Appellate Ethics in Reel/Real Life

Kirsten M. Castañeda
Alexander Dubose Jefferson & Townsend LLP
Dallas Office

Dallas Bar Association Appellate Section
December 17, 2015

ACKNOWLEDGMENTS

This paper is adapted from a paper presented at the 2015 ABA/SMU Appellate Judges Education Institute in Washington, D.C. Ideas for the paper were contributed by the moderator, the Honorable James E. Lockemy (South Carolina Court of Appeals), and the other panelists, Professor Paul Bergman (UCLA School of Law) and Mark A. Kressel (Horvitz & Levy LLP). To those interested in additional material on appellate ethics in the movies, I highly recommend Professor Bergman's book *Reel Justice: The Courtroom Goes to the Movies*, co-authored by Michael Asimow.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Cases

Statutes, Rules, and Standards

Ethics Opinions

Treatises and Law Reviews

Other Authorities

I. INTRODUCTION

In real life, ethical issues facing appellate lawyers seldom arise like Debbie Reynolds jumping out of the cake in *Singin' in the Rain.* More often, ethical issues sneak up on an appellate practitioner, often concealed in the guise of a seemingly innocuous task. Explanations of background facts and circumstances necessary to set the stage for a discussion of specific ethical dilemmas could require hours, but a picture—worth 10,000 words—provides immediate context. And as a recent article in the *ABA Journal* observed, "From Sophocles to Shakespeare, Dostoyevsky to Dickens, John Grisham to Scott Turow, the world's great poets and dramatists, novelists and film directors have been enamored of the legal system for its plotlines and morality tales." Thane Rosenbaum, *100 Years of Law in the Movies*, ABA JOURNAL at 36 (Aug. 2015).

This paper will discuss a variety of ethical questions appellate lawyers face in the pursuit of justice. In the presentation, pairing film clips with the rules of professional responsibility not only enhances the impact of our discussion, but also, in the words of Professor Paul Bergman, reflects the power of popular legal culture to reflect and reinforce viewers' attitudes about law, lawyers and the legal system. In an age in which the public regularly questions whether lawyers uphold their oath to "honestly demean [themselves] in the practice of law," understanding both our ethical obligations and the public's perception of our ethical obligations is essential to our ongoing efforts to preserve the integrity of our system of law.

II. ETHICS IN ORAL ARGUMENT

A. Lawyers' duties of candor to the court

Texas Disciplinary Rule of Professional Conduct ("Rule") 3.03 sets forth a lawyer's duty of candor toward the tribunal. Among them are the following:

- A lawyer shall not knowingly make a false statement of fact or law to a tribunal.
- A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1), (4), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9).

Rule 3.03(a)(1) differs from ABA Model Rule of Professional Conduct 3.3(a)(1), which prohibits a lawyers from knowingly making a false statement of fact or law to a tribunal *or* failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer. *Compare* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1) *with* ABA MODEL R. PROF. CONDUCT 3.3(a)(1). However, the Standards of Appellate Conduct admonish lawyers that they "should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities." TEX. STDS. APP. CONDUCT, *Lawyers' Duties to the Court* ¶3. Also be aware of Rule 3.03(b), which requires that, if a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(b). If these efforts are unsuccessful, the lawyers is required to take reasonable remedial measures, including disclosure of the true facts. *Id.* Although this rule is framed in the context of "plac[ing] testimony or other material into evidence" (*id.* cmt. 7), consider whether the rule might apply equally to statements of fact (*i.e.*, representations of the evidence contained in the record) in material support of an argument on appeal.

The duties described in Rule 3.03 are aimed at avoiding conduct that undermines the integrity of the adjudicative process. *Cf.* ABA MODEL R. PROF. CONDUCT 3.3, cmt. 2. The lawyer's duty of candor to the tribunal limits the lawyer's performance of his/her duty to present the client's case with persuasive force while maintaining the client's confidences. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 1.

