ARTICLE

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Order in the Court!: Ethical Conduct in a Criminal Trial Under the Texas Disciplinary Rules

Abstract. In a criminal trial, the most common ethical duties implicated are the duty of candor to the tribunal, maintaining the impartiality and integrity of the tribunal, and the fairness of the proceeding as a whole. Under the Texas Disciplinary Rules of Professional Conduct, these duties are broken down in Rules 3.03, 3.04, 3.05, and 3.06. Attorneys are charged with the responsibility of fully understanding each of these duties in order to interact accordingly with the tribunal. This Article will examine, in detail, each of these rules individually. Additionally, the Article will analyze how each of the rules overlap and coincide with the Texas Judicial Code of Conduct, criminal statutes, specific obligations of a prosecutor, and other ethical rules.

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I. INTRODUCTION

Under the Texas Disciplinary Rules of Professional Conduct (TDRPC), a criminal lawyer's ethical obligations to the judge and jury are covered by a number of broad, interrelated responsibilities: (1) the duty of fairness in an adjudicatory proceeding;[1] (2) the duty of candor to the tribunal;[2] (3) the duty of maintaining the impartiality of the tribunal;[3] and (4) the duty of maintaining the integrity of the jury system.[4] The duty of fairness in an adjudicatory proceeding may essentially be regarded as the responsibility owed to the trial judge and jury, or a trial judge if acting as fact finder, when in the "process of resolving a particular dispute or controversy."[5] In contrast, the duty of candor and the duty of maintaining the impartiality of the tribunal are largely, but not entirely, owed to the judge.[6] Finally, the duty of maintaining the integrity of the jury system consists of responsibilities owed to individual veniremembers and jurors.[7] These various obligations often overlap because of the broad definition of tribunal used in the TDRPC and the overall nature of the judicial system.[8] Even though the four duties taken together may be characterized as trial ethics, other ethical rules—such as a lawyer's duties to third parties—also come into play during a trial.[9]

This Article will focus on the most common ethical duties encountered during a criminal trial. Part I separately examines each of the responsibilities that make up a lawyer's duty of fairness in the adjudicatory process. Part II analyzes the duty of candor toward the tribunal. Part III considers the special duties owed to judges outside the context of direct

1. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

2. *Id.* R. 3.03.

3. *Id.* R. 3.05.

4. *Id.* R. 3.06.

5. *Id.* terminology. *See generally id.* R. 3.04 (establishing the concept of fairness in adjudicatory proceedings).

6. *See id.* R. 3.03 (addressing appropriate candor directed toward the court); *id.* R. 3.05 (explaining the expectations for preserving impartiality of the tribunal); *id.* terminology (defining tribunal as including judges but not juries).

7. *See id.* R. 3.06 (limiting lawyer conduct toward jurors and veniremembers in order to maintain the integrity of the judicial process).

8. *See id.* terminology (defining tribunal as "any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy"); *see also id.* R. 3.03 (referring to the tribunal when establishing lawyers' obligations of candor); *id.* R. 3.04 (advancing fairness "in representing a client before a tribunal"); *id.* R. 3.05 (requiring impartiality in a lawyer's dealings with the tribunal).

9. *See, e.g.*, *id.* R. 4.01 (providing a duty not to knowingly make "false statement of material fact or law to a third person").

trial proceedings. Finally, Part IV evaluates a lawyer's responsibilities toward jurors and potential jurors.[10]

II. THE ETHICAL DUTIES OF "FAIRNESS IN ADJUDICATORY PROCEEDINGS": RULE 3.04

Rule 3.04 of the TDRPC outlines the duty of fairness in adjudicatory proceedings.[11] The Rule comprises five duties employed in the litigation process: (1) not to "unlawfully obstruct another party's access to evidence"; (2) not to falsify evidence; (3) to practice with decorum before the court; (4) to obey rules and orders of the court; and (5) not to request a third party to refrain from providing information to opposing counsel.[12]

The obligations under the duty of fairness are based upon the premise that, although the "procedure of the adversary system contemplates that the evidence in a case is to be [marshaled] competitively by the contending parties," prohibitions against abusive and disorderly tactics are the only way to secure fair competition.[13] The goal of a fair trial is so paramount that criminal penalties exist to punish conduct that runs afoul of the Rules.[14]

A. *The Duty Not to Obstruct Access to Evidence*

Texas Disciplinary Rule 3.04(a) states:

> A lawyer shall not . . . unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy[,] or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.[15]

10. For further examination of the duties to judges and jurors outside the context of trial proceedings, see Edward L. Wilkinson, *Communications with Judges, Jurors, and Witnesses Outside the Courtroom*, *in* DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY 127 (2d ed. 2007) and EDWARD L. WILKINSON, LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE 225–54 (2006 ed.).

11. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04.

12. *Id.*

13. *Id.* R. 3.04 cmt. 1.

14. *See id.* R. 3.04 cmt. 2 (expounding on the offenses associated with impairing the availability of evidence); *see also* 18 U.S.C. § 1506 (2006) (providing criminal penalties for the theft or modification of any record or process); TEX. PENAL CODE ANN. § 37.09(a)(1) (West Supp. 2011) (creating an offense for tampering with or manufacturing physical evidence during an investigation or proceeding); *id.* § 37.09(d)(1) (penalizing interference with or fabricating of evidence to impair its validity and accessibility); *id.* § 37.10(a)(3) (West 2011) (criminalizing tampering with a governmental record).

15. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a).

Hence, Rule 3.04(a) consists of three similar and interlocking responsibilities.[16]

1. The Duty Not to Unlawfully Obstruct a Party's Access to Evidence

The duty not to obstruct access to evidence is perhaps less straightforward than first appears. On its face, the duty mandates that a lawyer abstain from "unlawfully obstruct[ing] another party's access to evidence."[17] Notably, the Rule does not require that counsel actually provide the opposing party with evidence; rather, it merely prohibits counsel from obstructing another party from gaining access.[18] The distinction is not without significance: absent a court order or procedural rule, a party does not have an affirmative ethical duty to either alert the opposing party to the existence of or to arrange access to evidence.[19]

Commentators posit that unlawful obstruction under Rule 3.04(a) constitutes an action "contrary to either the law, a court order, or applicable rules of practice or procedure."[20] Commentators further suggest, however, that a lawyer may be subject to discipline for unlawful obstruction by disregarding a court order or an applicable rule only when the attorney's action also violates either Rule 3.04(c)(1)[21] or 3.04(d),[22]

16. *Id.*

17. *Id.*

18. *Id.*; *see* Harm v. State, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006) (en banc) ("[T]he state is not required to seek out exculpatory evidence independently on appellant's behalf, or furnish appellant with exculpatory or mitigating evidence that is fully accessible to appellant from other sources." (citing Jackson v. State, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976))); Taylor v. State, 93 S.W.3d 487, 499 (Tex. App.—Texarkana 2002, pet. ref'd) ("[T]he prosecutor is not required to furnish the defendant with exculpatory and mitigating evidence which is equally and fully accessible to the defense." (citing Flores v. State, 940 S.W.2d 189, 191 (Tex. App.—San Antonio 1996, no writ))). *See generally* 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 63 (2010) (explaining that an attorney is vulnerable to discipline only in the specific circumstances articulated in Rule 3.04).

19. *See* 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 63 (2010) (disregarding a court order, the law, or a procedural rule constitutes unlawful obstruction); *cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (including no reference to an affirmative duty to alert opposing party of evidence or to arrange access to that evidence).

20. 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 63 (2010) (footnotes omitted); Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 272 (1990); *see In re* Carey, 89 S.W.3d 477, 501–02 (Mo. 2002) (illustrating discipline of a lawyer for failing to reveal the existence of evidence during court ordered discovery).

21. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(1) (stating that a lawyer shall not "habitually violate an established rule of procedure or of evidence").

22. *See id.* R. 3.04(d) (asserting that a lawyer shall not "knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal").

thus effectively subsuming the obligation into other subparagraphs of Rule 3.04.[23] Instead, the Rules might be effectively reconciled by interpreting the more specific rule, Rule 3.04(a), as controlling over the more general rules, Rules 3.04(c)(1) and 3.04(d), in situations in which a lawyer has obstructed another party's access to evidence.[24] Regardless, the term "unlawful" under Rule 3.04(a) clearly encompasses more than just acts that violate criminal statutes.

In specifically prohibiting a lawyer from unlawfully obstructing access to evidence, Rule 3.04(a) implicitly permits the "lawful" obstruction of access.[25] Thus, a claim of privilege or other objection to the review of evidence may be asserted without violating the Rule.[26] Yet, neither Rule 3.04(a) nor the comments to the Rule address the issue of whether an erroneous invocation of a claim of privilege violates the duty not to hinder access to evidence.[27] Given the policy considerations undergirding privileges,[28] a good-faith assertion should not be deemed a violation of the Rule even if it later proves inapplicable.[29] On the other hand, an assertion of a privilege by a lawyer in bad faith would violate not only Rule 3.04(a) but also other ethical and procedural rules as well.[30]

23. 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 63 (2010).

24. *Cf.* TEX. GOV'T CODE ANN. § 311.026(b) (West 2005) (mandating that a special or local provision controls over a general provision if the provisions are irreconcilable).

25. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (establishing only the duty to refrain from unlawfully obstructing access to evidence).

26. *See id.* R. 3.04(a) (implying that the lawful obstruction of access to evidence through claims of privilege or other objections is sanctioned).

27. *See id.* R. 3.04(a) & cmt. (failing to address erroneous assertions of privilege).

28. *See* 1 STEVEN GOODE ET AL., TEXAS PRACTICE SERIES: GUIDE TO THE TEXAS RULES OF EVIDENCE § 501.1 (3d ed. 2002) (noting that privileges "reflect a societal consensus that other values . . . sometimes take precedence over our interest in ascertaining the truth").

29. *Cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(1) ("[A] lawyer shall not knowingly . . . reveal confidential information of a client or a former client . . . ."). A privilege is recognized only if: (1) the communication originated in a belief that it would not be revealed; (2) the confidentiality of the communication is "essential to the full and satisfactory maintenance of the relation"; (3) the community believes that the relation involved ought to be diligently fostered; and (4) revelation of the communications would result in larger injury to the relation than benefit gained. Simpson v. Tennant, 871 S.W.2d 301, 306 (Tex. App.—Houston [14th Dist.] 1994, no writ) (citing Nicholson v. Wittig, 832 S.W.2d 681, 688 (Tex. App.—Houston [1st Dist.] 1992, no writ)).

30. *See* TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2005) ("[District attorneys] shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused."); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(4) (forbidding lawyers from participating in conduct considered to be an obstruction of justice); TEX. R. EVID. 501 (acknowledging that no party may refuse to provide any object or writing, or prevent another from "disclosing any matter or producing any object or writing," except as provided by the Constitution, statutes, or rules with statutory authority).

