civ. App.—El Paso 1970, writ ref'd w.o.j.) (county attorney's suit, purportedly on behalf of county, against commissioners court members in their official capacities dismissed in absence of authorization for suit by commissioners court); *Harwell v. Ward County*, 314 S.W.2d 868, 870 (Tex. Civ. App.—El Paso 1958, writ ref'd n.r.e.) (grand jury could not authorize county attorney to sue five members of commissioners court to recover value of fence materials and labor costs). Instead, as a general matter, the commissioners court retains the implied power to control county litigation and choose its legal remedies so long as it does not usurp the constitutional or statutory authority of the district or county attorney's office. *See Guynes v. Galveston County*, 861 S.W.2d 861, 863-64 (Tex. 1993). Generally, then, it must be remembered that it is the governing body of the entity, rather than its attorney, that will have the authority to dictate the direction and objectives of litigation on the entity's behalf. Accordingly, until a request actually is made, the speculative possibility that a governmental attorney may be asked to represent the entity or its officials in civil litigation may not present a solid case of the substantial relation or direct adversity with which the conflict rules are concerned.

Some governmentally-employed lawyers are statutorily assigned the responsibility for representing their entities and their employees. Many are not. But there is an overarching statutory responsibility that may apply in any county. Cities have an analogous statute.[5] To the extent the county scheme (with which the author is most familiar) may be instructive, either directly or comparatively, analysis of it may be useful.

(a) The County Perspective

The Local Government Code provides that:

> A county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of a public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.

Tex. Loc. Gov't Code Ann. § 157.901(a). The fact that district and county attorneys bear legal obligations primarily focused in the realm of criminal law was not overlooked.[6] Consequently, the statute requires that if additional counsel is necessary, or if an official or employee is entitled to representation and the act complained of may form the basis for filing a criminal charge against him or her, the commissioners court must employ and pay private counsel. *Id*. at (b).

It is not difficult to perceive problems under this statute when the litigation at issue is entirely between county personnel. Fortunately, section 157.901 and a

[4] *See* Tex. Gov't Code Ann. § 552.3215(c), (h)-(i) (Vernon 2004) (authorizing district or county attorney to bring action for declaratory or injunctive relief, in the name of the state, against governmental body based on violation of Public Information Act; providing for deferral to attorney general in case of conflict of interest).

[5] *See* Tex. Loc. Gov't Code Ann. § 180.002 (Vernon 2008).

[6] Of course, district and county attorneys are prohibited by the Code of Criminal Procedure from being of counsel adversely to the state in any case in any court. Tex. Code Crim. Proc. Ann. art. 2.08 (Vernon 2005).

recent accompanying statute avert some of these potential traps. For instance, some employees may claim entitlement to representation when they sue, such as when they choose to assert a counterclaim in an ouster suit. *See* Tex. R. Civ. P. 38, 51(a) (addressing third-party practice, joinder of claims by defendant). However, the statute only accrues to the benefit of an officer or employee who is sued by an entity other than the county.[7] Nor does the general requirement to provide advice create any built-in conflict of interest within an intracounty dispute. Section 157.9015 of the Local Government Code expressly provides:

> It is not a conflict of interest for a district or county attorney under Section 157.901 to defend a county or a county official or employee sued by another county official or employee and also to advise or represent the opposing party on a separate matter arising from the performance of a public duty, regardless of whether the attorney gives the advice or representation to the opposing party before the suit began or while the suit is pending.[8]

Significantly, though, section 157.901 addresses representation of officials or employees sued by an entity other than the employing county. In considering this issue, it should be recalled that section 157.901 applies only to defense of suits "for an action arising out of the performance of public duty."[9] Matters alleging criminal conduct are likely to be seen as falling outside the scope of "public duty." *See In re Reed*, 137 S.W.3d at 679-80. On a broader scale, it is notable that the Attorney General has opined that section 157.901 augments common law considerations that govern a county's authority to retain counsel for its employees. *See* Op. Tex. Att'y Gen. No. JC-0047 (1999), at 2. Under the common law rubric, county-funded defense may be extended where the commissioners court determines that the legitimate interests of the county, and not merely the personal interests of the officer, require the assertion of a vigorous legal defense. Op. Tex. Att'y Gen. No. JM-1276 (1990) at 11; *accord* Op. Tex. Att'y Gen. No. JM-1092 (1989) at 6.

(b) Prior Advice, Representation, Confidential Information and Disqualification

Engaging as these concepts may be, they do not fully answer whether prior civil representation of an officer creates a conflict of interest sufficient to disqualify a lawyer from representation against that officer. Plainly enough, a lawyer may not simultaneously represent opposing parties in a lawsuit. Tex. Disciplinary R. Prof'l Conduct 1.06(a) ("A lawyer shall not represent opposing parties to the same litigation."). But that will not be the usual case. More likely scenarios involve a suit arising from facts that also give rise to an action against an officer by a third party, advice given to a defendant officer that may subsequently relate to a lawsuit against the officer or previous representation of the defendant officer by the lawyer.

Not only is representation of adverse parties in a lawsuit precluded under the Disciplinary Rules of Professional Conduct, so is representation of a person in a substantially related mater in which that person's interests are materially and directly adverse to the interests of another client of the lawyer. Tex. Disciplinary R. Prof'l Conduct 1.06(b)(1). Where an official is defended in a lawsuit based on acts that also form the basis for upholding disciplinary action against the officer, for example, the need to establish those facts on behalf of the governmental entity and disprove them on behalf of the official would likely create direct adversity. *See National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding) ("Adversity is a product of the likelihood of the risk and the seriousness of it consequences."). Similarly, the interwoven nature of the case would appear to present the danger that confidential information provided for defense of the third-party lawsuit would be used in the pursuit of the disciplinary action, such that the two would be "substantially related." In this context, actual disclosure of confidences need not be proven; the issue is the existence of a genuine threat of disclosure because of the similarity of the matters. *Id.* at 132-33.

The thornier of the issues probably would be prior advice to or former representation of the current defendant. Rule 1.09 speaks to this problem. Before considering its speech on the matter, one thing should be noted about what the rule does not say. Under the provisions of Rule 1.09, "there is no absolute

[7] *See* Tex. Loc. Gov't Code Ann. § 157.901(a) (Vernon 2008) ("A county official or employee *sued by any entity* … is entitled [to required representation]" (emphasis added); *accord* Tex. Loc. Gov't Code Ann. § 157.9015(c) (Vernon 2008) (no requirement to represent county official or employee who brings suit against county or another county official or employee for action arising from performance of public duty).

[8] Tex. Loc. Gov't Code Ann. § 157.9015(a) (Vernon 2008).

[9] Tex. Loc. Gov't Code Ann. § 157.901(a) (Vernon 2008); *In re Reed*, 137 S.W.3d 676, 679 (Tex. App.—San Antonio 2004, orig. proceeding).

prohibition against an attorney representing a new client in a matter involving a former client." *Cimarron Agr. Ltd. v. Guitar Holding Co., L.P.*, 209 S.W.3d 197, 201 (Tex. App.—El Paso 2006, no pet.). Instead, the rule states that:

> Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
> (3) if it is the same or a substantially related matter.

Tex. Disciplinary R. Prof'l Conduct 1.09(a)(1)-(3). The concept of "personally represented" is not definitively addressed in the rule. However, considerations relevant to the question include how the former representation actually was conducted within the office; the nature and scope of the former client's contacts with the office (including any restrictions the client may have placed on the dissemination of confidential information within the office) and the size of the office. *See* Tex. Disciplinary R. Prof'l Conduct 1.09, cmt. 2. More fundamentally, logic dictates that a lawyer cannot have "personally represented" a client if the lawyer did not represent the client at all. Hence, some attention should be paid to whether an attorney-client relationship existed in the first instance.

The attorney-client relationship is a contractual relationship whereby an attorney agrees to render professional services for the client. *Honeycutt v. Billingsley*, 992 S.W.2d 570, 581 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). The relationship may be expressly created through a contract or it may be implied from the actions of the parties. *Id*. But it is necessary that the parties either explicitly or implicitly manifest an intention to create an attorney-client relationship. *Hill v. Bartlette*, 181 S.W.3d 541, 547 (Tex. App.—Texarkana 2005, no pet.). Where this standard is met, that is, when an attorney performs legal services benefiting a person individually who is regarded by both the attorney and the person as a client, the existence of an attorney-client relationship cannot be challenged by a third party. *In re EPIC Holdings, Inc*., 985 S.W.2d 41, 49 (Tex. 1998) (orig. proceeding). That means that members of a firm or office cannot disavow access to confidential information of any one attorney's client, which dovetails with the irrebuttable presumption that an attorney in a law office has access to the confidences of the clients and former clients of other attorneys in the office. *See id*.; *but see* Tex. Loc. Gov't Code Ann. § 157.9015(a) (Vernon 2008) (providing it is not conflict of interest for district or county attorney to defend county official or employee sued by another county official or employee and also advise or represent opposing party on separate matter arising from performance of public duty).