B. Preparing for oral argument

1. Providing competent representation

Whereas ABA Model Rule of Professional Conduct 1.1 requires a lawyer to provide competent representation to the client, the Texas rule is phrased from the opposite angle. *Compare* ABA MODEL R. PROF. CONDUCT 1.1. *with* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a). Rule 1.01(a) prohibits a lawyer from accepting or continuing employment in a legal matter that the lawyer knows or should know is beyond his/her competence. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a). Two exceptions to this rule allow a lawyer to accept or continue such representation with competent co-counsel or in an emergency situation. *Id.* Although Rule 1.01(a) is phrased in the negative, comment 6 affirmatively indicates that, having accepted employment, a lawyer should act with competence, commitment, and dedication to the interest of the client. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 6.

"Competent" representation requires possession of, or the ability to timely acquire, the legal knowledge, skill, and training reasonably necessary for the

representation of the client. TEX. DISCIPLINARY R. PROF'L CONDUCT, *Terminology*, "Competent." The comments elaborate that competent representation contemplates additional elements, such as reasonable thoroughness in the study and analysis of the law and facts. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 1. Competence is measured by what is reasonably necessary for the representation, not by artificial constraints placed on a budget by unreasonable or uneducated client expectations. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT, *Terminology*, "Competent."

Although a lawyer may take steps to provide representation as efficiently as possible, there are some tasks that cannot be eliminated in the name of cost savings. Ultimately, if a client insists on constraints that would result in violation of the rules of professional conduct, the lawyer will be required to withdraw. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(a)(1). Alternatively, if the client's constraints would result in an unreasonable financial burden on the lawyer or would render the representation unreasonably difficult, the lawyer may be faced with the question of whether to withdraw voluntarily. *Id.* 1.15(b)(4), (6). To avoid these situations, it behooves an appellate lawyer to discuss and define with a client at the outset of representation the expected effort—and accompanying expense—necessary to provide competent representation at the various stages of the appeal at hand.

> ***Tip:*** Discussions with the client about the scope of representation also present a perfect opportunity to educate the client about applicable standards of conduct. In addition to applicable rules of professional responsibility, other standards may set forth the type of conduct expected of advocates by the courts. For instance, as indicated above, Texas appellate lawyers are guided by the Texas Lawyers' Creed and the Texas Standards of Appellate Conduct. One example of the Standards is that counsel "will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel." TEX. STDS. APP. CONDUCT, *Lawyers' Duties to Lawyers* ¶2. Educating the client that certain requests for extensions of time are routinely requested by lawyers and granted by appellate courts, and that the standards governing your conduct prohibit you from unreasonably withholding consent, can forestall situations that might place you in the unenviable position between the Standards' requirements and a client's demands. *See also id., Lawyers' Duties to Clients* ¶5 (requiring counsel to "explain the appellate process to their clients"), ¶9 (requiring counsel to "advise their clients of proper behavior, including that civility and courtesy are expected").

2. Duties when co-counsel or another lawyer within the firm presents oral argument

In preparing for oral argument, most appellate lawyers are familiar with the basic "best practices." A thorough review of the record and relevant case law, research to locate any updated case law that may have issued between the briefing and argument, and formulation of answers to potential questions from the bench are all part of our repertoire. However, a lawyer's professional duties in preparing for oral argument do not end at his/her own office door.

When an appellate lawyer is not presenting oral argument, but has direct supervisory authority over the lawyer who is, the supervising lawyer is subject to discipline for the arguing lawyer's violation of the rules of professional conduct if the supervising lawyer: (1) orders, encourages, or knowingly permits the conduct involved; or (2) with knowledge of the arguing lawyer's violation, knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the arguing lawyer's violation.[1] TEX. DISCIPLINARY R. PROF'L CONDUCT 5.01. The latter standard also applies to any lawyer who is a partner in the arguing lawyer's law firm. *Id.* 5.01(b).