A prosecutor has a parallel constitutional duty under the Due Process Clause to provide a defendant access to evidence.[31] However, the scope of the constitutional and ethical duties differs dramatically. First, a prosecutor's constitutional duty extends only to exculpatory or impeachment evidence.[32] In contrast, Rule 3.04 extends to all evidence to which a party has a lawful right to access.[33] Second, under the Due Process Clause, a prosecutor has an affirmative duty to discover exculpatory evidence in the state's possession and to provide it to the defense.[34] Rule 3.04(a) merely prohibits counsel from unlawfully

31. *See* U.S. CONST. amend. XIV, § 1 (granting the right to not be "deprive[d] . . . of life, liberty, or property, without due process of law"); Banks v. Dretke, 540 U.S. 668, 691 (2004) (holding that a due process violation occurs when prosecutors suppress evidence favorable to the accused after the evidence is requested (citing Brady v. Maryland, 373 U.S. 83, 87 (1963))); *Brady*, 373 U.S. at 87 (establishing that suppressing exculpatory or impeachment evidence is a due process violation). *See generally* EDWARD L. WILKINSON, *BRADY* DUTIES AND THE PRE-TRIAL DISCLOSURE OF EVIDENCE 13–25 (2009) (providing a full discussion of aprosecutor's duty to disclose evidence).

32. *See* Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (providing that, to breach a prosecutor's duty to disclose exculpatory evidence, "[t]he evidence at issue must be favorable to the accused"); *Ex parte* Mitchell, 853 S.W.2d 1, 4 (Tex. Crim. App. 1993) (en banc) (explaining that the issue of exculpatory evidence is determined based on favorability to the accused).

33. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (referring to evidence to which the other party has rightful access).

34. *See Strickler*, 527 U.S. at 281 (indicating that prosecutors have an affirmative duty to learn of evidence in the state's possession that is favorable to the accused and to provide such evidence to the accused); Smith v. Holtz, 210 F.3d 186, 195 (3d Cir. 2000) (discussing the prosecution's duty to disclose favorable evidence to the defendant); State v. Quinn, 549 P.2d 1000, 1004 (Kan. 1976) (citing State v. Kelly, 531 P.2d 60, 62 (Kan. 1975)) (recognizing the state's affirmative duty to provide exculpatory evidence to the defendant); *Ex parte* Richardson, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002) (laying out the test for determining whether exculpatory evidence was suppressed by the prosecution). *But see* Bigby v. Dretke, 402 F.3d 551, 574–75 (5th Cir. 2005) (holding that the prosecution did not violate due process when it failed to disclose a defendant's jail medical records because the defendant could have obtained them); United States v. Sipe, 388 F.3d 471, 478 (5th Cir. 2004) ("[T]he State bears no responsibility to direct the defense toward potentially exculpatory evidence that is either known to the defendant or that could be discovered through the exercise of reasonable diligence." (citing Rector v. Johnson, 120 F.3d 551, 558–59 (5th Cir. 1997))); Hayes v. State, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (en banc) (explaining that the state has no duty to disclose to the defendant contents of a letter he wrote to a relative); Havard v. State, 800 S.W.2d 195, 205 (Tex. Crim. App. 1989) (en banc) (concluding that there is no duty to disclose where the defendant was aware of his own prior statement to police); *Ex parte* Russell, 738 S.W.2d 644, 646 (Tex. Crim. App. 1986) (en banc) ("Where applicant actually knew the facts which were allegedly withheld, he cannot seek relief on the basis of the State's alleged failure to disclose those same facts." (citing Means v. State, 429 S.W.2d 490, 496 (Tex. Crim. App. 1968))); Jackson v. State, 552 S.W.2d 798, 803–04 (Tex. Crim. App. 1976) (proclaiming that there is no duty to disclose where defense counsel has equal access to evidence).

obstructing the other party's access to evidence.[35] Finally, a prosecutor's constitutional duty applies only with respect to material evidence.[36] The duty under Rule 3.04(a) seemingly applies to all evidence, whether or not it is deemed material.[37]

Of equal significance is a lawyer's duty not to coerce a witness to be unresponsive to the other party.[38] The duty to refrain from unlawfully obstructing access to evidence logically prohibits not only efforts by an attorney to conceal witnesses or their whereabouts but also efforts to intimidate an otherwise willing witness from cooperating with the opposing party.[39] A lawyer's mere attempts to persuade a witness that her initial version of certain facts is not accurate will not run afoul of the Rule, provided that counsel has a factual basis for asserting that the witness's recollection is incomplete or inaccurate.[40]

Due process protections include a prohibition on the intimidation of witnesses, and any effort to run off a witness will pose particular dangers to a prosecutor.[41] The state, under the guise of warning a witness about the penalties for perjury, may not intimidate a witness to substantially prevent "a free and voluntary choice whether or not to testify."[42] The attempt to

35. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a).

36. *See Banks*, 540 U.S. at 691 (specifying that the evidence must be material to support a violation of the prosecutor's constitutional duty).

37. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (covering all evidence that is believed to have "potential or actual evidentiary value"). Additionally, a prosecutor has a duty to disclose evidence under Rule 3.09(d). *Id.* R. 3.09(d); *see* EDWARD L. WILKINSON, *BRADY* DUTIES AND THE PRE-TRIAL DISCLOSURE OF EVIDENCE 37 (2009) (noting that Rule 3.09(d) does not distinguish whether the evidence must be material).

38. *See In re* Disciplinary Proceedings Against Bonet, 29 P.3d 1242, 1249 (Wash. 2001) (characterizing the prosecutor's threats to influence the accused to testify as "highly unethical").

39. *See id.* at 1248–49 (disciplining a prosecutor for offering to dismiss criminal charges against the witness if the witness would make himself unavailable by pleading his Fifth Amendment privilege); *In re* Disciplinary Proceedings Against Simmons, 757 P.2d 519, 520 (Wash. 1988) (disqualifying the prosecutor for giving whiskey to an adverse witness who was a known alcoholic the day before the witness was scheduled to appear).

40. *See* Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (determining that attorneys had a "factual basis" for including additional statements in a witness's affidavit); Koller *ex rel.* Koller v. Richardson-Merrell Inc., 737 F.2d 1038, 1057–58 (D.C. Cir. 1984) (stating that absent a showing that the attorney had no factual basis for believing the client's claims, counsel's effort to obtain a retraction of testimony did not violate the disciplinary rules), *vacated on other grounds*, 472 U.S. 424 (1985).

41. *See* Robert N. Kepple, *Communication with Witnesses, the Court, and Jurors, in* DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY 69, 69–70 (Ronald H. Clark et al. eds., 2002) (describing the effects of running off a witness by substantially interfering with the witness's right to decide to testify).

42. Davis v. State, 831 S.W.2d 426, 438 (Tex. App.—Austin 1992, writ ref'd) (quoting State v. Melvin, 388 S.E.2d 72, 79–80 (N.C. 1990)) (internal quotation marks omitted); *see* Webb v.

coerce a witness violates the rules of ethics and also infringes on a defendant's right to due process, resulting in both sanctions against the prosecutor and a new trial for the defendant.[43]

Nonetheless, prosecutors may caution witnesses about the penalties for perjury, considering the right to present a defense is qualified and subject to "countervailing public interests."[44] Countervailing interests include

Texas, 409 U.S. 95, 98 (1972) (per curiam) (holding, in a landmark case, that the admonishment of a single witness by the trial court judge "effectively drove that witness off the stand," violating due process); *see also* United States v. Bieganowski, 313 F.3d 264, 291 (5th Cir. 2002) ("[S]ubstantial governmental interference with a defense witness'[s] choice to testify may violate the due process rights of the defendant." (quoting United States v. Dupre, 117 F.3d 810, 823 (5th Cir. 1997)) (internal quotation marks omitted)); United States v. Williams, 205 F.3d 23, 29 (2d Cir. 2000) (recognizing that prosecutorial intimidation by using the threat of perjury to dissuade a "potential defense witness from testifying for the defense can . . . violate the defendant's right to present a defense"); United States v. Golding, 168 F.3d 700, 703 (4th Cir. 1999) (commenting that authorities consistently hold that threats of perjury to a witness by the prosecution is a violation of the defendant's constitutional rights); United States v. Vavages, 151 F.3d 1185, 1188 (9th Cir. 1998) (explaining that "[u]nnecessarily strong admonitions against perjury aimed at discouraging defense witnesses" deprives the defendant of the constitutional right to obtain a witness in his favor); United States v. Foster, 128 F.3d 949, 953–54 (6th Cir. 1997) (discussing how a prosecutor's threats to revoke a potential witness's immunity if he testified at trial constituted substantial interference with the witness's free will); United States v. Schlei, 122 F.3d 944, 991 (11th Cir. 1997) (alleging that the prosecutor threatened the loss of immunity and inappropriate questions if the witnesses testified, breaching a defense witness's "free and unhampered" choice to testify); United States v. Heller, 830 F.2d 150, 153–54 (11th Cir. 1987) (concluding that threatening the defendant's accountant with prosecution for aiding and abetting should he decide not testify is substantial interference by the government); United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979) (construing threats of retaliation as "governmental interference depriv[ing] the defendant of his due process right to present his witnesses"); United States v. Morrison, 535 F.2d 223, 227 (3d Cir. 1976) (holding that a prosecutor's "repeated warnings which culminated in a highly intimidating personal interview were completely unnecessary"); United States v. Thomas, 488 F.2d 334, 336 (6th Cir. 1973) (establishing that the considerable measures taken by the government to advise a witness "that his decision to testify should be based on full knowledge of the consequences" hampered the witness's free will to decide to testify); Guerra v. Collins, 916 F. Supp. 620, 626 (S.D. Tex. 1995) ("[P]rosecutors intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense."), *aff'd*, 90 F.3d 1075 (5th Cir. 1996); Dowthitt v. State, 931 S.W.2d 244, 265 (Tex. Crim. App. 1996) (complaining that the government investigator threatened the potential defense witness with perjury, violating the defendant's constitutional rights); Knotts v. State, 61 S.W.3d 112, 117–18 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (ruling that a trial court's admonishment to a witness was improper when it intimidated the witness into refusing to testify), *aff'd sub nom.* Knotts v. Quarterman, 253 F. App'x 376 (5th Cir. 2007); Robert N. Kepple, *Communication with Witnesses, the Court, and Jurors, in* DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY 69, 69–70 (Ronald H. Clark et al. eds., 2002) (discussing, in detail, the problem of running off a witness).