A first-order matter of concern when conflict of interest arises, naturally, is whether continued representation is feasible or permissible. In plain English, that means that conflict may give rise to the specter of disqualification. Since the disciplinary rules are seen to be particularly instructive when disqualification for conflict is at issue, familiarity with them is crucial. But the common law goes further. A party seeking to disqualify an attorney must show the existence of a prior attorney-client relationship in which the factual matters were so related to the facts in the pending litigation that it creates a genuine threat that confidences that were revealed to the former attorney will be revealed by that attorney to the party's present adversary. *In re Goodman*, 210 S.W.3d 805, 808 (Tex. App.—Texarkana 2006, orig. proceeding) (quoting *In re Cap Rock Elec. Coop*., Inc., 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, orig. proceeding). In such a case, the movant has the burden of producing evidence of such specific similarities capable of being recited in the disqualification order. *In re Goodman*, 210 S.W.3d at 808. Here, the movant may not rely on conclusions, but must provide the court with sufficient information to allow it to engage in a "painstaking analysis" of the facts. *In re Drake*, 195 S.W.3d 232, 236 (Tex. App.—San Antonio 2006, orig. proceeding). Confidences need not be divulged, but the movant must delineate with specificity the subject matter, issues and causes of action presented in the former representation. *Id*. Superficial resemblances among issues do not rise to the level of the requisite substantial relationship. *Id*.

These rigors are necessitated because of the recognized fact that disqualification is a severe remedy that can result in immediate and palpable harm, disrupt trial court proceedings and deprive a party of the right to have counsel of choice. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding). In applying these concepts to a request for disqualification of a district attorney, the San Antonio Court of Appeals in *dicta* discussed evidence that the district attorney's office had represented the movant on various civil matters in the past and had provided the district attorney's office with personal information in connection with those prior dealings. However, the

court observed that the movant did not indicate what the personal information might have been, and further found that the matter then at issue, a prosecution for indecent exposure, was not "the same or substantially similar" to the prior matters in which the district attorney's office represented the movant. Consequently, the court found that the disqualification standard applicable to private attorneys, concerning the potential for violation of client confidences, would not be satisfied. *In re Reed*, 137 S.W.3d 676, 680 n. 3 (Tex. App.—San Antonio 2004, orig. proceeding).

Importantly, the ethical duties embodied in the conflict of interest rules flow to the lawyer's clients and former clients. *See In re State ex rel. Rodriguez*, 166 S.W.3d 894, 898 (Tex. App.—El Paso 2005, orig. proceeding). Accordingly, a non-client is unable to complain of an alleged "conflict of interest" on the part of a governmental litigator. *See id*. at 898-99.

(c) Promise Not to Tell: Confidences

Since the conflict of interest rules are seen as significantly concerned with client confidences,[10] a brief detour to review the concept of confidential information under the Disciplinary Rules of Professional Conduct is in order at this point.

Government is replete with characters that may euphemistically be called "colorful." Your representation of someone like that can quickly transform you into a local, if not a national, celebrity. However, it is not merely your representation of a well-known person or entity, or your snappy fashion sense that carries you into the spotlight. By virtue of that representation, you become privy to information that is desirable to the media and the public. Rightly or not, you are seen as knowing the sordid details and background facts that can make a case much more interesting and commercially attractive than it is within the confines of the pleadings. People want to know those facts, and they may go to surprising lengths to get them. Simultaneously, government litigation may occasionally become a bit inbred. That is, the same people who were advised or defended last year may become this year's target. Either way, you must initially remind yourself of the duties and restrictions set forth in Rule 1.05 of the Disciplinary Rules of Professional Conduct.

Rule 1.05 is concerned with the confidential information that comes into a lawyer's possession through representation of a client, as well as the expectation of "free discussion" between the client and the lawyer that should prevail within such representation. *See* Tex. Disciplinary R. Prof'l Conduct 1.05 cmt. 1. "Confidential information" consists of two types of data: "privileged information" and "unprivileged client information." Tex. Disciplinary R. Prof'l Conduct 1.05(a). "Privileged information" encompasses the communications between lawyer and client that are protected by the lawyer client privilege recognized in Tex. R. Evid. 503 and under the umbrella of common law privileges recognized by Fed. R. Evid. 501. Thus, "privileged information" includes any communication not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client and those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5). If such a communication is made for the purpose of facilitating the rendition of professional legal services to the client, it is "privileged information" if it is:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
(B) between the lawyer and the lawyer's representative;
(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer, representing another party in a pending action and concerning a matter of common interest therein;
(D) between the representatives of the client or between the client and a representative of the client; or
(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1); *cf*. Tex. Disciplinary R. Prof'l Conduct 1.05(a). Significantly, such confidentiality is specifically applicable to governmental lawyers, even though they may disagree with the policy goals that their representation is designed to advance. Tex. Disciplinary R. Prof'l Conduct 1.05 cmt. 5. Just as significantly, an exception to this confidentiality may arise in the context of governmental representation since some of the information garnered in the course of representing the state, the county or its officials may come from public records. Interpreting the confidentiality provisions of the prior Code of Professional Responsibility, the Texas Committee on Professional Ethics concluded that information that is a

[10] *See In re Hoar Constr., L.L.C.*, 256 S.W.3d 790, 800 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) ("Before a trial court may disqualify a lawyer pursuant to Rule 1.09(a)(2), the court must find a reasonable probability that some aspect of 1.05 will be violated.").

matter of public record is not considered confidential, despite the fact that such information was given by the client to the lawyer in connection with the lawyer's representation of the client. Tex. Comm. on Prof'l Ethics, Op. 463, 52 Tex. B.J. 1085 (1989); *cf.* Tex. Disciplinary R. Prof'l Conduct 3.07(c)(2) (pretrial publicity rule generally not violated by statement of information contained in public record); *see also Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App.—San Antonio 2001, pet. denied) (holding that once information is made matter of public record, First Amendment may prohibit recovery for injuries caused by further disclosure of and publicity given such information) (citing, *inter alia*, *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 684 (Tex. 1976)). Existence of client information within public information may not be universal carte blanche, though. Recently, the Professional Ethics Committee considered the question of whether confidential information is "generally known,"[11] and thereby subject to being used in a manner disadvantageous to a former client, simply because it may be found in a public record. The committee concluded that it is not. It noted that inclusion in a public record alone does not demonstrate general public awareness. Rather, said the committee, information is "generally known" if it is actually known to some members of the general public as opposed to merely being available to members of the public who might choose to look where the information may be found. Tex. Comm. on Prof'l Ethics, Op. 595, 75 Tex. B. J. 478 (2010). So, unless information communicated in the course of representation can be directly attributed to a public record and is known to more than just the legal moles digging for it, or is subject to a disclosure authorization discussed below, it should be treated as confidential and unavailable for use to the detriment of the client or former client.

"Unprivileged client information," in contrast, is all information relating to a client or furnished by the client that is not privileged information and that is acquired by the lawyer during the course of or by reason of the representation of the client. Tex. Disciplinary R. Prof'l Conduct 1.05(a).

The reason these concepts are of any relevance — other than preparation for a nap — is that they help define when information obtained in the course of representing a client can, and cannot, be disclosed. In general, any information falling within the overarching scope of "confidential information" may not knowingly be revealed to any person that the client has instructed not to receive the information or anyone else, other than the client, the client's representatives or the members, associates or employees of the lawyer's firm. Tex. Disciplinary R. Prof'l Conduct 1.05(b)(1). Moreover, "confidential information" may not be used to the disadvantage of a client or former client unless the client or former client consents after consultation, nor may such information be used for the advantage of the lawyer or of a third person unless the client consents after consultation. *Id.* at (b)(2)-(4). As referenced above, however, the circumstances of a case may dictate that revelation of information, which is "confidential information" within the contemplation of the rule, may be necessary in a high-profile, high-stakes case. Indeed, it may be crucial to safeguarding the reputation and status of your client,[12] and you may find that the news media is willing to be a conduit for accomplishment of those purposes. *See* Armstrong, *supra*, at 617-18 ("If you take your case and order it in a way that helps [the media] structure their story, they're going to be grateful and you're going to get the play. The press is more often manipulated than it is the manipulator.") Thus, if there is potential that disclosure of client information may be necessary, an initial determination must be made about the nature of the client information, since overlapping but differing standards apply to disclosure of "privileged information" and "unprivileged client information." *Compare* Tex. Disciplinary R. Prof'l Conduct 1.05(c) *with id.* at (d).