The Texas rules do not include a counterpart to ABA Model Rule 5.1(a), which provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the professional conduct rules. ABA MODEL R. PROF. CONDUCT 5.1(a). The Texas rules also do not mirror ABA Model Rule 5.1(b), providing that a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the professional conduct rules. However, comment 6 to Rule 5.01 provides as follows:

[1] Yes, there are two "knowledge" elements in Rule 5.01(b).

> Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

TEX. DISCIPLINARY R. PROF'L CONDUCT 5.01 cmt. 6. The distinction between professional conduct requirements and "moral" obligations may not extend to civil or criminal liability—the comments note that such liability presents "a question of law beyond the scope of these rules." *Id.* cmt. 5.

Thus, in a given appeal, assisting a less experienced lawyer (or a lawyer less experienced in the appellate arena) in preparing for oral argument may be not only advisable, but also ethically or morally required. Likewise, an appellate lawyer who is a partner or who possesses comparable managerial authority may want to examine whether his/her firm has established mechanisms by which less experienced lawyers can learn best appellate practices and obtain assistance from more experienced lawyers at the firm when needed.

3. Use of the Internet in preparing for argument

Questions about judges' use of the Internet in deciding cases lead to questions about whether lawyers should be permitted to use and rely upon the same types of resources in presenting their cases. On the judicial side, the ABA Model Code of Judicial Conduct's "ex parte communications" rule contains the following prohibition: "A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed." ABA MODEL CODE JUDICIAL CONDUCT 2.9(C). This prohibition extends to information available in all forms, including electronic. *Id.* cmt. 6. However, using "judicial notice" as a yardstick measures the propriety of research by theoretically muddled standards in an emerging area of evidence law. *See* Beth Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008). This ambiguity creates a grey area that leaves much to an individual's interpretation. To the extent that a judge or staff attorney is allowed to conduct independent research of any issue, it is possible a lawyer should be allowed to point out the same information from permissible judicial research sources.

As muddy as the model standard may be, the Texas Code of Judicial Conduct does not contain a prohibition similar to the Model Code. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. B. However, in seeking answers about facts outside the record, the judge's ethical obligations may be implicated. For instance, a judge must uphold and apply the law, including any case law and procedural rules limiting appellate review to the scope of the record. *See* TEX. CODE JUD. CONDUCT, Canon 2(A), 3(B)(2). Furthermore, a judge's responsibility to perform all judicial duties without bias (*id.*, Canon 3(B)(5)) would seem to prohibit a judge from investigating outside the record in one appeal, while not taking the time to do so in other appeals. A necessary component of fairness is the consistent application of procedural rules to all litigants. *See, e.g.*, *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006); *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 14 (1st Cir. 1996). And although satisfying one's curiosity might seem to be separable from deciding the case, it is incredibly difficult for any human being to exclude a fact from his/her thinking after that fact has been disclosed.

In studying the limits on a decisionmaker's ability to disregard disclosed facts in court proceedings, a researcher has posited that one's ability is limited by one's sense of what is just. Joel D. Lieberman, Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCH., PUB. POLICY, & LAW 677, 701 (Sept. 2000). When a person believes it would be just to consider certain information, but consideration is prohibited by an external source (*e.g.*, a trial judge's limiting instruction, or a judicial code's professional responsibility rule), the clash between the two forces hampers a person's ability to disregard the information. *Id.* Another researcher suggests that the more "emotional" a particular fact is, the more difficult it is for a decisionmaker to suppress consideration of the fact. *Id.* These possible limits on the ability to exclude a known fact from the decisionmaking process have nothing to do with a judge's willpower or character. They have to do with the fact that a judge is human.

C. Asking and fielding questions from the bench

Lawyers regularly hear from appellate judges that "I wasn't at the trial" or "I didn't come on board until the appeal" is not an acceptable answer to a question at oral argument. Nonetheless, as our film clip shows, sometimes the best answer to a question is (without shifting responsibility to trial counsel) "I don't know." Although making a guess as to law or fact might be tempting as a face-saving option, it carries a substantial

risk that the lawyer will find it advisable to file a post-submission paper correcting what he/she learns, upon return to the office, was a false statement of fact or law made to the tribunal at oral argument. *Cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(b) & cmt. 14.