43. *See, e.g.*, *Golding*, 168 F.3d at 705 (remanding for a new trial due to the government's interference with the defense witness's right to testify).

44. *Williams*, 205 F.3d at 29 (quoting Buie v. Sullivan, 923 F.2d 10, 11 (2d Cir. 1990)) (internal quotation marks omitted); *accord* United States v. Bin Laden, 116 F. Supp. 2d 489, 494 (S.D.N.Y. 2000) (acknowledging that the rights of a defendant are vulnerable to countervailing

preventing a witness from lying under oath and investigating past criminal conduct.[45] Courts have, therefore, declined to conclude that a due process violation arises when the prosecutor merely interviews a witness in hopes of obtaining testimony,[46] or because the government warned a defense witness of the consequences of committing perjury.[47]

In determining whether the government's conduct interfered substantially with a witness's "free and unhampered choice" to testify, courts may look to a number of factors: whether governmental agents threatened to prosecute the witness for perjury;[48] whether the government threatened to prosecute the witness for other crimes if he testified;[49] and whether other discouraging conduct by the government, *designed* to be intimidating, influenced the witness.[50] In addition, courts may consider

public interests (citing *Williams*, 205 F.3d at 29)); *see* Hillard v. Commonwealth, 158 S.W.3d 758, 766 (Ky. 2005) ("[P]erjury warnings are not improper, per se." (quoting *Vavages*, 151 F.3d at 1189) (internal quotation marks omitted)).

45. *Williams*, 205 F.3d at 29; *see* United States v. Whittington, 783 F.2d 1210, 1219 (5th Cir. 1986) ("A prosecutor may, however, engage in proper investigatory actions if his conduct is not designed to intimidate a witness.").

46. *See* United States v. Simmons, 670 F.2d 365, 371 (D.C. Cir. 1982) (per curiam) (indicating that intimidation requires more than just an interview "to enlist a co[]defendant as a witness").

47. *See Bieganowski*, 313 F.3d at 292 (finding that "comparatively benign" warnings of prosecution for perjury did not violate due process); United States v. Thompson, 130 F.3d 676, 687 (5th Cir. 1997) (negating a defendant's challenge of substantial interference "because it assumes that the government cannot tell a witness of the consequences of committing perjury"); United States v. Hayward, 6 F.3d 1241, 1257 (7th Cir. 1993) (stating that a prosecutor's instruction to witnesses to testify truthfully or they "would go to jail" was proper "even if carried out in a caustic manner"), *overruled on other grounds by* United States v. Colvin, 353 F.3d 569 (7th Cir. 2003); United States v. Viera, 839 F.2d 1113, 1115 (5th Cir. 1988) (en banc) ("A prosecutor is always entitled to attempt to avert perjury and to punish criminal conduct." (citing United States v. Binker, 795 F.2d 1218, 1229 (5th Cir. 1986); *Whittington*, 783 F.2d at 1219)).

48. *See Williams*, 205 F.3d at 28 (alleging that the prosecution threatened to prosecute for perjury and misrepresented the strength of the evidence of perjury); Davis v. State, 831 S.W.2d 426, 438 (Tex. App.—Austin 1992, writ ref'd) (threatening to prosecute for perjury if the witness did not recant her prior testimony).

49. *See* United States v. Golding, 168 F.3d 700, 702 (4th Cir. 1999) (accusing the prosecutor of threatening to prosecute a witness for drug possession in addition to the already existing charge of firearm possession if she testified); *Viera*, 839 F.2d at 1115 (determining that the prosecutor informed the witness that the witness's own involvement in drug dealing would pose problems if he testified).

50. *See Golding*, 168 F.3d at 705 (inducing the defendant's wife to invoke the marital privilege through threats of prosecution for perjury); United States v. Pinto, 850 F.2d 927, 932–33 (2d Cir. 1988) (questioning by government agents of a witness was intended to elicit false statements in an effort to gain leverage); United States v. MacCloskey, 682 F.2d 468, 478 (4th Cir. 1982) (doubting any good intention of the prosecutor in making an "eleventh hour" phone call to witness's attorney reminding him of potential Fifth Amendment problem if witness testified); United States v. Hammond, 598 F.2d 1008, 1012 (5th Cir. 1979) (informing a witness that if he testified, he would

actions and events outside the prosecutor's control.[51] To prove the government substantially interfered with a witness, a defendant must also show that the witness's "testimony would have been different *but for* the government's actions."[52]

Furthermore, simply demonstrating that the government's conduct interfered with a witness's "free and voluntary choice" to testify is not sufficient by itself to establish a violation of due process.[53] Similar to other instances involving a prosecution's loss, destruction, or withholding of evidence, a defendant who claims that he was deprived of the right to present a defense by the government's intimidation of a witness must also prove that: (1) he was deprived of material, exculpatory evidence; (2) the evidence could not be reasonably obtained elsewhere; (3) the government acted in bad faith; and (4) the misconduct evinces an "absence of fundamental fairness [that] infected the trial" and prevented a fair trial.[54]

2. The Duty Not to Alter or Destroy Material with Potential or Actual Evidentiary Value

Rule 3.04(a) of the TDRPC also does not permit counsel to, "in

have "nothing but trouble" and subsequently subpoenaing the witness for grand jury); United States v. Henricksen, 564 F.2d 197, 198 (5th Cir. 1977) (per curiam) (requiring the defendant, as part of a plea bargain agreement, not to testify in the trial of a codefendant).

51. *See* Webb v. Texas, 409 U.S. 95, 98 (1972) (per curiam) (asserting that, outside the prosecutor's control, the trial court's improper cautioning of a single witness to the extent that the witness refused to testify violated due process); United States *ex rel.* Jones v. DeRobertis, 766 F.2d 270, 274 (7th Cir. 1985) (noting that the witness, without input from the state's attorney, believed petitioner's claim was meritless and feared prosecution for perjury).

52. *Thompson*, 130 F.3d at 687; *see* Dowthitt v. Johnson, 230 F.3d 733, 755 (5th Cir. 2000) (holding that the defendant must show the prosecutor's actions were so grave that the conviction was, in effect, a violation of due process (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986))); Hillard v. Commonwealth, 158 S.W.3d 758, 766 (Ky. 2005) ("[I]f some other reason motivated the witness's refusal to testify, the threats are deemed harmless." (citing *DeRobertis*, 766 F.2d at 274–75)).

53. *See Williams*, 205 F.3d at 29–30 (requiring a defendant to prove multiple elements to prevail on a claim that his right to present a defense was violated).

54. *Id.* (quoting Buie v. Sullivan, 923 F.2d 10, 11–12 (2d Cir. 1990)) (internal quotation marks omitted); *see* United States v. Hatch, 926 F.2d 387, 394 (5th Cir. 1991) ("We can reverse only if the . . . [actions] seriously affected the fairness or integrity of the proceedings and resulted in a miscarriage of justice." (citing United States v. Lopez, 923 F.2d 47, 50 (5th Cir. 1991))); *Buie*, 923 F.2d at 11–12 (requiring the defendant to prove the evidence was material, the government acted in bad faith, and a fundamental lack of fairness); *Pinto*, 850 F.2d at 933–34 (affirming because the appellant failed to offer more than conclusory assertions); *see also* Illinois v. Fisher, 540 U.S. 544, 547–48 (2004) (per curiam) (holding that, to establish a due process violation resulted from the loss or destruction of evidence, a defendant must show that the evidence was material); Strickler v. Greene, 527 U.S. 263, 282 (1999) (stating that a defendant must show that the evidence withheld was material to prove a violation of due process).

anticipation of a dispute[,] unlawfully alter, destroy[,] or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value."[55] The obligation is carefully worded to apply only if counsel anticipates a dispute.[56] However, the TDRPC fail to define either "dispute" or "anticipated."

A dispute encompasses more than actual litigation or the threat of litigation; thus, evidence falls under Rule 3.04(a) if collected prior to indictment or even prior to a suspect being identified.[57] Yet, the Rule appears not to encompass the early stages of an investigation into an accident or similar occurrence when the circumstances are unclear whether a criminal offense was committed or whether a dispute exists at all.[58] The Rule also does not require an attorney to have actual knowledge that a proceeding has been initiated in order to violate the rule.[59] Indeed, the Rule does not even require that proceedings exist. Rather, the lawyer simply anticipating that proceedings might be instituted is sufficient.[60]

Rule 3.04(a) specifically limits the obligation not to destroy or alter evidence to documents or other materials that "a competent lawyer would believe [have] potential or actual evidentiary value."[61] The Rule speaks in terms of a competent, instead of a reasonable, lawyer, suggesting that the Rule is intended to be broad and objective.[62] The competent lawyer standard is not a standard of strict liability—an attorney will not be subject to discipline for the destruction of material later determined to have evidentiary value if that value "would not likely have been apparent to a competent lawyer" at the time of destruction.[63] A lawyer's subjective

55. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a).

56. *Id.*

57. *See* Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 140 (2d Cir. 2000) (defining dispute as a "conflict or controversy" (quoting BLACK'S LAW DICTIONARY 472 (6th ed. 1990)) (internal quotation marks omitted)). "Dispute" is defined as "[a] conflict or controversy, esp[ecially] one that has given rise to a particular lawsuit." BLACK'S LAW DICTIONARY 1190 (9th ed. 2009).

58. *Cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (requiring anticipation of litigation before restricting the opposing party's access to evidence).

59. *See id.* (excusing actual knowledge for the standard of whether "a competent lawyer would believe" a proceeding was initiated).

60. *Id.*

61. *Id.*

62. *See id.* terminology (defining "competent" as the "possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client").

63. 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 66 (2010) (addressing the strict liability concern associated with Rule 3.04); *see* Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 273 (1990) (explaining the standard in terms of a belief of a competent lawyer, not actual awareness, of potential proceedings). *But see* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) (explaining that the good faith or bad faith of

belief that an item has no potential or actual evidentiary value is also irrelevant to the analysis of whether the Rule was violated; however, an attorney may not negligently or recklessly ignore the alteration or destruction of material if a competent lawyer would have recognized its evidentiary value.[64]

Similarly, Rule 3.04(a) applies expressly to materials that have "potential or actual evidentiary value."[65] By describing the type of material as potential or actual, the rule's language seemingly attempts to expand the application of the Rule to pre-litigation situations as well as after an indictment or information has been filed. On the other hand, the description of material may be an awkward attempt to apply the duty to readily admissible evidence and to material normally admissible at trial only under special circumstances, such as impeachment or rebuttal.[66] Both interpretations maintain the obvious spirit of Rule 3.04.