"Confidential information," which necessarily includes "privileged information,"[13] may be disclosed under certain, limited circumstances. Specifically, a lawyer may reveal "confidential information":

(1) when the lawyer has been expressly authorized to do so in order to carry out the representation;
(2) when the client consents after consultation;
(3) to the client, the client's representatives, or the members, associates and employees of the lawyer's firm, except when otherwise instructed by the client;

[11] *See* Tex. Disciplinary R. Prof'l Conduct 1.05(b)(3) (lawyer may not use confidential information of former client to disadvantage of former client after conclusion of representation unless former client consents after consultation or confidential information "has become generally known.").

[12] *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991).

[13] *See* Tex. Disciplinary R. Prof'l Conduct 1.05(a).

(4) when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law;
(5) to the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client;
(6) to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client;
(7) when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act; or
(8) to the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

Tex. Disciplinary R. Prof'l Conduct 1.05(c). Since "confidential information" includes "unprivileged client information,"[14] the latter may be revealed in any of the situations delineated above. Additionally, other circumstances may authorize the disclosure of "unprivileged client information." Rule 1.05 permits a lawyer to disclose "unprivileged client information":

(1) when impliedly authorized to do so in order to carry out the representation;
(2) when the lawyer has reason to believe it is necessary in order to:
   (A) carry out the representation effectively;
   (B) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
   (C) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
   (D) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

Tex. Disciplinary R. Prof'l Conduct 1.05(d). Review of the disclosure provisions reveals the common concern with the use of a lawyer's services to commit criminal or fraudulent acts. *See* Tex. Disciplinary R. Prof'l Conduct 1.05 cmts. 10-13. In making the decision to reveal "confidential information" or "unprivileged client information" on the basis of past or potential criminal or fraudulent conduct, relevant considerations include the magnitude, proximity and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client, the lawyer's own involvement in the transaction and any mitigating factors relating to the conduct. *Id*. cmt. 14. Once this initial analysis is conducted, determination of what may be disclosed and what must be withheld in front of the media or other inquiring party is more attainable. If certain information about the case may not be disclosed, but the media asks about it, experience counsels that "no comment" is usually a poor way of addressing the matter. *Accord* Ruth E. Pillar, *Dealing with the Press During Trial: A Primer*, 37 Hous. Law. 42, 44 (2000).[15] Instead, the most fruitful approach is being forthright about the ethical rule that prevents your discussion. *See* William H. Colby, *Panel Discussion: Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case Is Front Page News* (Feb. 24, 1995), *in* 14 Rev. Litig. 595, 607 (1995).[16] Conversely, if the facts and circumstances indicate that disclosure is permissible and appropriate, additional strictures come into play. Either way, resolving this initial dilemma means that further implications of lawyering in the high-profile case should be analyzed.

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[14] Tex. Disciplinary R. Prof'l Conduct 1.05(a).

[15] "Indeed, if an attorney is asked about the trial and/or the lawsuit in general, that attorney should make some sort of comment, because reporters interpret 'no comment' as a brush-off. That is, an innocent 'no comment' by an attorney may be reported as a refusal to comment, which suggests that the attorney has something to hide or, even worse, that the attorney distrusts and dislikes the press. That is important, because it could wind up affecting the way the story is reported." Pillar, *supra*, at 44.

[16] Colby maintains that lawyers should be extremely cautious in dealing with reporters. Nevertheless, he counsels, "I don't mean to imply that you treat reporters with any lack of courtesy or professionalism, because I think that's very important, not to getting a leg up, but in ensuring that you're treated fairly. … [R]eporters generally don't understand the law. So, to the extent that you help educate them, you assist. Common courtesy is appreciated." Colby, *supra*, at 607.

3. What Can I Really Do with My 15 Minutes of Fame?

Governmental cases often garner extraordinary attention and coverage. Interest in such cases historically lives on long after the conclusion of the actual litigation. Publication deals and similar offers are sure to tempt the parties and lawyers in significant cases, given "the public's unceasing appetite for … courtroom drama."[17] This is the invitation into his parlor of the spider to the fly.[18] Unlike the unfortunate insect, however, lawyers have the benefit of a disciplinary rule to warn us away from such a dangerous lair.

Within the rule governing conflict of interest in the context of prohibited transactions, the Disciplinary Rules of Professional Conduct specifically address the prospect of a lawyer entering into a media or literary rights deal concerning the subject of representation. *See* Tex. Disciplinary R. Prof'l Conduct 1.08(c). Essentially, the rule says, "don't do it." The rule expressly dictates:

> Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client, giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Tex. Disciplinary R. Prof'l Conduct 1.08(c). If there is any question about the intended reach of the rule, the courts are forceful in their views about the subject. As the Fifth Circuit has stated, "[t]his court joins other courts, scholars and organizations of the bar who have uniformly denounced the execution of literary and media rights fee arrangements between attorneys and their clients during the pendency of a representation." *Beets v. Scott*, 65 F.3d 1258, 1273 (5th Cir. 1995), *cert. denied sub nom. Beets v. Johnson*, 517 U.S. 1157 (1996). Underlying the rule and associated holdings is the concern that contracts allowing attorneys to publish articles and books about their clients may present the danger that the lawyer's representation will be adversely affected by the lawyer's interest in the publication, particularly in high-profile cases in which the lawyer may earn a substantial income from the publication. Graham Brown, *Should Law Professors Practice What They Teach?*, 42 S. Tex. L. Rev. 316, 327 n. 30 (2001). To allay these concerns, any consideration of a literary or media deal with respect to the case must be abated until the case is finally concluded.

By its own terms, the rule applies only during the term of representation. *See* Tex. Disciplinary R. Prof'l Conduct 1.08(c). Conclusion of the case is not an automatic green light, however. Here, it must be recalled that the general prohibition of revealing "confidential information" applies to confidential information of a former client, as well as that of a current client. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1); *see also* Tex. Disciplinary R. Prof'l Conduct 3.07 cmt. 5 ("Frequently, a lawyer's obligations to a client under Rule 1.05 will prevent the disclosure of confidential information"). Thus, although representation of an individual government employee may expire at the end of the case, the confidentiality of information received from that employee does not. Furthermore, the state's or county's status as a current client tends to persist regardless of whether a particular case has ended.

So, in contemplating a media deal, careful consideration must be given to whether the core of information sought in the deal may lawfully be revealed. Often, it cannot be without the client's consent after consultation. *See*, *e.g.*, Tex. Disciplinary R. Prof'l Conduct 1.05(c)(2) (lawyer may reveal confidential information when client consents after consultation). That consultation, in turn, cannot be cursory; it must be reasonably sufficient to permit the client to appreciate the significance of the matter in question. *See* Tex. Disciplinary R. Prof'l Conduct terminology. But the ethical fun doesn't stop there.

4. Don't Go Sneakin' 'Round the Back Door

Even if no book or movie deal is in the works, the high-profile case presents the same difficulties inherent in any other litigation, only magnified. One such problem concerns the ubiquitous requests for interviews in the run-up to a sensational trial. Lawyers representing a client generally know that they may not communicate directly with a "person, organization or entity of government" the lawyer knows to be represented by another lawyer about the subject of representation unless the other lawyer consents or some law authorizes the communication. Tex. Disciplinary R. Prof'l Conduct 4.02(a). Indirect communication is similarly precluded, either with the represented party or with a person or organization employed or retained for conferral or advisement about the subject matter at issue. *Id.*; *see also id*. at (b).

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[17] David V. Wilson, II, *Media Review: The Prosecutors, by Gary Delsohn*, 41 Hous. Law. 40, 40 (2003).

[18] *See* Mary Howitt, *The Spider and the Fly* ("'Will you walk into my parlor?' said the spider to the fly; 'Tis the prettiest little parlor that ever you may spy.")