On the flip side, a thorough knowledge of all the surrounding facts—including facts *outside* the record—can raise tricky issues for an appellate lawyer. Ordinarily, appellate review is limited to matters contained in the record. *See, e.g.*, *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n. 16, 90 S.Ct. 1598, 1608 n. 16 (1970). Appellate arguments based on demonstrative trial exhibits that were never made part of the record, off-the-record bench conferences, or facts that developed after the trial stage implications the prohibition against stating or alluding to any matter that will not be supported by admissible evidence. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(2). To the extent that Texas Rule of Appellate Procedure 34 defines the scope of the appellate record (*see, e.g.*, TEX. R. APP. P. 34.1), attempts to work extra-record facts into your presentation clash with the prohibition not to "knowingly disobey . . . an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience." TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d).

But what if a judge on the panel asks a question whose honest answer lies outside the record, or asks directly about extra-record facts?[2] To avoid misleading the tribunal, the best initial response is one alerting the court that the answer is outside the record. This information gives the judge the opportunity to withdraw the question. If the question is not withdrawn, however, this author was unable to locate a portion of the professional conduct rules that would prohibit the advocate from providing the answer when the tribunal has posed the question.

D. Having trial counsel at table

Another consideration with regard to oral argument is whether to have trial counsel at the table. One question to ask in making this decision is whether trial counsel has entered an appearance in the appellate court. Another question is whether the trial lawyer understands that sitting at counsel table does not enable him/her to respond directly to the tribunal. And although trial counsel may be able to provide valuable assistance in locating a page in the record or passing a note reminding the appellate lawyer of a certain fact or argument, the reality is that the pace of oral argument is too fast for meaningful participation by lawyers other than the one presenting argument.

Thus, having trial counsel at one's side during oral argument cannot substitute for the thorough preparation necessary to competently represent the client. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01. Furthermore, the appellate attorney may be considered to have direct supervisory authority over trial counsel at oral argument. This relationship before the tribunal may render the supervising lawyer liable for professional conduct violations committed by the arguing lawyer under certain circumstances. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.01.

E. The perils of a known or unknown panel

In Texas state appellate courts and the Fifth Circuit, the panel of appellate judges that will hear oral argument is revealed prior to the day argument is scheduled. An unintended consequence of thoroughly preparing to face the assigned judges is the realization that the assigned judges are quite intimidating. Even if a lawyer has never appeared before an appellate judge, a formidable portrait can be sketched by collecting information from colleagues, court biographies, media articles, CLE papers, and the judge's own opinions. This is when an appellate lawyer must draw upon "skill" to rise above the intimidation factor and present a zealous argument on his/her client's behalf. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT *Terminology*, "Competence" & 1.01 cmt. 6.

When representing a client in another jurisdiction, be aware that some courts do not disclose the identity of the panel until the lawyers arrive at the courthouse for oral argument. In order to provide the "competent representation" required by Rule 1.01 (which is embodied in ABA Model Rule 1.1, and thus appears in many states' professional conduct rules), it is imperative for the lawyer to be familiar with the applicable procedures for constituting a panel, disqualification, recusal, and objections to visiting judges. The lawyer discovering a panel's makeup immediately before argument will not have time to research these items before springing into action. (Indeed, a lawyer facing a last-minute recusal or substitution in a Texas appellate court also wouldn't have time to research these items before deciding how to proceed.)

[2] For possible limits imposed by the Code on a judge's ability to ask questions beyond the scope of the record on appeal, see Section II(B)(3), *supra*, discussing limits on extra-record research.