Additionally, Rule 3.04(a) extends to material evidence, evidence that would make a difference in the outcome of litigation, and to all items with "potential or actual evidentiary value."[67] Under a literal reading of the Rule, destruction or alteration of an item is not *de minimis*.[68] Thus, a lawyer may be sanctioned for altering or destroying evidence even if a party can obtain similar evidence elsewhere or if the evidentiary value of the item is slight.[69]

The duty not to alter or destroy evidence under Rule 3.04(a) parallels a prosecutor's constitutional duty to preserve evidence under the Due Process Clause.[70] The duty under the Rule is broader than a prosecutor's

the prosecution is irrelevant as to a violation of the duty to disclose material evidence because the duty is inescapable).

64. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (promulgating a competent lawyer's responsibilities regarding alteration or destruction of material evidence).

65. *Id.*

66. *Cf.* Lagrone v. State, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997) (en banc) (delineating that prosecutors have no duty regarding evidence which would be inadmissible at trial).

67. TEX. DISCIPLINARY RULES PROF'L CONDUCT 3.04(a); *see Ex parte* Richardson, 70 S.W.3d 865, 872 (Tex. Crim. App. 2002) (defining material evidence as having a reasonable probability of changing the outcome of the trial); Proctor v. State, 319 S.W.3d 175, 184 (Tex. App.—Houston [1st Dist.] 2010, pet. struck) (explaining that the defendant is required to show the evidence in the state's possession is "material exculpatory evidence that would create a probability of a different outcome").

68. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 cmt. 2 (emphasizing the importance of preserving relevant material).

69. *See id.* (detailing possible offenses for tampering with evidence).

70. *See* Arizona v. Youngblood, 488 U.S. 51, 52 (1988) (exploring the bounds of the state's duty to preserve evidentiary material); California v. Trombetta, 467 U.S. 479, 486–87 (1984) (establishing the state's duty to conserve evidence); *see also* U.S. CONST. amend. XIV, § 1 (protecting defendants' due process rights). For an extended examination of a prosecutor's duty to preserve evidence, see EDWARD L. WILKINSON, *BRADY* DUTIES AND THE PRE-TRIAL DISCLOSURE OF

constitutional duty because the Rule applies to all evidence, not just material evidence.[71] Rule 3.04(a) is simultaneously narrower too, as it encompasses only items with evidentiary value, suggesting that inadmissible evidence is not subject to the Rule.[72] Moreover, unlike a prosecutor's constitutional duty, the responsibilities under Rule 3.04(a) apply to defense counsel and the state's attorney.[73] Thus, while defense counsel does not have an affirmative duty to provide material evidence to the state, defense counsel may not hide, alter, or destroy the evidence in counsel's possession or control.[74]

The duty under Rule 3.04(a) not to alter or destroy evidence is also analogous to provisions in the Texas Penal Code.[75] Subsection (a) of Rule 3.04 and subsection (d) of Penal Code section 37.09 prohibit a person from altering, destroying, or concealing "any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding" if he knows that "an investigation or official proceeding is pending," in progress, or that an offense has been committed.[76] This violation of the Penal Code is a third-degree felony.[77] Furthermore, a lawyer who destroys or alters the State's evidence may also violate Penal Code section 37.10(a)(3), which prohibits the intentional destruction, concealment, removal, or alteration of a governmental record.[78] The offense is "a Class A misdemeanor unless the actor's intent is to defraud or harm another," which would constitute a felony carrying a jail sentence.[79] Similar conduct is penalized under federal criminal statutes.[80]

EVIDENCE 25–27, 36–37 (2009).

71. *Compare Trombetta*, 467 U.S. at 488 (creating the requirement of materiality for the duty to apply), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (applying to all material with actual or potential evidentiary value).

72. *Compare Trombetta*, 467 U.S. at 488 (providing the duty to preserve all material evidence involved in the dispute without referencing admissibility), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a) (specifying application by the phrase "evidentiary value," excluding inadmissible material).

73. *But see* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09 (explaining special duties of a prosecutor).

74. *Id.* R. 3.04(a). *See generally* 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 63 (2010) (clarifying that an attorney is detailed in the specific language of Rule 3.04).

75. *See* TEX. PENAL CODE ANN. § 37.09 (West Supp. 2011) (penalizing the alteration or destruction of evidence).

76. *Id.* § 37.09(a)(1), (d)(1).

77. *Id.* § 37.09(c). The offense is a second-degree felony if the "thing altered, destroyed, or concealed" is a corpse. *Id.*

78. *Id.* § 37.10(a)(3) (West 2011).

79. *Id.* § 37.10(c)(1).

80. *See* 18 U.S.C. § 1506 (2006) (criminalizing "theft or alteration of record or process").

3. The Duty Not to Counsel or Assist Another to Unlawfully Obstruct Access to Evidence or to Alter or Destroy Material with Potential or Actual Evidentiary Value

The third responsibility under Rule 3.04(a) requires a lawyer to refrain from counseling or assisting another person in performing any of the acts prohibited under the Rule.[81] A lawyer is thus ethically accountable for the alteration or destruction of evidence, even if he did not personally alter or destroy the item but simply counseled or assisted another.[82] One of the drafters of Rule 3.04 maintains that this duty should be read broadly to include instances where a lawyer merely advises someone of the legal difficulties involved should certain potential evidence materialize and, as a result, the person destroys or alters the evidence.[83] Under such a sweeping reading, counsel could not later claim "the client independently made the decision to engage in the prohibited conduct."[84] Thus, a lawyer who, under the guise of rendering a legal opinion, implies to investigators or witnesses that physical evidence might be better lost or altered would be ethically responsible for the actions of those whom he "counseled," even though he did not explicitly direct the third party's actions.[85] Rule 3.04(a) also has corollaries in Rule 5.01, which outlines the responsibilities of a supervisory lawyer toward associates or junior attorneys, and Rule 5.03, which delineates a lawyer's duties toward nonlawyer associates.[86]

81. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a).

82. *See id.* (stating that "[a] lawyer shall not . . . counsel or assist another person" in performing a prohibited act under the rule).

83. *See* 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 66–67 (2010) (discussing expansive application of the rule and reasons for a broad interpretation).

84. *See id.* at 67 (holding an attorney accountable for the client's prohibited conduct); Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 274–75 (1990) (clarifying that an attorney cannot evade responsibilities by claiming the client acted independently).

85. *See* 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 67 (2010) (illustrating that an attorney's actions may be viewed as counseling); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(2) (stating that a lawyer may not "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act"); *id.* R. 8.04(a)(1) ("A lawyer shall not . . . violate these rules, knowingly assist or induce another to do so, or do so through the acts of another . . . ."); *id.* R. 8.04(a)(3) (prohibiting a lawyer from engaging in actions constituting deception or deceit); *id.* R. 8.04(a)(4) (requiring that lawyers not engage in behavior resulting in the obstruction of justice).

86. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01 (subjecting the supervising attorney to discipline if he "orders, encourages, or knowingly permits" a supervised attorney to violate rules or if he fails to take remedial measures); *id.* R. 5.03 (authorizing the discipline of a lawyer if he

B. *The Duty Not to Falsify Evidence*

Rule 3.04(b) of the TDRPC mandates that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case."[87] This straightforward Rule has been strictly applied. In *American Airlines, Inc. v. Allied Pilots Ass'n*,[88] attorneys seeking a temporary restraining order submitted purported conformed copies of signed original affidavits.[89] In reality, though the witnesses had orally agreed to the contents of the affidavits, they were unavailable to sign the affidavits.[90] When the federal district judge later learned the affidavits were not signed when presented to the court, the judge held the attorneys in contempt, citing Rule 3.04, along with Rules 3.03 and 4.01.[91] The Fifth Circuit upheld the lower court's sanctions, holding that the lawyers' action of signing the documents as though they were conformed copies of originals constituted the falsification of evidence subject to disciplinary action.[92] However, the court rejected the attorneys' criminal contempt convictions based upon the same actions.[93]

Rule 3.04(b) also prohibits an attorney from counseling or assisting a witness in testifying untruthfully.[94] A lawyer who knows a witness is

"orders, encourages, or permits" a nonlawyer assistant to violate rules or fails to take remedial measures after discovering the violation); *see also* EDWARD L. WILKINSON, LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE 255–58 (2006 ed.) (discussing the duties established under Rules 5.01, 5.02, and 5.03); Edward L. Wilkinson, *Supervising Lawyers, Supervised Lawyers & Nonlawyer Assistants: Ethical Responsibilities Under the State Bar Rules*, 64 TEX. B.J. 452, 452–57 (2001) (explaining the responsibilities of a supervising lawyer under the TDRPC).

87. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(b).

88. Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523 (5th Cir. 1992).

89. *Id.* at 525.

90. *Id.*

91. *Id.* at 526–27.

92. *Id.* at 528.

93. *Id.* at 532–33; *see* Goodsell v. Miss. Bar, 667 So. 2d 7, 10 (Miss. 1996) (ruling that the attorney violated the rule against falsifying evidence when he presented an affidavit in support of a temporary restraining order as having been signed by the client when the attorney himself had actually signed the document); *In re* Caranchini, 956 S.W.2d 910, 916 (Mo. 1997) (disbarring a lawyer for, among other misconduct, supporting a claim of sexual harassment with a forged document).

94. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(b); *see also In re* Peasley, 90 P.3d 764, 778 (Ariz. 2004) (suspending a prosecutor for intentionally suborning perjury in a capital murder trial); *In re* Mitchell, 262 S.E.2d 89, 89 (Ga. 1979) (disciplining an attorney for inducing perjury); *In re* Oberhellmann, 873 S.W.2d 851, 853–54 (Mo. 1994) (disbarring an attorney for filing a petition that falsely alleged diversity for purposes of federal jurisdiction and coaching the client to testify falsely that she lived an adjoining state).

planning to proffer perjured testimony is obligated to attempt to persuade the witness not to offer the false testimony.[95] As Justice Blackmun pointed out, convincing a witness not to present perjured testimony is often in the best interest of the client because such evidence could have the unintended effect of undercutting the credibility of the client's entire defense.[96]

Advice not to offer false testimony may be considered effective advocacy as well as ethical conduct.[97] The lawyer's advice to testify truthfully should include apprising both the witness and the client of the lawyer's additional ethical obligations: Rule 3.03(a)(5), not to offer or use false evidence; Rule 3.03(a)(2), to disclose to the court the false evidence if necessary "to avoid assisting a criminal or fraudulent act"; and Rule 3.03(b), to disclose the true facts if other remedial measures to correct false testimony prove unavailing.[98] Common sense also dictates warning the witness of the penalties for perjury.[99]

If the witness and client still insist on offering fabricated testimony, the defense lawyer may attempt to withdraw from the case.[100] Should the court refuse to permit the attorney to withdraw, the lawyer may ethically continue to represent the client despite the disagreement regarding the

95. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 5 ("Initially . . . , a lawyer should urge the client or other person involved to not offer false or fabricated evidence."); Nix v. Whiteside, 475 U.S. 157, 169 (1986) ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.02(e) (asserting that a lawyer shall promptly make a reasonable attempt to "persuade the client to take corrective action" once the lawyer discovers that the client used the lawyer's services to commit a prohibited act).