Consequently, the opposition's experts may not be directly contacted without the consent of opposing counsel or independent legal authorization. Tex. Disciplinary R. Prof'l Conduct 4.02 cmt. 3. That much is relatively straightforward. It is representation of the county that can muddle the question a bit.

Although a governmental entity often is a somewhat complex organization, and its business is directed generally by its governing body, the obligations of the lawyer representing the entity itself do not unyieldingly extend to those within that structure. Rather, the Disciplinary Rules contemplate that a lawyer retained by an organization represents the entity. Tex. Disciplinary R. Prof'l Conduct 1.12(a). Ultimate responsibility to the governmental entity prevails even though the lawyer may be required to report to its governing body and other decisionmaking officials. *See id*.[19] That conclusion flows from the fact that, although the lawyer representing an organization must conduct that representation through a constituent, it is the organization — as distinct from its officers, employees, members, shareholders or other constituents — that is the client. Tex. Disciplinary R. Prof'l Conduct 1.12 cmt. 1. In fact, the rule further imposes an affirmative obligation upon a lawyer to explain to the organization's directors, officers, employees, members, shareholders or other constituents the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing, or when it is necessary to avoid misunderstanding on the part of those constituents. Tex. Disciplinary R. Prof'l Conduct 1.12(e). Lest there be any confusion based on the usage of terms like "shareholders" or "directors," the obligations of Rule 1.12 apply to governmental organizations. Tex. Disciplinary R. Prof'l Conduct 1.12 cmt. 9.

At the same time, for purposes of the represented party contact rule, "organization or entity of government" includes:

> (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation; or
>
> (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

Tex. Disciplinary R. Prof'l Conduct 4.02(c). Accordingly, the Committee on Professional Ethics has concluded that direct contact by a plaintiff's lawyer with the members of a defendant city's ruling council, without consent of the city's attorney, is improper under Rule 4.02. Tex. Comm. on Prof'l Ethics, Op. 474, 55 TEX. B.J. 882 (1992). Such a conclusion is predictable, since the no-contact rule is based on the presumption that persons having managerial responsibilities to the organization or entity of government are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. Tex. Disciplinary R. Prof'l Conduct 4.02 cmt. 4. For better or worse, however, the rule does not cut both ways. If the person, organization or entity of government represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited from giving advice without notifying or seeking consent from the first lawyer. Tex. Disciplinary R. Prof'l Conduct 4.02(d). You may find in the course of a sensational case that factions or elements within the county, or department of the county, you represent are given to second-guessing your strategy and decisionmaking. To that end, the councilman, commissioner, officer or other official who disagrees with you may ask another lawyer to "armchair quarterback" your work. If that faction can muster a majority of votes on the governing board, the entity itself may seek such a second opinion. Unfortunately, the rule offers no protection to you in this circumstance. *See id*. To add insult to injury, in fact, such co-counsel likely is entitled to access relevant documents in your possession. *See, e.g., In re Norris*, No. 02-04-047-CV, 2004 WL 912664, at *2 (Tex. App.—Fort Worth Apr. 29, 2004, orig. proceeding [mand. dism'd]) (mem. op.) (holding trial court order prohibiting disclosure of relevant, admissible documents as between co-counsel violated fundamental principles underlying attorney-client relationship and prevented co-counsel from discharging attorney-client obligations to client).

There is a bit of good news here if you work in a district or county attorney's office, however. By

[19] Rule 1.12 specifically states that, "[w]hile the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in [situations involving legal violations within the organization by officers, employees or other persons associated with the organization] the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization." Tex. Disciplinary R. Prof'l Conduct 1.12(a).

statute, the district attorney or county attorney shall represent the state in a criminal case. Tex. Code Crim. Proc. Ann. arts. 2.01, 2.02 (Vernon 2005). Which is the appropriate counsel in a particular criminal case is a function of whether the case winds up in district court or a court "below the grade of district court." *See id*. These statutory obligations follow from the Texas Constitution itself. *See* Tex. Const. art. V, § 21 (providing for county attorneys, criminal district attorneys and district attorneys; delegating to Legislature authority to regulate duties in representing state as between such offices). In light of this constitutional and statutory investiture of authority, there is no general provision for the state to seek a second opinion or impose additional counsel as is the case in a civil context. The state may not be represented "in district or inferior courts by any person other than the county or district attorney, unless such officer joins them." *State Bd. of Dental Exam'rs v. Bickham*, 203 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1947, no writ). Moreover, outright ouster from representing the state in a criminal case is authorized under very narrow circumstances. Those circumstances arise if the attorney for the state is disqualified or, if not disqualified, recuses "for good cause and upon approval by the court". Tex. Code Crim. Proc. Ann. art. 2.07(a), (b-1) (Vernon 2005). For these purposes, disqualification arises if the prosecutor "has been, before his election, employed adversely." Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 2005); *In re Reed*, 137 S.W.3d 676, 679 (Tex. App.—San Antonio 2004, orig. proceeding). But even that restriction only goes so far. Article 2.01 and the defendant's due process rights are not typically implicated by a prosecutor's participation in a case unless the attorney for the state prosecutes a charge "against a defendant whom he formerly represented as defense counsel ***in the same case***." *In re Reed*, 137 S.W.3d at 679 (quoting *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979)) (emphasis by the court). And though a conflict of interest is seen to trigger a responsibility to seek recusal, in most cases that responsibility lies with the prosecutor, not the trial court. *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App.1990) (orig. proceeding) (plurality op.). Only if a due process violation is the result of the conflict may the trial court disqualify the attorney for the state. *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994) (orig. proceeding) (plurality op.). Otherwise, a disqualification of the prosecutor in a criminal case amounts to a removal from office, which is only proper under the grounds and procedures set out in chapter 87 of the Texas Local Government Code. *See Eidson*, 793 S.W.2d at 5.[20]

One other point about advising a governmental entity client is appropriate here. Different circumstances may prompt a request for advice from governing officials. Some of those circumstances may involve a generic uncertainty about the official's or entity's authority or duties, which may not be particularly sensitive. Others, however, may involve the potential for litigation. Members of the governing body of an entity appear to fall within the "control group" of the entity that would be within the scope of protection provided by the lawyer-client privilege if the entity is your client. *See*, *e.g.*, *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993) (orig. proceeding); *see also* Tex. R. Evid. 503(a)(2)(A). The Supreme Court in *Nat'l Tank Co*. found that the text of Rule 503 required adoption of the "control group" test. 851 S.W.2d at 198. The "control group" test protects communications between an attorney and an official of an entity client who is "in a position to control or even take a substantial part in a decision about any action which the [entity] may take upon the advice of the attorney." *Nat'l Tank Co.*, 851 S.W.2d at 197. Similarly, Rule 503 of the Texas Rules of Evidence defines a "representative of the client" to include "a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client[.]" Tex. R. Evid. 503(a)(2)(A).

Bearing that in mind, a cautious governmental practitioner should be wary of sharing advice to governing board members with other governmental officials. As a cautionary tale, and without deciding the question of whether advice given under section 41.007[21] of the Government Code fell within the attorney-client privilege, the Corpus Christi Court of Appeals has held that distribution of a county attorney opinion to county offices other than the one that requested the advice waived the lawyer-client privilege from disclosure. *Cameron County v. Hinojosa*, 760 S.W.2d 742, 746 (Tex. App.—Corpus Christi 1988, orig. proceeding [leave denied]). Under those circumstances, a well-intentioned distribution of an opinion to educate the governmental entity at large readily presents the potential for inadvertently

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[20] *See also* Tex. Const. art. V, § 24 (providing for removal from office for official misconduct, incompetency and habitual drunkenness).

[21] A district or county attorney is required, on request, to provide a written opinion or written advice to a county or precinct official of his district or county relating to the requestor's official duties. Tex. Gov't Code Ann. § 41.007 (Vernon 2004).

disclosing confidential information.[22] Thus, it may be advisable to clarify with the official who requests advice whether the advice or opinion may be disclosed to any other governmental official, particularly anyone who is not a member of the entity's governing body.

5. The Gun May Be Stashed, But You Can Still Smell the Smoke

Big cases present confusing representational and disclosure issues, but they harbor subtle temptations and traps, too. Review and development of evidence in a significant case almost inevitably will lead to discovery of some dirty little secret that neither lawyer nor client want introduced or otherwise "aired." For example, few people want their downloaded cache of cyber-porn to be made a matter of public record, regardless of whether the underlying litigation is a sexual harassment case or a contract action. Not infrequently, such adverse evidence can foreseeably be spun into a potentially devastating "smoking gun" for the opposition. Under these circumstances, making the troubling piece of evidence simply go away would be extraordinarily desirable. It also would be criminally and ethically punishable.