In preparing a toolbox for argument, an appellate lawyer should ask, *e.g.*:

- How and when must the various objections to the panel be lodged?
- How many judges constitute a panel in this court? May the case be submitted to a panel consisting of fewer-than-usual judges and, if so, under what conditions?
- Do the same procedures govern disqualifications and recusals in this jurisdiction? What grounds require disqualification, and what grounds support recusal?
- What are the consequences of a motion to disqualify or a motion to recuse (*i.e.*, if the challenged judge does not agree, who decides the issue, and how quickly does that happen)? What are the consequences if an appellate judge is disqualified or recused (*e.g.*, proceed with the remaining judges on the panel, appoint a replacement to the panel)?
- What types of judges are qualified to sit as visiting judges on this court?
- By what procedure are visiting judges assigned in this court? How do you obtain information about the procedure by which the judge on your panel was assigned?
- Does the right to object to a visiting judge differ depending on whether the judge retired or left office in some other way (*e.g.*, lost a contested election, lost a retention election)?

Texas Rule of Appellate Procedure 16 addresses disqualification or recusal of appellate judges. TEX. R. APP. P. 16; *see also* TEX. R. CIV. P. 18a, 18b. In particular, Rule 16.3 sets forth the appellate recusal procedure. TEX. R. APP. P. 16.3. The standards for assignment of (and objections to) visiting judges are set forth in Chapter 74 of the Texas Government Code. *See* TEX. GOV'T CODE §§74.052-.062.

In a jurisdiction in which the panel will not be revealed until the day of argument, consider whether it is advisable to task another lawyer to handle this aspect of the argument. Just as a trial lawyer is better able to prepare for closing arguments when an appellate lawyer handles jury charge issues, an appellate lawyer may be better able to present oral argument when another appellate lawyer handles panel objections. Even if applicable procedures require the lawyer presenting argument also to present any panel objections, having another lawyer on hand to analyze the issues and help formulate the objections may be necessary to provide "competent representation" in a particular case.

III. ETHICALLY HANDLING ADVERSE AUTHORITY

A lawyer must not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4). The Standards of Appellate Conduct encourage lawyers more broadly to "advise the Court of controlling legal authorities, including those adverse to their position," and admonish lawyers not to "cite authority that has been reversed, overruled, or restricted without informing the court of those limitations." TEX. STDS. APP. CONDUCT, *Lawyers' Duties to the Court* ¶4. Additional duties may exist through procedural rules. For example, Texas Rule of Civil Procedure 13 and Federal Rule of Civil Procedure 11 contain similar provisions about the effect of a lawyer's signature on a filing, *i.e.*, that to the best of his/her knowledge, information, and belief "formed after reasonable inquiry," the filing is not groundless and brought in bad faith or for the purpose of harassment. *See* TEX. R. CIV. P. 13; FED. R. CIV. P. 11. Thus, in addition to the "knowing" standard employed by the professional responsibility rule, a "reasonable inquiry" standard may govern whether a failure to disclose adverse authority is sanctionable. *See, e.g.*, Mark S. Cady, *Curbing Litigation Abuse & Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 495-98 (1986).

"Controlling jurisdiction" and "directly adverse" serve as two boundaries on the professional responsibility obligation. When determining whether an authority is "controlling," look beyond the parameters of the court in which the appeal is pending. For example, on a question about the correct interpretation of a federal statute, adverse federal authority may fall within the scope of disclosure even if the appeal is pending in state court. Or, in a diversity case, adverse state court authority can be binding on a federal court. Consider also the relationship between multiple intermediate appellate courts in one forum. They are supposed to apply (and be bound by) one, unified law, even if sometimes they disagree on the proper interpretation.

"Directly adverse" authority goes beyond the classic "white horse" case.[3] In determining whether a

[3] According to Bryan A. Garner, *A Dictionary of Modern Legal Usage* 577 (1987), the term *white horse case* (along with the terms *horse case, gray mule case, goose case, spotted pony case,* and *pony case*) means a reported case with virtually identical facts, which therefore should determine the disposition of the instant

particular case should be disclosed, an appellate lawyer might use this practical measure: "the more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it." Geoffrey Hazard, W. William Hodes, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.3:206 (2d ed. 1990). Or one might ask: "If I don't disclose this authority and the justices later find out about it, will they believe they have been misled?" Wayne Schiess, *Ethical Legal Writing*, 21 REV. LITIG. 527, 532 (2002).