96. *See Nix*, 475 U.S. at 188 (Blackmun, J., concurring) ("[A]n attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility.").

97. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 6 (expressing that a lawyer should urge the client to testify truthfully). *See generally id.* R. 1.01(b)(1) ("In representing a client, a lawyer shall not . . . neglect a legal matter entrusted to the lawyer . . . .").

98. *Id.* R. 3.03(a)(2), (a)(5), (b); *see id.* R. 3.03 cmt. 5 ("[A] lawyer should urge the client or other person involved to not offer false or fabricated evidence.").

99. *See* TEX. PENAL CODE ANN. § 37.02(b) (West 2011) (establishing perjury as a class A misdemeanor); *id.* § 37.03(b) (listing aggravated perjury as a third-degree felony).

100. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 6 ("If the request to place false testimony or other material into evidence came from the lawyer's client, the lawyer also would be justified in seeking to withdraw from the case."); *see also id.* R. 1.15(a)(1) (authorizing a lawyer to withdraw from representation if continuing would result in a rule violation); *id.* R. 1.15(b)(2) (including a client's refusal to abandon a prohibited course of action to the instances when a lawyer may withdraw from representation); *id.* R. 1.15(b)(4) ("[A] lawyer shall not withdraw from representing a client unless . . . the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent[,] or with which the lawyer has a fundamental disagreement.").

proffer of evidence.[101] Counsel may also simply refuse to call the witness, even over insistence by the client, if the witness continues to insist upon offering false testimony.[102] In the alternative, the Disciplinary Rules allow the lawyer to disclose to the court, or even the opposing party, the belief that a witness intends to offer false evidence to avoid participating in a criminal or fraudulent act.[103] Because a witness's express intent to offer false testimony at some indefinite date in the future does not constitute a criminal or fraudulent act, disclosure before the false testimony actually occurs seems premature and could conceivably harm the client's case.[104]

Under Rule 3.03(b) and the comment thereto, however, if an attorney discovers the falsity of a witness's material testimony during the trial, the attorney must "make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence."[105] If the attorney's efforts are unsuccessful, he must then take reasonable remedial measures.[106] The comment does not offer specific examples of reasonable remedial measures, except to declare that such measures may include "disclosure of the true facts."[107]

A client's intent to testify falsely creates a more subtle set of problems for the attorney. As the Texas Court of Criminal Appeals has observed:

> The problem of representing a defendant who insists on testifying falsely has been called, correctly, one of the hardest questions a criminal defense lawyer faces. The attorney is faced simultaneously with a duty to represent his client effectively, a duty to protect his client's right to testify, a

101. *See id.* R. 1.15(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

102. *See id.* R. 3.03 cmt. 5 ("However, whether [false or fabricated evidence] is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes."); *see also* Weisinger v. State, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd) (explaining that, as part of trial strategy, counsel has the ability to decide which witnesses will testify), *aff'd sub nom.* Weisinger v. Scott, 24 F.3d 240 (5th Cir. 1994) (not designated for publication).

103. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(4) (permitting disclosure of "confidential information" when the attorney "has reason to believe it is necessary to do so in order to comply with . . . a Texas Disciplinary Rule of Professional Conduct"); *id.* R. 3.03(a)(2) (directing an attorney to disclose information to a tribunal to avoid contributing to a fraudulent act).

104. *See* United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988) (stressing that a statement of an intention to commit perjury does not become actionable until the witness actually lies on the stand); People v. Johnson, 72 Cal. Rptr. 2d 805, 813 (Ct. App. 1998) ("Additionally, until the [witness] actually takes the stand and testifies falsely, there is always a chance the [witness] will change his mind and testify truthfully.").

105. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(b) & cmt. 7; *see id.* R. 3.04(b) ("A lawyer shall not . . . counsel or assist a witness to testify falsely . . . .").

106. *See id.* R. 3.03(b) (directing an attorney to take remedial measures if prior attempts to correct a client's actions are unsuccessful).

107. *Id.* R. 3.03(b) & cmt. 7.

> duty not to disclose the confidential communications of his client, a duty to reveal fraud on the court, and a duty not to knowingly use perjured testimony (as well as the possibility of criminal liability for perjury).[108]

The incomplete or improper execution of any one of these competing demands may have harsh legal and ethical ramifications for both the lawyer and client.

When a criminal attorney discovers that a client intends to testify falsely, the attorney must urge the client to act otherwise.[109] The lawyer must also advise the client of the attorney's ethical duties should he discover that false testimony has been presented.[110] Counsel should discuss the possible ramifications of the client's false testimony, including the civil and criminal penalties.[111] In addition, the lawyer should warn the client that the trial judge or jury would be constitutionally justified in imposing a longer sentence for lying on the stand.[112]

In urging a client to abstain from testifying falsely, however, defense counsel must be especially careful to ensure that the client understands that the lawyer is not precluding the client from testifying *truthfully*.[113] A

108. Maddox v. State, 613 S.W.2d 275, 280 (Tex. Crim. App. [Panel Op.] 1981) (footnotes omitted).

109. *See* Nix v. Whiteside, 475 U.S. 157, 169 (1996) (explaining that the attorney has a duty "to attempt to dissuade the client from the unlawful course of conduct" once aware of a plan to perjure testimony); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(d) (providing that if a lawyer has information that a client plans to engage in a criminal or fraudulent act, the lawyer must make reasonable efforts to deter the client); *id.* R. 3.03 cmt. 5 ("[A] lawyer should urge the client . . . to not offer false or fabricated evidence.").

110. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(f) ("When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.").

111. *See* Vaughn v. Tex. Emp't Comm'n, 792 S.W.2d 139, 142, 144 (Tex. App.—Houston [1st Dist.] 1990, no writ) (discussing the reasons for and possible sanctions when a plaintiff fabricates evidence); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(c) (authorizing a lawyer to "discuss the legal consequences of any proposed" conduct with a client); *id.* R. 1.03(b) (delineating that a lawyer provide necessary information to the client to allow the client to make an informed decision); TEX. PENAL CODE ANN. § 37.02(b) (West 2011) (mandating perjury as a class A misdemeanor); *id.* § 37.03(b) (indicating that aggravated perjury is a third-degree felony).

112. *See* United States v. Grayson, 438 U.S. 41, 52 (1978) ("[T]he defendant's readiness to lie under oath . . . may be deemed probative of his prospects for rehabilitation."), *superseded by statute on other grounds*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, *as recognized in* Barber v. Thomas, 130 S. Ct. 2499 (2010); United States v. Litchfield, 959 F.2d 1514, 1523 (10th Cir. 1992) (explaining that the trial was justified in enhancing the offense level in response to the defendant's obstruction of justice "by giving false testimony at trial"); Wilson v. State, 810 S.W.2d 807, 811 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("In assessing punishment, the judge was entitled to consider appellant's truthfulness as he testified." (citing *Grayson*, 438 U.S. at 53)).

113. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions

criminal defendant enjoys an absolute right to testify under the United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure.[114] While counsel makes many of the trial decisions surrounding a case, the decision of whether the defendant testifies is left to the defendant; counsel can advise the client on the advantages and disadvantages of testifying, but the defendant must make the ultimate decision.[115]

In addition, the Texas Disciplinary Rules explicitly mandate that, in a criminal case, the client alone decides whether to testify.[116] However, if the attorney fails to convince the client not to testify falsely, one option is to simply refuse to call the client to testify.[117] As already discussed, however, the decision whether to testify under Rule 1.02(a)(3) is entirely a defendant's[118] and a defendant possesses a constitutional right to testify,[119] which counsel may not waive simply as a part of trial strategy.[120] Though the issue of "whether counsel may keep a defendant entirely off the stand if counsel believes that defendant will commit perjury has not yet been addressed by the [U.S. Supreme] Court,"[121] the failure of trial counsel to permit a client to testify, even if counsel suspects the client

regarding the representation.").

114. *See* U.S. CONST. amend. V (providing the right to refuse to testify at a criminal trial); *id.* amend. VI (establishing the framework of the right to testify); TEX. CONST. art. I, § 10 (instituting the right to testify); TEX. CODE CRIM. PROC. ANN. art. 38.08 (West 2005) (permitting a criminal defendant to testify on his own behalf); *see also* Rock v. Arkansas, 483 U.S. 44, 49 (1987) (characterizing a defendant's right to testify as a fundamental constitutional right); Sapata v. State, 574 S.W.2d 770, 771 (Tex. Crim. App. [Panel Op.] 1978) (stating that the accused has the right to testify at trial).

115. *See Sapata*, 574 S.W.2d at 771 ("[T]he decision as to whether the accused will testify is his own personal right."); Hebert v. State, 836 S.W.2d 252, 255 (Tex. App.—Houston [1st Dist.] 1992, writ ref'd) (commenting that the decision whether to testify is that of the defendant).

116. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(3).

117. *See* United States v. Rantz, 862 F.2d 808, 811 (10th Cir. 1988) (holding that because attorneys have no duty to allow their clients to testify falsely, the attorney was not required to call the defendant to testify when the attorney knew the testimony would be false); Weisinger v. State, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd) ("It is the trial counsel's prerogative, as a matter of trial strategy, to decide which witnesses to call and not that of the client."), *aff'd sub nom*. Weisinger v. Scott, 24 F.3d 240 (5th Cir. 1994) (not designated for publication); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987) (assuring that counsel's refusal to call the defendant to testify when the defendant plans to testify falsely is not a deprivation of the defendant's right).

118. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(3).

119. *See Rock*, 483 U.S. at 49 (discussing the constitutional right of a defendant to testify).

120. United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984) (per curiam); *accord* Wimberly v. McKune, 963 F. Supp. 1016, 1022 (D. Kan. 1997) (specifying that only the accused may waive his right to testify), *aff'd*, 141 F.3d 1187 (10th Cir. 1998).