Rule 3.04 of the Disciplinary Rules of Professional Conduct generally prohibits a lawyer from committing acts harmful to the fairness of an adjudicatory proceeding. *See* Tex. Disciplinary R. Prof'l Conduct 3.04. It is primarily concerned with assuring the competitive yet fair control of evidence, which is critical to the integrity of the legal system since the introduction and exclusion of evidence invariably play a major role in the outcome of a case. Barbara Hansen Nellermoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 through 4.04*, 28 St. Mary's L.J. 443, 466 (1997). Essentially, Rule 3.04 is violated if an attorney: (1) falsifies, destroys or conceals evidence;[23] (2) unlawfully obstructs the opposing party's access to evidence or improperly influences a witness's testimony; (3) pays a witness for his testimony;[24] (4) degrades a witness or otherwise disrupts the proceedings; or (5) employs other obstructive measures during discovery. *Id.*; *cf.* Tex. Disciplinary R. Prof'l Conduct 3.04(a)-(e). Destruction of documentary evidence also constitutes spoliation, which may result in an instruction to the jury that the destroyed evidence would have been unfavorable to the party responsible for its destruction. *See Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998) (referring to long-standing spoliation presumption in declining to recognize independent tort of spoliation). In light of these strictures, it may seem the safest course is to find out what the physical and testimonial evidence will be, then let the chips fall where they may. Weighing against this approach is the fundamental obligation of the lawyer to zealously represent his or her client within the bounds of the law. *See Toles v. Toles*, 113 S.W.3d 899, 910 (Tex. App.—Dallas 2003, no pet.); *Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist.*, 92 S.W.3d 889, 901 (Tex. App.—Beaumont 2002, pet. denied); *Bradt v. West*, 892 S.W.2d 56, 71 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Since zealous representation is an obligation owed to the client by the lawyer, the lawyer must avoid frequently failing to carry it out. Tex. Disciplinary R. Prof'l Conduct 1.01(b)(2). Zealous representation, however, does not include skirting other ethical obligations. *United States v. De La Rosa*, 171 F.3d 215, 220 n. 19 (5th Cir. 1999). Thus, although substantive manipulation of the evidence is condemned by Rule 3.04, preparation of a vigorous claim or defense remains a mandate for the lawyer within the restriction of Rule 3.04. A prime example of the ethical tightrope that must be walked in resolving this issue finds form in the woodshedding of witnesses.[25]

At least one commentator postulates that failure to engage in some level of woodshedding is unethical and

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[22] *See* Tex. Disciplinary R. Prof'l Conduct 1.05(a), (b)(1)(i) ("confidential information" includes information of client protected by Rule 503, which may not be revealed to person that client has instructed is not to receive information); *see also id.*, cmt. 3 (principle of confidentiality in Rule 1.05 gives effect to confidentiality embodied in rule, as well as evidentiary privilege).

[23] *Cf.* Tex. Pen. Code Ann. § 37.09(a) (Vernon 2011) (criminalizing alteration, falsification or destruction of evidence with intent to impair official investigation or proceeding, or presenting such altered or falsified evidence with knowledge of its falsity and intent to affect course of official proceeding); *id.* § 37.10(a)(1)-(3), (5) (Vernon 2011) (generally criminalizing making false entry in, false alteration of, destruction of or use of falsified or altered governmental record).

[24] Payment of a witness's reasonable expenses incurred in attending and testifying, compensating a witness for loss of time while attending or testifying and paying reasonable expert witness fees are excluded from this prohibition. Tex. Disciplinary R. Prof'l Conduct 3.04(b)(1)-(3).

[25] "Woodshedding" is the process of preparing witnesses through active coaching and rehearsal. Bryan A. Garner, A Dictionary of Modern Legal Usage 408 (2d ed. 1995). A synonym for the term is "horseshedding." *Id.*

unprofessional, "bordering on legal malpractice to boot." W. William Hodes, *The Professional Duty to Horseshed Witnesses — Zealously, Within the Bounds of the Law*, 30 Tex. Tech L. Rev. 1343, 1350 (1999). The tougher question is how far to proceed along the spectrum that runs from refreshing recollection to suborning perjury. *Id*. Further complicating the issue is the fact that choosing what material to present and what to omit "is a crucial aspect of every litigating lawyer's overall advocacy effort, and the resulting 'courtroom truth' need not match every chapter and every verse of objective truth." Hodes, *supra*, at 1360 (footnote omitted). An effort too tentative may well deserve sanction for failing to carry out the most basic duties encompassed by the lawyer-client relationship. Going too far, by the same token, may lead the lawyer into sanctionable and, perhaps, criminal territory. *Id*. at 1350. At a minimum, then, a lawyer woodshedding a witness should instruct the witness to tell the truth in response to whatever questions are asked, but not more. *See id*. at 1361. An able lawyer also will emerge from the woodshedding process with a solid insight into the overall state of the evidence and, just as importantly, the credibility, strengths and foibles of the witnesses. But, as any trial lawyer knows, woodshedding witnesses is hard work. To do the job right requires in-depth preparation and the ability to handle witnesses who are not always cooperative, or, in some cases, competent. Not only is woodshedding hard work, it is a process the end result of which we may not be able to fully control. Thus, there may be an enticement to develop only that testimony that will be helpful to the county or its officials, then stop. Unfortunately, an inchoate approach like this will hinder the lawyer's ability to fully evaluate and address the issues in the case, particularly if it is convoluted or complicated, and may confound explaining the case to the client for decisionmaking purposes. *See* Tex. Disciplinary R. Prof'l Conduct 1.01(a), (b) (requiring competent, diligent representation); 1.03 (requiring lawyer to keep client reasonably informed about status of case, explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation).

6. If You Don't Know the Facts or the Law, Get to Know the Judge — Very Carefully

Another occasional siren's song in governmental litigation is the inclination to put in a friendly, informal phone call to or visit with the judge. After all, conventional wisdom has it that, "good lawyers know the law; great lawyers know the judge." And, the tortured logic would continue, everyone involved is on the same team. Unless opposing counsel is on the line and the contact with the judge is a conference call,[26] however, it's about as good an idea as a gift bag full of glass shards. No matter how bulletproof the caller and the judge may think they are, *ex parte* communications have a way of becoming known to the outside world. *See*, *e.g.*, *In re Thoma*, 873 S.W.2d 477, 497-509 (Tex. Rev. Trib. 1994, no appeal) (recounting taped conversations between probationers and judge to affirm findings of improper *ex parte* contact.) Attempting to influence the judge about a pending case by legally impermissible means, or communicating or causing another to communicate ex parte with the judge is prohibited under the Disciplinary Rules. Tex. Disciplinary R. Prof'l Conduct 3.05(a), (b). Such contacts are subject to stringent control because of the potential for abuse that they present. Tex. Disciplinary R. Prof'l Conduct 3.05 cmt. 3. Moreover, the lawyer who initiates an ex parte communication with his or her favorite judge may subject the judge to discipline, as well. *See* Tex. Code Jud. Conduct, Canon 3A(4), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. B (Vernon 2005). Those types of incidents have a tendency to strain relations between the bench and bar. Though the task may be difficult in the heat of battle, an objective look at the prospect will counsel against straying into *ex parte* territory.

7. Living in the Limelight — The Universal Bad Dream

Arguably the preeminent concern particularly presented by governmental cases and their penchant for intense interest case is coverage, both at the water cooler and throughout the local media market. An old saw suggests that "there is no bad publicity." That may be true for politicians and marketers. But where lawsuits are concerned, it reflects the same wisdom as saying, "there is no bad evidence." Saturation media coverage of a case implicates several issues of concern — both legal and pragmatic — as well as specific Disciplinary Rules of Professional Conduct.

(a) Is a $40 Check All There Is to It?