The duty to disclose adverse authority does not prohibit appellate lawyers from arguing that earlier precedent should be overturned. *See, e.g.*, TEX. STDS. APP. CONDUCT, *Lawyers' Duties to the Court* ¶1 (discouraging lawyers from pursuing an appellate remedy unless counsel believes in good faith that, among other things, there is a reasonable basis for the extension, modification, or reversal of existing law) & ¶4 (allowing counsel to cite authority that has been reversed, overruled, or restricted if he/she informs the court of those limitations); *see, e.g.*, *Watts v. Oliver*, 396 S.W.3d 124, 130-31 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (addressing argument in which appellant acknowledged lack of on-point authority and declining to overturn contrary precedent); *Walker v. State*, 579 So.2d 348, 349 n.1 (Fla. 1st DCA 1991) (noting court's appreciation for counsel's compliance with professional responsibility rules in acknowledging directly adverse authority and arguing that earlier precedent should be revisited and overturned). Nor does it prohibit an appellate lawyer from disclosing arguably adverse authority and explaining why it should not apply. However, in making these sorts of arguments, the lawyer should disclose clearly that the adverse authority exists. Stewart Howard, *The Duty to Cite Adverse Authority*, 16 J. Legal Prof. 295, 299 (1991).

Even when disclosure of adverse authority is not technically required, a skilled appellate lawyer will ask him/herself whether dealing head-on with a tough legal issue yields strategic advantage. As Jack Ryan advised the President on the question of how to deal with media questions about his relationship with a man discovered to have drug cartel connections: "If a reporter asked if you and Hardin were friends, I'd say 'good friends.' If they asked if you were good friends, I'd say 'lifelong friends.' Give them no place to go, nothing to report. No story." Tom Clancy (novel), Donald Stewart, Steven Zaillian, John Milius (screenplay), *Clear and Present Danger* (1994). Avoiding a difficult legal question merely reinforces the perception that it creates a problem for which the advocate has no good answer.

IV. ETHICAL RESPONSES TO TRIAL COUNSEL MALPRACTICE

The "competent representation" required by Rule 1.01 does not necessarily encompass any duty to alert the client to trial counsel malpractice. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 & cmt. 6.. In an area of the law in which ineffective assistance of counsel provides a ground for reversal, the appellate lawyer's job necessarily may involve identification and disclosure of trial counsel malpractice. Otherwise, the work performed on appeal may be much different than the analysis required to determine whether trial counsel committed malpractice. David H. Tennant, Lauren M. Michals, *Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel*, 20 PROF. LAW. 3, 4-5 (2010). Nevertheless, when the scope of representation is defined broadly in an engagement letter, and the appellate lawyer identifies conduct that clearly or reasonably appears to constitute malpractice, Rules 1.01 through 1.03 could impose a duty to report that information to the client.

To the extent that trial counsel malpractice forecloses an argument that otherwise might be available on appeal, the comments advise lawyers that a "client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 1. To the extent that a fairly neutral discussion under this rule leads the client to ask whether trial counsel's acts or omissions might constitute malpractice, an appellate lawyer must "promptly comply with reasonable requests for information" and "explain a matter to the extent reasonably necessary to permit the client to make

---

case. At least one source reports that this term was coined in Dallas. According to what is probably an apocryphal story, around the turn of the century a law firm had a case in which a white horse owned by the client's taxi service reared in the street, causing an elderly woman to fall and injure herself. The partner handling the case asked a young associate to find a case on point. The associate came back several hours later with a case involving an elderly lady who had fallen in the street after a taxi company's black horse had reared in front of her. When the associate took this case to the partner, the partner said, "Nice try, son. Now, go find me a white horse case." *Hilland v. Arnold*, 856 S.W.2d 240, 242 n.1 (Tex. App.—Texarkana 1993, no writ).

informed decisions regarding the representation." *Id.* 1.03(a), (b).