Rules 3.06 and 3.07 of the Disciplinary Rules of Professional Conduct govern a lawyer's participation in the dissemination of publicity before and during trial. *See* Tex. Disciplinary R. Prof'l Conduct 3.06, 3.07. The two rules focus upon similar problems, but address

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[26] Communication with the judge is acceptable under the *ex parte* rule if the communication is made in the course of official proceedings in the cause, in writing with a copy promptly delivered to opposing counsel or the adverse party or orally upon adequate notice to opposing counsel or the adverse party. Tex. Disciplinary R. Prof'l Conduct 3.05(b)(1)-(3).

them by divergent means. Preventing improper influence upon jurors, for the purpose of safeguarding the impartiality essential to the judicial process, is the province of Rule 3.06. Tex. Disciplinary R. Prof'l Conduct 3.06 cmt. 1. Once a jury has been selected in a case, publicity of improper information during trial can bias the sitting jury, depriving a party to the litigation of a fair trial. Dunn, *supra*, at 1079. More directly, an outcome affected by extrajudicial statements to jurors violates the litigants' fundamental right to a fair trial. *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434 (Tex. 1998) (citing Tex. Disciplinary R. Prof'l Conduct 3.06 cmt. 1). For these reasons, Rule 3.06 limits attorneys' conduct with regard to the jury system as a whole. Peckham & Barloco, *supra*, at 18.

With respect to the pretrial and trial stages of litigation, Rule 3.06 provides that a lawyer shall not:

> (A) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror;
> (B) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.
> (C) prior to discharge of the jury, communicate or cause another to communicate with a person who the lawyer knows is a member of the venire from which the jury in the lawyer's case will be selected, except during official proceedings; or
> (D) communicate or cause another to communicate with a juror or alternate juror during trial about the matter being tried.

Tex. Disciplinary R. Prof'l Conduct 3.06(a)-(c). In order to fully protect the jury system, Rule 3.06 also has a post-trial component.[27] It is intended to avoid post-verdict conversations that may be harmful to the administration of justice by influencing future jurors or souring jurors on the judicial system as a whole. Peckham & Barloco, *supra*, at 19. Specifically, the rule commands:

> After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass … the juror or to influence his actions in future jury service.

Tex. Disciplinary R. Prof'l Conduct 3.06(d).[28] All restrictions imposed by the rule regarding how a lawyer may treat a venire member or juror also apply to family members of the venire members and jurors. *Id*. at (e).

(b) The Government Is Ready to Proceed ... Mr. DeMille

As if all of the other rules weren't enough to try and get a handle on when the spotlights come on, the fact that folks are intensely interested probably triggers Rule 3.07. The rule addresses not only high-profile cases, but any case involving extrajudicial statements made by a lawyer "that a reasonable person would expect to be disseminated by means of public communication … that has a substantial likelihood of materially prejudicing an adjudicatory proceeding." Nellermoe & Rodriguez, *supra*, at 477 (quoting Tex. Disciplinary R. Prof'l Conduct 3.07(a)). It is an attempt to balance the First Amendment rights of lawyers, listeners and the media with those of litigants and the jury system. Peckham & Barloco, *supra*, at 18; *accord* Nellermoe & Rodriguez, *supra*, at 477 ("The rule reflects an attempt to balance the right to a fair trial with the right to free expression.") Analyzing a Nevada disciplinary rule with the same "substantial likelihood of material prejudice" standard, the United States Supreme Court held that the rule represented a constitutionally permissible balance between the First Amendment rights of lawyers in pending cases and the state's interest in assuring fair trials. *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1075 (1991). Finding such a restriction to be acceptable under First Amendment standards was, at least in part, a function of the fact that a lawyer's right to "free speech" in the courtroom during a judicial proceeding, and even outside the courtroom, is "extremely circumscribed" and is subject

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[27] *See Benton*, 980 S.W.2d at 433-34 (need to prevent adverse impact upon impartiality in future jury service by post-trial contact from lawyers sustains Rule 3.06(d) against First Amendment challenge).

[28] The full text of paragraph (d) also prohibits post-trial questioning of or making of comments to a juror "merely to … embarrass" a member of the jury. In *Benton*, however, the Texas Supreme Court held the term "embarrass" to be unconstitutionally vague. *See* 980 S.W.2d at 440. To the extent the term "harass" is interpreted to mean (1) a course of conduct, (2) directed at a specific person or persons, (3) causing or tending to cause substantial distress, and (4) having no legitimate purpose, the court found it to survive a facial vagueness challenge. *Id*. at 439.

to ethical restrictions on speech to which an ordinary citizen would not be. *Id*., 501 U.S. at 1071. Likewise, although an attorney's remarks may be protected on the same terms as a layperson's outside the judicial process, the attorney's right to free speech and her obligation to zealously represent her client are limited in the formal judicial setting where the state has a substantial interest in preserving the integrity of the judicial process and the public's confidence therein. *Matter of Maloney*, 949 S.W.2d 385, 387 (Tex. App.—San Antonio 1997, no writ). To complete the circle, a civil litigant also is entitled to a trial where the jurors are able to render a fair verdict on the evidence without mental images from outside sources intruding to overwhelm the constraints imposed by attorneys and the court. David D. Smyth, III, *A New Framework for Analyzing Gag Orders against Trial Witnesses*, 56 Baylor L. Rev. 89, 90 (2004).

The rule itself bears three important divisions. First is the rule's general prohibition, which declares:

> In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Tex. Disciplinary R. Prof'l Conduct 3.07(a). As a consequence of this rule, serious thought must be undertaken before making any statement, either to the media or that may reach the media indirectly, if publication seems substantially likely. "Leaking" such prejudicial material is just as culpable. *See* Tex. Disciplinary R. Prof'l Conduct 3.07 cmt. 2 ("If a particular statement would be inappropriate for a lawyer to make, however, the lawyer is as readily subject to discipline for counseling or assisting another person to make it as he or she would be for doing so directly.") Not every bit of information about a case that reaches the general public represents a violation of Rule 3.07, though. Word-of-mouth in a small town, for instance, is not sufficient standing alone to fall within the purview of dissemination by "means of public communication" as used by Rule 3.07. *Primrose Operating Co., Inc. v. Jones*, 102 S.W.3d 188, 194 (Tex. App.—Amarillo 2003, pet. denied). Similarly, generic comments about a significant, widely-reported event, which are not intended to prejudice a party's right to a fair trial, are not violative of Rule 3.07. *See Wilson v. State*, 854 S.W.2d 270, 275 (Tex. App.—Amarillo 1993, pet. ref'd).

Because of the important competing concerns the rule attempts to balance, it provides express examples of conduct that generally does and generally does not violate the rule. *See* Tex. Disciplinary R. Prof'l Conduct 3.07 cmts. 1, 2, 4. This makes the text of the rule somewhat helpful, although the lists are not exhaustive. Nellermoe & Rodriguez, *supra*, at 477. According to the rule, a lawyer generally will violate the rule by making an extrajudicial statement that refers to:

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

Tex. Disciplinary R. Prof'l Conduct 3.07(b)(1)-(5). Punctuating the list is the notation that the likelihood of a violation increases if the adjudication is ongoing or imminent. *Id*. at (b). Similar considerations prompted the Committee on Professional Ethics to note, in interpreting prior provisions of the Code of Professional Responsibility, that a prosecutor's comments denigrating the trial judge before or during trial might warrant discipline. Tex. Comm. on Prof'l Ethics, Op. 369 (1974). Conversely, the current rule recognizes that a lawyer generally does not violate the trial publicity provisions (again, in the civil context) by stating:

(1) the general nature of the claim or defense;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;
(4) except where prohibited by law, the identity of the persons involved in the matter;
(5) the scheduling or result of any step in litigation;
(6) a request for assistance in obtaining evidence, and information necessary thereto;
(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(8) if a criminal case:
    (i) the identity, residence, occupation and family status of the accused;
    (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    (iii) the fact, time and place of arrest; and
    (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Tex. Disciplinary R. Prof'l Conduct 3.07(c)(1)-(8). It should be noted that the list does not represent absolute approval of the listed conduct. Instead, statements such as those listed "are unlikely to violate [the rule's general prohibition] in the absence of exceptional aggravating circumstances." Tex. Disciplinary R. Prof'l Conduct 3.07 cmt. 4. Very little case law interpreting Rule 3.07 exists,[29] so the boundaries of such "exceptional aggravating circumstances" are, as yet, uncertain.

(c) If I Can't Hit the Bully, What Can I Do?

In light of the rule, complete abstention from media contact might seem to be the best approach. For at least two reasons, that isn't really the case. First, allowing a client to be ruthlessly demonized in the media without defense may fail to meet the lawyer's obligation to defend the client and minimize the adverse consequences of the case. *See Gentile v. State Bar of Nev*., 501 U.S. 1030, 1043 (1991); *see also* Tex. Disciplinary R. Prof'l Conduct 1.01(b)(2) (prohibiting frequent failure to carry out completely obligations that lawyer owes to client or clients). Second, unless it is an integral part of a carefully-developed media strategy, stonewalling the media ultimately hurts the lawyer and the client because of perceptions that something bad is being hidden and, perhaps, the client's case is hopeless. *See* Pillar, *supra*, at 44; Armstrong, *supra*, at 606.

Being on the receiving end of an opponent's slash-and-burn publicity and litigation scheme can be incredibly frustrating. In the heat of such a high-profile battle, some are given to applying the philosophy espoused in *National Lampoon's Animal House*: "Don't get mad, get even." So long as the Disciplinary Rules and other applicable laws are not violated, such a reaction may lack moral commendability but it is not inconsistent with the nature of the adversarial system of justice. For others, however, it is quite easy to refrain from acting based on the desire not be seen as pointlessly overaggressive or quixotic. While that approach may be understandable, it can be inconsistent with the mandate of the Disciplinary Rules. Except in cases involving chemical dependency or mental illness, a lawyer having knowledge that another lawyer has committed a violation of the applicable rules of professional conduct that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer in other respects must inform the appropriate disciplinary authority. Tex. Disciplinary R. Prof'l Conduct 8.03(a).

So, what is there to do? Sparse case law construing Rule 3.07,[30] coupled with an absence of direction from the Committee on Professional Ethics, leaves you to ply relatively uncharted waters. A few common-sense navigational aids are available, though. First, and foremost, when you recognize that your case has potential to be high-profile, you can readily conclude that you will be approached by the media for comment. Upon that realization, it is absolutely critical to formulate a media strategy or plan. *See* Armstrong, *supra*, at 617; *accord* Colby, *supra*, at 618; Walter L. Cofer, Panel Discussion: *Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case Is Front Page News* (Feb. 24, 1995), *in* 14 Rev. Litig. 595, 617 (1995). Formulating such a strategy from a civil defendant's perspective entails first determining whether speaking to the press

[29] *Accord* Pillar, *supra*, at 42.

[30] *See* Pillar, *supra*, at 42.

is going to help your client. Cofer, *supra*, at 617. After all, defendants generally don't like publicity since they're involuntary participants in the process. Their most fervent wish, usually, "is to get out of the suit as quickly and quietly as possible, hopefully with their reputation and at least some assets still intact." *Id*. at 596. If speaking to the media will be helpful, the lawyer's approach should be offensive, rather than defensive, but tempered by restraint and discretion. *Id*. Invariably, the message must be crafted to meet the initially-determined objective. Colby, *supra*, at 618. It also may be helpful to get a feel for the particular reporter or media organization that is to conduct the interview. One anecdotal suggestion is to ask questions first. As an experienced defense lawyer puts it:

> I say, "what do you want to know, why are you calling, who have you talked with, and when is your deadline?" And if they won't tell me answers to those questions, then I have a good idea of the probable slant of the article.

Cofer, *supra*, at 602. He goes on to suggest:

> You write down the two or three points that you want made, and you make them. And if it's a reporter that you don't have a lot of confidence in, you make them and say, "thanks," and you hang up and go have a beer. What you don't do is start ad-libbing. Now if it's a reporter that you have confidence in, you may spend more time with them.

Id. at 602-03. Consideration also should be given to the fact that accomplished reporters probably are looking for a deeper story. In other words, the typical inclination is to simply say, "my client didn't do it," "we have an extremely strong case" or "my client was right under the specific facts of this case," but seasoned reporters try to reach a discussion in the nature of "there is a public issue buried in this lawsuit. This public issue should come out in a particular way." Michael Tigar, Panel Discussion: *Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case Is Front Page News* (Feb. 24, 1995), *in* 14 Rev. Litig. 595, 608 (1995). Of course, that public policy discussion must abide by the confines of Rule 3.07(a) and (b). Nonetheless, focusing on the significant underlying issue, and repeatedly espousing your client's simplified objectives in relation to that issue, can be effective in framing the public's perception of the justness of your case. *See* Colby, *supra*, at 607 (relating, in widely-publicized right-to-die case, that "we essentially said the same thing, a paragraph about that long, over and over and over again"; and adding, "over time that became the message that led the debate, and I think ultimately became the answer to how we deal with these issues."). Finally, it is crucial that the lawyer avoid lying to the media at all costs. Why? The answer is simple. "They will find out. They will be furious. Remember Nixon?" *Id*. at 613.

Maintaining focus on Rules 3.06 and 3.07 may seem difficult in the flurry of media activity in a sensational case. Practically speaking, however:

> [i]t would certainly be wise for the attorney approached by the press requesting statements concerning a high-profile case to temper all communication with the knowledge that the "general public" hearing or reading the results of counsel's interview might include jurors, the judge, and the Commission for Lawyer Discipline.

Peckham & Barloco, *supra*, at 21. Practical suggestions for accomplishing this balancing act also are available from another newspaper reporter-turned-attorney.[31] First, she suggests that, if the inquiry is about something contained within the public record, the lawyer should direct the reporter to the public record that gives his or her side of the story. Pillar, *supra*, at 44. One important caveat to this suggestion is to be certain, if the reporter is referred to a pleading in the public record, that the facts contained in the pleading are true. *Id*. Far trickier is discussion of merits-based issues, such as the reasons for seeking summary judgment or the propriety of a particular court ruling. In such circumstances, the lawyer must take care to ensure that nothing he or she says goes beyond the public record. *Id*.; *accord* TEX. Disciplinary R. Prof'l Conduct 3.07(c)(2).

For the governmental practitioner, this issue may be complicated by a somewhat unique question of strategy. If the release of public information has been or will be resisted under the Public Information Act,[32] provision of public records to substantiate claims made to the media may result in waiver of the permissive

[31] *See* Pillar, *supra*, at 42.

[32] *See* Tex. Gov't Code Ann. § 552.103(a) (Vernon 2004) (excepting from required disclosure information relating to litigation of civil or criminal nature to which state or political subdivision is party or to which officer or employee of state or political subdivision, based on employment, is party).

exception from required disclosure of information regarding litigation. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475 (Tex. App.―Dallas 1999, no pet.) (in determining waiver of litigation exception to disclosure, court reviews whether governmental litigant intentionally relinquished known right or intentionally acted in manner inconsistent with claiming that right).

In order to formulate a proper overall strategy, then, it may be helpful to anticipate that reporters will have a copy of the plaintiff's latest petition or complaint, or the defendant's motions in a criminal case, and will want to know the government's side of the story. Pillar, *supra*, at 44. Fielding these questions requires skillfully remaining within the strictures of Rule 3.07, while, if possible, expressing sympathy for the plaintiff when warranted.[33] *Id*. at 45. Similarly, in a criminal case, expression of sympathy for the victim may be salutary. But the temptation to vilify the defendant in response to the victim's suffering should be avoided. Finally, Ms. Pillar gives the following adept pointers for speaking with the media, which should always be prefaced by an explanation that the ethical rules prevent the lawyer from discussing the specifics of the case during trial:

1. the attorney will be glad to discuss the case after the trial;
2. the attorney will be glad to answer what questions he or she can now, such as procedural questions or matters of public record;
3. the attorney will be glad to give the reporter a business card so the reporter can get in touch with the attorney after the trial; and
4. the attorney looks forward to talking to the reporter in the future.

Id. at 44. Contextualizing these suggestions is the additional caveat that lawyers should not "talk down" to reporters, but should remember that they may not be familiar with legal terms such as "interrogatories, *Daubert*, *Kumho Tire*, *Robinson*, *Havner*, preserving error, discovery and motion *in limine*." *Id*. Explanation of those terms in plain English will go far toward enhancing the lawyer's credibility with the reporter, while remaining compliant with the trial publicity rules.

[33] Generic comments such as, "we're sorry about the plaintiff's injury, but my client did not cause it" may be appropriate in this scenario. Pillar, *supra*, at 45.

8. Legal Eagle or Gumshoe: Participation in Investigations

It may occasionally happen that a governmental entity will need to conduct an in-house investigation. As the need for an investigation materializes, one of the most important initial considerations will be the identity of the investigator. And while a lawyer may bring to an investigation a helpful measure of familiarity with the critical issues within the substantive and procedural law, a downside may arise, as well. This is particularly true if the lawyer under consideration as the investigator also would be a prime candidate to assume the role of defense counsel.