It is possible to exclude the identification of trial counsel malpractice from the scope of representation. Discussing the matter with the client, and providing in the engagement letter that the scope of representation in the appeal does not include advice regarding legal malpractice claims against other lawyers, could resolve some of the questions raised by Rules 1.1 and 1.4. For example:

> Because our experience is limited to handling appellate matters, [firm] will not, and expressly disclaims any duty to, provide the Client with advice regarding legal-malpractice claims against other lawyers currently representing Client . . . The Client understands that, unless otherwise agreed in writing, [firm] is not undertaking any duty to advise the Client about these matters, and the client should retain separate counsel to address these matters.

Mixing Business with Ethics, 20 PROF. LAW. at 6.

The adequacy of this carve-out should be revisited if the trial counsel at issue is a regular referral source for the appellate counsel. In such a situation, Rule 1.7 may come into play. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2). Moreover, the comments to Rule 1.03 instruct that, with regard to information falling within the rules' scope of disclosure, a lawyer may not withhold information to serve the lawyer's own interest or convenience. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 4. In a "chicken and egg" way, carving out legal malpractice from the representation to avoid a possible conflict may not absolve the appellate lawyer from disclosing the potential conflict. The relationship between the appellate and trial lawyers (*i.e.*, the appellate lawyer's personal interest) already exists, even if an actual conflict does not. Thus, in order to represent a client under these circumstances, Rule 1.06(c)(2) may require the appellate lawyer to disclose fully the nature and extent of his/her relationship with the trial counsel and the potential for conflict, and to obtain the client's waiver of the conflict and consent to the representation. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(2) & cmts. 4-5.

Just as there is a distinction between the appellate lawyer's analysis and the analysis performed by a lawyer in assessing the viability of a malpractice claim, there is a difference between the judicial holdings necessary to find waiver of an argument and comments on the adequacy of representation provided by trial counsel. An objection may be waived as part of a valid trial strategy. An issue waived in the trial court may be immaterial if, in winnowing down the issues for appeal, it never would have made the cut. *Cf. Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In other cases, trial counsel malpractice may be clear from the face of the record.

Unless such malpractice is part of an issue on appeal, it is questionable whether a discussion or comment should form any part of the court's opinion. For instance, where a court, by rule or operating procedure, limits its opinions to address only the issues raised and necessary to final disposition of the appeal, trial counsel malpractice may lie outside the opinion's scope. *See, e.g.*, TEX. R. APP. P. 47.1 (providing that a court of appeals "must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal"). However, to the extent the appellate judge knows the trial lawyer has committed a violation of the professional conduct rules that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, the judge is obligated to inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action. TEX. CODE JUD. CONDUCT, Canon 3(D)(2). Alternatively, if the appellate judge receives information clearly establishing that a lawyer has committed a violation of the professional conduct rules, the judge "should take appropriate action." *Id.*

V. ETHICAL RELATIONSHIPS BETWEEN LAWYERS AND JUDGES

In conducting their relationships with judges, wise appellate lawyers will avoid placing judges in awkward situations by staying up-to-date on the applicable judicial conduct rules. The Texas Code of Judicial Conduct recognizes and facilitates a relationship between bench and bar. Judges generally are permitted to take part in bar association activities. TEX. CODE JUD. CONDUCT, Canon 4(B). Judges also generally may accept "ordinary social hospitality" from lawyers. *Id.* Canon 4(D)(4)(b) This category generally includes dinners and receptions at which the sponsoring bar association pays the judge's expenses, as well as a law firm's holiday party, open house, or summer picnic. Dana Ann Remus, *Just Conduct Regulating Bench-Bar Relationships*, 30 YALE L. & POLICY REV. 123, 142-43 (2011).