The most pressing concern would seem to be the rule regarding a lawyer who also may be a witness. Under the Disciplinary Rules, a lawyer may not accept or continue employment as an advocate in a contemplated or pending adjudicatory proceeding if (1) the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client; or (2) the lawyer believes that he or she will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure. *See* Tex. Disciplinary R. Prof'l Conduct 3.08(a), (b); *see also id.*, cmt. 9 (rule's two purposes are insuring that client's case is not compromised by representation by lawyer who could more effectively be witness for client and insuring that client is not burdened by counsel who may have to offer testimony substantially adverse to client's case).

Significantly, though, even if Rule 3.08(a) is violated, disqualification will not be appropriate unless the moving party presents evidence that the lawyer's testimony is "necessary" and goes to an "essential fact" of the nonmovant's case. *In re Hormachea*, No. 04-04-00581-CV, 2004 WL 2597447, at *2-3 (Tex. App.—San Antonio Nov. 17, 2004, orig. proceeding). Likewise, under Rule 3.08(b), disqualification is not appropriate unless that the testimony of the lawyer is "required" for the movant's case and that the testimony will be substantially adverse to the lawyer's client. *Id*. In general, there is a perception that Rule 3.08 may be used as a tactical device to deprive a party of the counsel of its choice. *See In re Sanders*, 153 S.W.3d 54, 58 (Tex. 2004). To avoid that prospect, the Texas Supreme Court has engrafted an additional requirement before disqualification under Rule 3.08 is proper. A party requesting disqualification under the rule must show not only a violation, but also that the opposing lawyer's dual roles as attorney and witness will cause the party actual prejudice. *Id*. at 57. While the issue should be resolved as early as possible in the litigation, and is not prevented by the fact that some speculation may be involved, the speculation cannot be

unsupported or dubious if disqualification is to be upheld. *In re Guerra*, 235 S.W.3d 392, 432 (Tex. App.—Corpus Christi 2007, orig. proceeding [mand. denied]).

So, how do these principles find their way into practice? One common example is fairly easy to understand. If a lawyer who represents a party is an affiant in support of a motion for summary judgment, he or she is a witness such that serving as an advocate in the case will violate Rule 3.08. *Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538, 544 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Aghili v. Banks*, 63 S.W.3d 812, 817-18 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). But there are exceptions that may apply here. Specifically and relevantly, a lawyer's role as a witness does not hinder his or her ability to serve as an advocate if the subject of the lawyer's proposed testimony relates to (1) an uncontested issue; (2) a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) the nature and value of legal services rendered in the case or (4) a matter on which the lawyer expects to testify if the lawyer has promptly notified opposing counsel and disqualification of the lawyer would work substantial hardship on the client. Tex. Disciplinary R. Prof'l Conduct 3.08(a)(1)-(3), (4).

Conversely, a lawyer's testimony generally will not implicate Rule 3.08 — at least to the extent disqualification may result — unless the lawyer's testimony will go to an "essential element" of the case. *See In re Bennett*, No. 14-06-00537-CV, 2006 WL 2403319, at 3 (Tex. App.—Houston [14th Dist.] Aug. 22, 2006, orig. proceeding) (mem. op.) (where lawyer's testimony did not go to essential element of divorce action, disqualification was improper); *compare Aghili*, 63 S.W.3d at 818 ("the practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence … nothing short of actual corruption can more surely discredit the profession.") (quoting *Warrilow v. Norrell*, 791 S.W.2d 515, 523 (Tex. App.—Corpus Christi 1989, writ denied)). What may be gleaned from these authorities is the idea that some thought must be given in advance to whether the product of the investigation, including the impressions of the investigator, will be necessary to support the county's defense in any litigation that may arise from the subject of the investigation. If so, it would seem prudent to secure the services of an investigator separate and apart from the lawyer who may defend the ensuing lawsuit. But if the investigating lawyer is a particularly adept writer, his or her services may not be entirely foreclosed. The prohibition of Rule 3.08 applies only to in-court functions; the rule is not violated if the lawyer-witness drafts pleadings, engages in settlement negotiations or assists with trial strategy, even after learning that he or she will probably be called as a witness at trial on behalf of the client. *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422-23 (Tex. 1996).

If a lawyer conducts the investigation, another potential trap lies in what is told to the witnesses in the case. This may be painfully true with regard to the target or the complainant. To set the stage, it should initially be acknowledged that lawyers shoulder obligations to preserve the confidences of their clients and avoid conflicts of interest as between the clients they represent. *See* Tex. Disciplinary R. Prof'l Conduct 1.05(b), 1.06(b). These rules can become pertinent if representations about what an investigation witness should do are made. For instance, where the subject of a municipal workplace investigation was asked to answer a series of questions under oath and the city attorney allegedly told the witness that he didn't need to hire a personal attorney because the city attorney would advise him regarding the investigation, the court found that a fact issue had been raised regarding whether an attorney-client relationship existed between the witness and the city attorney. *See Welch v. Milton*, 185 S.W.3d 586, 590-91, 600-01 (Tex. App.—Dallas 2006, pet. denied). Perhaps the simplest and most poignant lesson to be taken from the *Welch* case, then, is if a witness asks whether he or she needs a personal attorney, the answer should be "get one if you want one; I'm not your lawyer."

An investigation also may cast an attorney-investigator into the uncomfortable role of a "go-between" in the dispute between involved parties and the governmental entity's ruling body, as the business decision-maker for the entity. *See* Tex. Disciplinary R. Prof'l Conduct 1.12(a), cmt. 1 (noting representation of entity client may require lawyer to report to and accept direction from entity's duly authorized constituents; recognizing decisionmaking role of constituents for organization may cast lawyer into intermediary role). Problems can arise if those facts play out. The Disciplinary Rules expressly caution that:

> A lawyer shall not act as an intermediary between clients unless:
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

> (2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
> (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

Tex. Disciplinary R. Prof'l Conduct 1.07(a). In such a tenuous situation, it is critical that the lawyer's interests be factored out of the equation. *See id*., cmt. 2 ("a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed."). At the same time, subsection (2)'s use of the universal harbinger of objectiveness—"reasonably"—strongly indicates the need to step back and take a "30,000-foot" view of the situation. Personal motivations, including the potential to notch the "big case" and the prospect of copious fees, cannot supplant a dispassionate consideration of whether resolution of any anticipated dispute may be accomplished without going to court. Where the joint clients are already wary of or hostile with each other, the prospect that successful intermediation can be accomplished is poor. *See* Tex. Disciplinary R. Prof'l Conduct 1.07, cmt. 4. Likewise, where one client enjoys a long-standing relationship with the lawyer, but the other is fairly new, there may be a perception that the former may enjoy a measure of favoritism or, at the least, the important air of impartiality may be fouled. *See id*. at cmt. 7. In this situation, consequently, an outside viewpoint may be useful.[34] It should be remembered here, too, that as between commonly-represented clients, the general rule is the lawyer-client privilege does not attach, so joint clients should be advised that "intermediated" communications may not be protected if litigation between them ultimately ensues. *Id*., cmt. 6. Ultimately, if any of the conditions described by paragraph (a) of the rule is no longer satisfied, withdrawal from all representation in the matter is required. Tex. Disciplinary R. Prof'l Conduct 1.07(c). If the lawyer is precluded from acting as an intermediary under Rule 1.07, the lawyer's entire office is similarly barred from doing so. *Id*. at (e).

Finally, it should be noted that if any of the involved parties already is represented by counsel regarding the subject of the investigation, contact with that person about the investigation may only proceed with the consent of the person's lawyer unless the contact is otherwise authorized by law. Tex. Disciplinary R. Prof'l Conduct 4.02(a). The same rule applies to indirect contact with a represented party. *See id.* at (b). Likewise, bluffing by coloring the truth also is frowned upon by the rules. See Tex. Disciplinary R. Prof'l Conduct 4.01 (in course of representing client, lawyer shall not make false statement of material fact or law to third person or fail to disclose material fact to third person when disclosure is necessary to avoid making lawyer party to criminal act or knowingly assisting in fraudulent act perpetrated by client). Thus, the best practice here for a lawyer-investigator is to be straightforward about the subject matter and purpose of the investigation and how its results may be used.

[34] Of course, if outside counsel is consulted, informed consent from the affected clients would appear to be necessary. *See* Tex. Disciplinary R. Prof'l Conduct 1.07, cmt. 8. The daunting prospect of obtaining such multi-faceted consent would, of course, serve Rule 1.07's general admonition to avoid intermediation except under the most amiable of circumstances.