Online friendships may or may not be permitted in any given jurisdiction. At least one Texas court of appeals has held that the "general premise that judges are not prohibited from using social media is consistent with the current standards suggested by the American Bar

Association, as well as recent articles addressing the topic." *Youkers v. State*, 400 S.W.3d 200, 205 (Tex. App.—Dallas 2013, pet. ref'd). The court explained:

> Allowing judges to use Facebook and other social media is also consistent with the premise that judges do not "forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would ... lessen the effectiveness of the judicial officer." Comm. on Jud. Ethics, State Bar of Tex., Op. 39 (1978). Social websites are one way judges can remain active in the community. For example, the ABA has stated, "[s]ocial interactions of all kinds, including [the use of social media websites], can ... prevent [judges] from being thought of as isolated or out of touch." ABA Op. 462. Texas also differs from many states because judges in Texas are elected officials, and the internet and social media websites have become campaign tools to raise funds and to provide information about candidates. *Id.; see also* Criss, *supra,* at 18 ("Few judicial campaigns can realistically afford to refrain from using social media to deliver their message to the voting public. Social media can be a very effective and inexpensive method to deliver campaign messages to the voting public").
>
> While the use of social media websites such as Facebook "can benefit judges in both their personal and professional lives," the use presents concerns unique to the role of the judiciary in our justice system. ABA Op. 462. An independent and honorable judiciary is indispensable to justice in our society. *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994, no appeal). Thus, judges must be mindful of their responsibilities under applicable judicial codes of conduct. *See* ABA Op. 462; TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2005).

Id. After analyzing the various applicable canons of judicial conduct, the Dallas Court of Appeals concluded that "[m]erely designating someone as a 'friend' on Facebook 'does not show the degree or intensity of a judge's relationship with a person.'" *Id.* at 206. Accordingly, the designation, standing alone, does not support a finding of judicial bias that would have afforded the defendant a new trial. *Id.*

It is unclear what impact interactions beyond a "mere designation" would have on the analysis. Even when a jurisdiction allows online friendships, judges are urged to exercise caution. *E.g.*, *id.* at 205; Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 5 (2010); Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7, at 1 (2010). *See also* Brian Hull, *Why Can't We Be 'Friends'? A Call for a Less Stringent Policy for Judges Using Online Social Networking*, 63 Hastings L.J. 595 (2012). And although *Youkers* indicates that the mere "friend" designation does not violate canons of judicial conduct, judges may want to consider ceasing contact (*e.g.*, unfriending or otherwise blocking the lawyer) on a social networking site when a social media connection actually makes an appearance before the judge. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 10-11 (2010).

> ***Tip***: Be aware that local interpretation of the judicial conduct canons may regulate activity beyond the judge's own acts and statements. For example, California judges have an affirmative obligation to check their social media accounts and remove, repudiate, or hide comments made by others that may be distasteful or offensive. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 4-5 (2010).

As with a determination of whether an in-person friendship casts doubt on a judge's ability to be partial, the question of whether an online friendship violates judicial conduct canons involves consideration of multiple factors. *Cf. Youkers*, 400 S.W.3d at 205-06. For example, the California Judicial Ethics Committee considered three main factors to determine whether a judge "interacting with an attorney on a social networking site would create the impression the attorney is in a special position to influence the judge and cast doubt on the judge's ability to be impartial:"

- Whether the social networking site and/or judge's page are used for primarily personal reasons or professional purposes;
- Whether the number of connections is small and select or large and generally open; and
- Whether the lawyer appears frequently before the judge.

Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 8 (2010).

VI. CONCLUSION

As the inimitable Stan Lee has taught us, "With great power comes great responsibility." *E.g.*, Stan Lee, David Koepp, *Spider-Man* (2002); Stan Lee (writer), Steve Ditko (artist), *Amazing Fantasy* No. 15 (Aug.

1962). The independence of the judicial branch carries with it the responsibility to regulate ourselves. Those lawyers and judges who disregard the rules of professional responsibility and codes of judicial conduct chip away at the public confidence that supports our independence. And our independence, in turn, provides an invaluable service to the public. As John Rutledge, Jr., explained to his colleagues in Congress over 200 years ago:

> The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe . . . .

11 Annals of Cong. 739-40 (1802).