121. United States v. Scott, 909 F.2d 488, 491 (11th Cir. 1990).

will testify falsely, has been held to constitute ineffective assistance of counsel and a denial of due process.[122] Therefore, the balance suggests that a lawyer may refuse to call the client only when the attorney knows that the entirety of the client's testimony will be false.[123]

Defense counsel has a number of other options for dealing with false testimony, all of which present advantages and disadvantages.[124] Counsel may attempt to withdraw, call the client to the stand and attempt to examine around the potentially perjured evidence, or call the witness and, if the client testifies falsely, resort to remedial measures.[125]

Furthermore, a prosecutor has a constitutional duty not to knowingly use false testimony.[126] The constitutional duty differs from the duty under Rule 3.04(b) in that the constitutional duty applies only to material evidence.[127] In addition, under the state's constitutional obligation, the prosecution may violate the duty not to use false evidence when someone on the prosecution team knows of the inaccuracy, even if the prosecutor himself is not aware of the false nature of the testimony.[128] Rule 3.04(b), however, applies only if the lawyer himself is cognizant of the perjury.[129]

122. *See generally* Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978) (asking for removal after attorney becomes aware of client's intent to falsely testify could result in deprivation of the client's due process rights); State v. Albright, 291 N.W.2d 487, 496 (Wis. 1980) (applying the analysis of whether counsel waiving the client's right to testify results in ineffective assistance of counsel). To constitute ineffective counsel, the claimant must show: (1) counsel failed to act reasonably under the circumstances; and (2) but for the performance by counsel, the final ruling would have been different. *Rantz*, 862 F.2d at 810–11 (citing Strickland v. Washington, 466 U.S. 668, 687–88 (1984)).

123. *Cf.* United States v. Litchfield, 959 F.2d 1514, 1518 (10th Cir. 1992) (stating that an attorney may refuse to call a defendant to testify when he knows the testimony is false); *Curtis*, 742 F.2d at 1075 (explaining that counsel was justified in refusing to put the client on the stand because the client planned to commit perjury).

124. *See* Edward L. Wilkinson, "*That's a Damn Lie!": Ethical Obligations of Counsel When a Witness Offers False Testimony in a Criminal Trial*, 31 ST. MARY'S L.J. 407, 438–47 (2000) (providing a detailed examination of counsel's options and the pros and cons of each).

125. *See generally* People v. Darrett, 769 N.Y.S.2d 14, 23 (App. Div. 2003) (discussing the defense lawyer's dilemma).

126. *See* Alcorta v. Texas, 355 U.S. 28, 31–32 (1957) (per curiam) (holding that petitioner was denied due process after his attorney admitted to having knowledge of false testimony). For a detailed discussion on the duty not to use perjured testimony, see EDWARD L. WILKINSON, LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE 306–11 (2006 ed.).

127. *Compare Ex parte* Napper, 322 S.W.3d 202, 241 (Tex. Crim. App. 2010) (contending that the prosecutor violates due process if the knowingly false testimony is material), *and Ex parte* Castellano, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993) (en banc) ("The perjured testimony must be material." (citing United States v. Agurs, 427 U.S. 97, 103–04 (1976))), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(b) & cmt. 2 (prohibiting the falsifying of any evidence).

128. *See Castellano*, 863 S.W.2d at 480 (recognizing that knowledge of false testimony may be imputed to prosecution through any state agent).

129. *Compare id.* ("[K]nowledge of perjured testimony may be imputed to a prosecutor who

At first glance, Rule 3.04(b) appears redundant in light of Rule 3.03(a)(5), which prohibits the "offer or use [of] evidence that the lawyer knows to be false."[130] But, Rule 3.03(a)(5) applies to a lawyer's use of evidence that the lawyer knows to be false regardless of whether he conspired with the witness in the falsification.[131] Rule 3.04(b), in contrast, prohibits the subornation of perjury or falsification of evidence.[132] Conduct that violates Rule 3.04(b) might also implicate Rule 8.04(a)(1), which prohibits counsel from violating the disciplinary rules; Rule 8.04(a)(2), which prohibits a lawyer from committing a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness[,] or fitness as a lawyer"; or Rule 8.04(a)(3), which bars engaging in conduct "involving dishonesty, fraud, deceit[,] or misrepresentation."[133]

Disciplinary Rule 3.04(b) also has counterparts in the Texas Penal Code.[134] Falsifying evidence constitutes a third-degree felony under Section 37.09(c) of the Penal Code.[135] Similarly, falsifying a governmental record constitutes a criminal offense.[136] Curiously, the comment to Rule 3.04(b) cites only the Penal Code provisions addressing the offenses of tampering with or fabricating evidence and altering or destroying government documents.[137] However, the Rule specifically prohibits counseling or assisting a witness to testify falsely.[138] Logically, the comment should also mention that perjury is a criminal offense,[139] as is tampering with a witness[140] and obstruction or retaliation against a witness.[141] Federal criminal statutes also penalize the falsification of evidence.[142]

lacks actual knowledge of the falsity." (citing Giglio v. United States, 405 U.S. 150, 154 (1972))), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(b) (limiting the duty not to "counsel or assist a witness to testify falsely" to the lawyer himself).

130. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(5). *Compare id.* R. 3.03(a)(5) (prohibiting a lawyer from offering or using any evidence known to be false), *with id.* R. 3.04(b) (demanding a lawyer not counsel or assist another in falsifying evidence).

131. *Id.* R. 3.03(a)(5).

132. *Id.* R. 3.04(b).

133. *Id.* R. 8.04(a)(1)–(3).

134. *See id.* R. 3.04 cmt. 2 (mentioning the corresponding statutes in the Texas Penal Code).

135. TEX. PENAL CODE ANN. § 37.09(a)(2), (c) (West Supp. 2011).

136. *Id.* § 37.10(a)(5) (West 2011).

137. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 cmt. 2 (referencing only Texas Penal Code sections 37.09(a)(1) and 37.10(a)(3)).

138. *Id.* R. 3.04(b).

139. *See* PENAL § 37.02(a) (establishing the offense of perjury); *id.* § 37.03(a) (instituting the offense of aggravated perjury).

140. *Id.* § 36.05(a) (West Supp. 2011).

141. *Id.* § 36.06(a)(2) (West 2011).

142. *See* 18 U.S.C. § 1512 (2006) (providing for an offense of tampering with a witness); *id.*

Additionally, Rule 3.04(b) requires that a lawyer not "pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case."[143] The "other entity" referred to in the Rule encompasses search firms and similar groups that locate expert witnesses for a fee.[144] "Payment of compensation" does not include a prosecutor's offer of a favorable plea agreement in exchange for truthful testimony against accomplices or co-conspirators.[145]

Rule 3.04(b) does provide exceptions, under which a lawyer may pay: "(1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; [and] (3) a reasonable fee for the professional services of an expert witness."[146] Because payment based on the outcome of a trial is

§ 1513 (establishing an offense for retaliating against a witness); *id.* § 1621 (making perjury a crime); *id.* § 1622 (outlining punishments for subornation of perjury).

143. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(b).

144. *See* Tex. Comm. on Prof'l Ethics, Op. 458, 51 TEX. B.J. 924 (1988) (interpreting DR 7-109 as indicating that a lawyer is prohibited from acquiring an expert witness based on a contingent-fee arrangement with a consulting firm).

145. *See* Castillo v. State, 221 S.W.3d 689, 694 (Tex. Crim. App. 2007) (holding that a plea bargain offer contingent upon a witness's truthful testimony did not violate Rule 3.04(b)). Similarly, the federal Anti-Gratuity Statute prohibits a person from giving or offering value for testimony. 18 U.S.C. § 201(c)(2) (2006); *see* United States v. Mattarolo, 209 F.3d 1153, 1160 (9th Cir. 2000) (rejecting the argument that testimony in cooperation with the government is a violation of the prohibition against valuable consideration); United States v. Marks, 209 F.3d 577, 585 (6th Cir. 2000) ("[A] prosecutor's offer of leniency in exchange for truthful testimony is not an illegal witness gratuity."); United States v. Smith, 203 F.3d 884, 894 (5th Cir. 2000) (finding that the government did not violate the Anti-Gratuity Statute by offering leniency for the codefendant's testimony); United States v. Hunte, 193 F.3d 173, 175–76 (3d Cir. 1999) (deciding that sentence reductions may be offered to defendants who provide testimony in assistance of prosecution); United States v. Lara, 181 F.3d 183, 197 (1st Cir. 1999) (indicating that the Anti-Gratuity Statute is not a bright-line barrier to witnesses making agreements with the government for testimony); United States v. Stephenson, 183 F.3d 110, 118 (2d Cir. 1999) (holding that the Anti-Gratuity Statute "does not apply to the United States or to any Assistant United States Attorney acting within his or her official capacity"); United States v. Condon, 170 F.3d 687, 688–89 (7th Cir. 1999) ("Forgoing criminal prosecution (or securing a lower sentence) is not a 'thing of value' within the meaning of [the Anti-Gratuity Statute]."); United States v. Johnson, 169 F.3d 1092, 1097 (8th Cir. 1999) (upholding the determination that the Anti-Gratuity Statute is not so broad as to prevent the offering of leniency for truthful testimony); United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999) ("[W]e hold that agreements in which the government trades sentencing recommendations . . . or consideration for cooperation, including testimony, do not violate [the Anti-Gratuity Statute]."); United States v. Singleton, 165 F.3d 1297, 1301 (10th Cir. 1999) (en banc) (commenting that application of the statute prohibiting consideration for testimony to the sovereign's prosecutorial authority is absurd); United States v. Haese, 162 F.3d 359, 367–68 (5th Cir. 1998) (rejecting the argument that the Anti-Gratuity Statute is violated when testimony is provided under an arrangement for a favorable plea agreement).

146. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(b).

not reasonable, the Rule prohibits paying an expert a contingent fee.[147]

C. *The Duty of Decorum Before the Court*

Rule 3.04(c) of the TDRPC outlines an attorney's ethical duties before a judge and jury.[148] An attorney appearing before a tribunal shall not: (a) "habitually violate an established rule of procedure or of evidence"; (b) "state or allude to any matter" that is not relevant and admissible; (c) state a personal opinion about the case; (d) "degrade a witness or other person"; or (e) intentionally disrupt the proceedings.[149] Exceptions to several of these guidelines are either provided in the Rule or discussed in the comments.[150]

1. The Duty Not to Habitually Violate an Established Rule of Procedure or Evidence

Unlike other conduct proscribed by Rule 3.04(c), Rule 3.04(c)(1) subjects a lawyer to discipline only for a habitual abuse of a procedural or evidentiary rule.[151] The Rule was purposely designed to provide judges leeway to assess and punish individual transgressions during proceedings.[152] In addition, the limitation of Rule 3.04(c)(1) to habitual violations virtually eliminates an "inappropriate resort to disciplinary proceedings" as a tactical weapon used in individual cases.[153] As the comment to the Rule emphasizes, despite the limitation, "[a] lawyer in good conscience should not engage in even a single intentional violation" of the rules of procedure or evidence and is subject to judicial sanctions if the lawyer does so.[154]

The TDRPC do not define "habitual." The comment to Rule 3.04(c)(1) suggests that habitual constitutes more than one violation of an "established rule of procedure or of evidence."[155] This

147. *See* Tex. Comm. on Prof'l Ethics, Op. 553, 67 TEX. B.J. 982 (2004) ("[A] lawyer cannot acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or upon the outcome of the case.").

148. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c) (outlining acts prohibited before the tribunal).

149. *Id.* R. 3.04(c)(1)–(5).

150. *See id.* R. 3.04(c) & cmts. 1–7 (providing exceptions to the some of the general rules).

151. *Id.* R. 3.04(c)(1).

152. *See id.* R. 3.04 cmt. 3 (stating that the purpose of the rule is to provide judges the flexibility to maintain order within the tribunal).

153. *Id.*

154. *Id.*

155. *Id.* R. 3.04(c)(1); *see id.* R. 3.04 cmt. 3 (implying that the use of habitual relates to multiple abuses); *cf.* Tex. Comm. on Prof'l Ethics, Op. 415, 47 TEX. B.J. 946 (1984) (emphasizing

characterization of the term is consistent with interpretations of similar provisions in other contexts.[156] Furthermore, the Rule implies that to be subject to discipline, a lawyer must habitually violate the same rule; violations of different rules of procedure or rules of evidence, no matter how egregious or abusive, would not appear to fall under Rule 3.04(c)(1)'s rubric.[157] The Rule appears aimed at punishing a lawyer's consistent refusal to follow a particular procedure or evidentiary rule, but not a lawyer's general gamesmanship across cases.

2. The Duty Not to State or Allude to Any Matter That Is Not Relevant and Admissible

Rule 3.04(c)(2) admonishes counsel not to "state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence."[158] The Rule attempts to curb attorneys "seeking to influence the outcome of a matter by introducing irrelevant or improper considerations into the deliberative process."[159] The standard used to determine whether an attorney has improperly injected irrelevant or improper considerations is objective and subjective: counsel may believe a matter is either relevant or supported by admissible evidence, even when others do not, but the belief must be reasonable—i.e., under the circumstances, a "reasonably prudent and competent lawyer" would hold the same belief.[160] Unlike subsection (c)(1), violation of Rule 3.04(c)(2) need not be habitual to

that an attorney "shall not *intentionally* or habitually violate any established rule of procedure or of evidence" (emphasis added)).

156. *See* Chacon v. State, 558 S.W.2d 874, 875 (Tex. Crim. App. 1977) (holding that the one-time use of drugs does not constitute a habit for purposes of probation revocation); Morales v. State, 538 S.W.2d 629, 630 (Tex. Crim. App. 1976) (deciding that the single use of alcohol is not a habit when considering probation revocation); Campbell v. State, 456 S.W.2d 918, 922 (Tex. Crim. App. 1970) (stating that a single act is not a habit); Dietz v. State, 123 S.W.3d 528, 532 (Tex. App.—San Antonio 2003, pet. ref'd) (holding that to be admissible as a habit, evidence must demonstrate "a regular practice of meeting a particular kind of situation with a specific kind of conduct" (quoting Anderson v. State, 15 S.W.3d 177, 183 (Tex. App.—Texarkana 2000, no pet.)) (internal quotation marks omitted)); Myers v. State, 780 S.W.2d 441, 446 (Tex. App.—Texarkana 1989, writ ref'd) (defining habit as the "tendency for customary conduct acquired from frequent repetition of the same acts" (citing *Campbell*, 456 S.W.2d 918)); *see also* BLACK'S LAW DICTIONARY 711 (6th ed. 1990) (providing the definition of habit as "[f]ormed or acquired by or resulting from habit; frequent use or custom.").

157. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(1) (addressing the habitual violation of "an established rule of procedure or of evidence").

158. *Id.* R. 3.04(c)(2).

159. *Id.* R. 3.04 cmt. 4.

160. *Id.* R. 3.04(c)(2); *id.* terminology.

subject a lawyer to disciplinary action.[161]

Attacks upon opposing counsel's integrity are certain to violate the Rule, especially when these attacks are accusations that counsel has manufactured evidence, suborned perjury, or has been untruthful.[162] In addition to ethical rules prohibiting counsel from raising irrelevant or inadmissible matters before the jury, such as baseless allegations of misconduct, a lawyer's improper statements or allusions may violate a criminal defendant's right to due process if sufficiently extreme.[163]

Rule 3.04(c)(2) also prohibits counsel from expressing "personal knowledge of the facts in issue except when testifying as a witness."[164] A lawyer's dual role as witness and advocate presents difficult problems involving conflicts of interest and confusion of roles.[165] A declaration of

161. *See id.* R. 3.04(c)(2) (indicating the rule applies to any matter with no requirement of a habitual violation); *see also* Office of Disciplinary Counsel v. Armengau, 788 N.E.2d 1068, 1069 (Ohio 2003) (per curiam) (disciplining a defense attorney for questioning a witness concerning inadmissible personal experiences with counsel and asking questions with no basis in fact).

162. *See* Checker Bag Co. v. Washington, 27 S.W.3d 625, 643 (Tex. App.—Waco 2000, pet. denied) (noting that in addition to Rule 3.04(c), attacks on counsel's integrity violated the Texas Lawyer's Creed (citing SUPREME COURT OF TEX. & COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (1989), *available at* http://www.supreme.courts.state.tx.us/pdf/TexasLawyersCreed.pdf)); Amelia's Auto., Inc. v. Rodriguez, 921 S.W.2d 767, 773 (Tex. App.—San Antonio 1996, no writ) (declaring that a lawyer's comments on opposing counsel's integrity violated Rule 3.04(d)); Circle Y of Yoakum v. Blevins, 826 S.W.2d 753, 758 (Tex. App.—Texarkana 1992, writ denied) (explaining that criticizing opposing counsel's integrity is prohibited), *abrogated on other grounds by* State Farm Fire & Cas. Co. v. Morua, 979 S.W.2d 616 (Tex. 1998).

163. *See* Haddad v. State, 860 S.W.2d 947, 953–54 (Tex. App.—Dallas 1993, writ ref'd) (explaining that in examining prosecutorial misconduct, "[courts] not only look at the facts of each case, but also consider the probable effect on the jurors' minds" (citing Hodge v. State, 488 S.W.2d 779, 781–82 (Tex. Crim. App. 1972))); *see also In re* Zawada, 92 P.3d 862, 870–71 (Ariz. 2004) (suspending a prosecutor who accused a defense expert of unethical conduct without a basis for the allegation); Stahl v. State, 749 S.W.2d 826, 831–32 (Tex. Crim. App. 1988) (en banc) (holding that the prosecutor's continued line of questioning after the witness's outburst for the sole purpose of exacerbating the effect of the outburst violated defendant's due process rights); Koller v. State, 518 S.W.2d 373, 378 (Tex. Crim. App. 1975) (determining that the prosecutor's continued improper conduct deprived the appellant of his due process rights); Boyde v. State, 513 S.W.2d 588, 593 (Tex. Crim. App. 1974) (opining that the prosecutor's "course of repeatedly attempting to place matters before the jury which were clearly impermissible" was harmful and required reversal). *But see* Mosley v. State, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998) (en banc) (stating that unsubstantiated accusations of misconduct against the defense attorney during closing argument were highly improper, but the error was harmless under the facts of the case); Allen v. State, 149 S.W.3d 254, 261 (Tex. App.—Fort Worth 2004, pet. ref'd) (per curiam) (asserting that the prosecutor's unprovoked attack on the defense counsel was improper, but harmless under the *Mosley* standard).

164. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(2).

165. *See* Powers v. State, 165 S.W.3d 357, 360 (Tex. Crim. App. 2005) (identifying "confusion of the jury" as one of the "harmful circumstances specifically targeted" by the advocate–witness rule); EDWARD L. WILKINSON, CONFLICTS OF INTEREST: DISQUALIFICATION, RECUSAL,

personal knowledge to the fact finder increases the potential for misunderstanding or abuse when counsel has not been sworn or subjected to cross-examination, and the statement cannot be rebutted.[166] If egregious, a prosecutor's declaration of personal knowledge may violate a defendant's right to a fair trial.[167]

3. The Duty Not to Express Personal Opinion

Rule 3.04(c)(3) prohibits an attorney from stating a "personal opinion as to the justness of a cause . . . or the guilt or innocence of an accused."[168] An expression of personal opinion, particularly from a prosecutor or a seasoned defense attorney, might convey to the jury that

& WITHDRAWAL OF COUNSEL & THE ADVOCATE WITNESS RULE 89–112 (2010) (examining the advocate–witness rule).

166. *See* United States v. Garcia-Guizar, 160 F.3d 511, 520 (9th Cir. 1998) ("[T]he government may not vouch for the credibility of its witnesses, either by putting its own prestige behind the witness, or by indicating that extrinsic information not presented in court supports the witness'[s] testimony." (quoting United States v. Rudberg, 122 F.3d 1199, 1200 (9th Cir. 1997)) (internal quotation marks omitted)); United States v. Edwards, 154 F.3d 915, 923 (9th Cir. 1998) (explaining that in vouching for credibility of witnesses, the prosecutor, in effect, functioned "as a silent witness for the prosecution" without the opportunity to be subjected to cross-examination); *see also* Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner That Is the Man Himself,"* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145, 146 (1993) (discussing justifications for a rule against vouching). Improper vouching for a witness or the use of other forms of personal knowledge with the jury could lead to a reversal of the case. *Rudberg*, 122 F.3d at 1206 ("[W]e find that the repeated instances of prosecutorial vouching affected the jury's verdict. . . . We reverse for plain error." (alteration in original) (quoting United States v. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992)) (internal quotation marks omitted)); United States v. DiLoreto, 888 F.2d 996, 999–1000 (3d Cir. 1989) (reversing the conviction on grounds that the prosecutor impermissibly argued, "[w]e don't put liars on the stand"), *overruled on other grounds by* United States v. Zehrbach, 47 F.3d 1252 (3d Cir. 1995); United States v. Modica, 663 F.2d 1173, 1178 (2d Cir. 1981) (per curiam) (holding that the prosecutor's error in vouching for a witness was reversible).

167. *See Garcia-Guizar*, 160 F.3d at 520 (stating that the use of repeated improper insinuations and assertions calculated to mislead the jury denied the defendant of due process); *see also* United States v. Young, 470 U.S. 1, 18–19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose [the danger of] such comments . . . jeopardiz[ing] the defendant's right to be tried solely on the basis of the evidence presented to the jury . . . ."); United States v. Ramirez-Velasquez, 322 F.3d 868, 874 (5th Cir. 2003) (holding that a violation of a defendant's due process rights exists when a prosecutor invokes "the sanction of the government itself as a basis for convicting a criminal defendant," inducing the jury to "trust the Government's judgment rather than its own view of the evidence" (quoting United States v. Gallardo-Trapero, 185 F.3d 307, 320 (5th Cir. 1999); *Young*, 470 U.S. at 18–19) (internal quotation marks omitted)); *Edwards*, 154 F.3d at 923 (deciding that a prosecutor violated the due process rights of the defendant when he vouched for the legitimacy of a search and seizure in which he had discovered the evidence that linked the defendant to the contraband); *Boyde*, 513 S.W.2d at 591, 593 (ruling that a statement by the prosecutor that he knew what the witness had told the grand jury constituted reversible error).

168. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(3).

the lawyer has a basis for the conclusion in addition to the evidence before the jury.[169]

The Rule, however, provides an exception: "a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters" relevant to the proceeding.[170] Therefore, counsel may state a belief that the defendant is guilty or not guilty if the opinion is based on the evidence introduced during the trial and does not constitute unsworn testimony.[171]

4. The Duty Not to Degrade a Witness

Rule 3.04(c)(4) provides that an attorney shall not "ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence."[172] Oddly, the subsection does not condemn all questions asked with the intent to degrade a witness, but instead, only those questions that lead to irrelevant and inadmissible evidence. In other words, under a strict reading of the Rule, a lawyer may ask a question intending to degrade a witness if the "question will lead to relevant and

169. *See Young*, 470 U.S. at 18–19 ("[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own."); United States v. Wright, 625 F.3d 583, 610–11 (9th Cir. 2010) (stating that a prosecutor's remarks improperly revealed his opinion of the witnesses and inappropriately injected his long experience in handling similar cases); *Kerr*, 981 F.2d at 1053 ("A prosecutor has no business telling the jury his individual impressions of the evidence."); Young v. State, 752 S.W.2d 137, 146 (Tex. App.—Dallas 1988, writ ref'd) (explaining that the prosecutor should not express a personal opinion because he is "a public official occupying an exalted station" and jurors may interpret his statements as expert testimony from an officer of the court (quoting United States v. Morris, 568 F.2d 396, 402 (5th Cir. 1978)) (internal quotation marks omitted)); *see also* Jackson v. State, 17 S.W.3d 664, 675 (Tex. Crim. App. 2000) ("A prosecutor may not convey to the jury . . . that he possesses specialized knowledge or expertise about a contested factual issue in the case.").

170. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(3).

171. Wolfe v. State, 917 S.W.2d 270, 281 (Tex. Crim. App. 1996) (quoting McKay v. State, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985) (en banc)); *see* United States v. Delgado, 672 F.3d 320, 336–37 (5th Cir. 2012) (en banc) (holding that a prosecutor's unflattering descriptions of the defendant did not require reversal because those descriptions were well founded in the evidence); Sikes v. State, 500 S.W.2d 650, 652 (Tex. Crim. App. 1973) (permitting a district attorney's personal opinion in the closing because the statements were reasonably deducted from the evidence); Benn v. State, 110 S.W.3d 645, 651 (Tex. App.—Corpus Christi 2003, no pet.) (acknowledging that the prosecutor may provide opinions that are based on supported facts and do not amount to sworn testimony).

172. TEX. DISCIPLINARY RULES PROF'L CONDUCT 3.04(c)(4); *see In re* Zawada, 92 P.3d 862, 864–65 (Ariz. 2004) (holding that the prosecutor violated ethical rules by using innuendo during cross-examination to undermine the defense expert's testimony); Sipsas v. State, 716 P.2d 231, 234 (Nev. 1986) (characterizing an expert witness as "[h]av[ing] stethoscope, will travel" and referring to the witness as "the hired gun from Hot Tub Country" was determined improper).

admissible evidence."[173]

The exception to the prohibition against degrading inquiries is contingent upon the existence of two circumstances: (1) the evidence sought must be admissible, not merely relevant, and (2) the lawyer must reasonably believe the evidence exists.[174] Reasonably believes, for the purpose of the Rule, "denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."[175]

The Rule is ambiguous on what constitutes a "question [that] will lead to relevant and admissible evidence."[176] Arguably, under the Rule, a lawyer is restricted only to questions leading to relevant and admissible answers.[177] On the other hand, since the Rule is not specific, questions and answers that are not immediately and directly admissible, but may elicit relevant and admissible evidence upon additional examination, may not violate the Rule.[178]

Rule 3.04(c)(4) parallels Rule 4.04(a) in that it prohibits a lawyer from using "means that have no substantial purpose other than to embarrass . . . or burden a third person."[179] The Rules and commentary are unclear about whether conduct excepted under Rule 3.04(c)(4) is nevertheless subject to sanctions under Rule 4.04(a).[180]

5. The Duty Not to Disrupt Proceedings

The final subsection of Rule 3.04(c) mandates that a lawyer not "engage in conduct intended to disrupt the proceedings."[181] For an attorney's

173. TEX. DISCIPLINARY RULES PROF'L CONDUCT 3.04(c)(4); *see* Cravens v. State, 687 S.W.2d 748, 753–54 (Tex. Crim. App. 1985) (en banc) (impeaching the witness with questions of whether she was a "common prostitute" when the witnesses had never been convicted of the offense, even when offered to attack her credibility, was improper).

174. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(4) (providing exceptions to the ban on degrading a witness); *cf. Zawada*, 92 P.3d at 864–65 (suspending a prosecutor for accusing the defense experts of having been paid to concoct a diagnosis without a basis for such an accusation).

175. TEX. DISCIPLINARY RULES PROF'L CONDUCT terminology.

176. *Id.* R. 3.04(c)(4).

177. *See id.* (listing only questions related to "relevant and admissible evidence").

178. *See id.* (providing questions that lead to admissible evidence).

179. *Id.* R. 4.04(a).

180. *See* 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 82 (2010) (suggesting that the standard under Rule 4.04(a) "may be slightly stricter," but that "[i]n any event, a lawyer should be aware of the need to comply with both Rules").

181. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(5); *see* People v. Clough, 74 P.3d 552, 561 (Colo. O.P.D.J. 2003) (finding that counsel intentionally disrupted the tribunal by

conduct to violate the Rule, the behavior generally must involve more than mere accusations of bias against a judge.[182] Though unclear, conduct may be disruptive only if it in some way obstructs the judge from performing a judicial duty.[183] The comment to Rule 3.04(c)(5) observes that the obligation applies even in the face of abuse by a tribunal; counsel may "stand firm against abuse . . . , but should avoid reciprocation."[184] This

engaging in a verbal altercation with a state's witness in the courthouse lobby); *In re* Greenburg, 9 So. 3d 802, 806 (La. 2009) (per curiam) (ruling that attorneys who became involved in a fistfight in open court, after the judge had cautioned them about using abusive language, violated the rule against intentionally disrupting proceedings); Miss. Bar v. Lumumba, 912 So. 2d 871, 880–81 (Miss. 2005) (en banc) (holding that the attorney intentionally disrupted proceedings by stating repeatedly to the judge that if he had to pay for justice, he would do so); *In re* Neal, 81 P.3d 47, 52 (N.M. 2003) (per curiam) (deciding that refusing to appear for trial by falsely claiming that counsel had been ordered to a trial in another court and by entering into a dispute with a jail transport officer outside the courtroom constituted a disruption of the tribunal); *In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 927 (N.D. 2002) (per curiam) (deciding that the "disruptive, belligerent, and disrespectful" questioning was intended to disrupt a tribunal); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239 (W. Va. 2000) (per curiam) (determining that an attorney's intentional reference before the jury to a polygraph test and his reference to the prosecutor as a "coke dealer" were intended to disrupt the tribunal); *In re* Disciplinary Proceedings Against Eisenburg, 675 N.W.2d 747, 751 (Wis. 2004) (per curiam) (asserting that a lawyer's "rude, abusive, controlling, [and] disrespectful" conduct toward the hearing examiner was intended to disrupt the tribunal). *But see* Attorney Grievance Comm'n v. Hermina, 842 A.2d 762, 768 (Md. 2004) (explaining that insufficient evidence existed to establish that the attorney's failure to comply with discovery orders was intended to disrupt the proceedings); *In re* Disciplinary Proceedings Against Ray, 651 N.W.2d 727, 731 (Wis. 2002) (per curiam) (holding that, although the attorney interrupted opposing counsel repeatedly with comments such as "[o]h, brother" and "[o]h, what crap," no evidence indicated that counsel intended to disrupt the proceedings).

182. *See In re* Little, 404 U.S. 553, 555 (1972) (per curiam) (reversing a contempt finding against a pro se litigant who accused the judge of bias where there was no other evidence that the comments disrupted proceedings); *Ex parte* Curtis, 568 S.W.2d 363, 366 (Tex. Crim. App. 1978) (en banc) (repeating charges of bias by the prosecutor outside the presence of the jury was not sufficient to establish disruptive behavior). *But see In re* Buckley, 514 P.2d 1201, 1208–09 (Cal. 1973) (holding that the attorney's declaration that the judge simply "did not want to apply the law" in response to an adverse ruling was sufficiently disruptive to merit a contempt finding); Bd. of Prof'l Responsibility v. Slavin, 145 S.W.3d 538, 551 (Tenn. 2004) (ruling that the lawyer's conduct "propelled [him] into the quagmire of unacceptable speech").

183. *See generally Curtis*, 568 S.W.2d at 366 (quoting *In re* McConnell, 370 U.S. 230, 236 (1962)) (interpreting the standard for criminal contempt of court).

184. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 cmt. 5; *see In re* Abse, 251 A.2d 655, 656–57 (D.C. 1969) (granting attorneys the right to rebut unfair accusations by the judge if done in a respectful manner); Shaw v. Greater Hous. Transp. Co., 791 S.W.2d 204, 211 (Tex. App.—Corpus Christi 1990, no writ) (warning that lawyers "have the responsibility to conduct themselves with respect for the tribunal and the legal system" even when a judge has "failed to act in a manner appropriate for a member of the judiciary"); *cf.* TEX. CODE JUD. CONDUCT, Canon 3(B)(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2005) (mandating that a judge maintain order and decorum in the tribunal); *id.* Canon 3(B)(4) (promoting respect and patience by the judge to all parties involved in the proceeding and encouraging judges to demand the same of the parties under the judge's direction).

responsibility is a "corollary of the advocate's right to speak on behalf of litigants"[185] and the judge's duty to conduct proceedings with decorum.[186]

Rule 3.04(c) extends beyond the disruption of formal proceedings.[187] In *Love v. State Bar of Texas*,[188] an attorney appeared an hour late for docket call and attempted to set a trial date.[189] The court informed the attorney that he needed to confer with the prosecution first, but the lawyer left the courtroom without doing so.[190] After concluding docket call, the trial judge reset the cause before retiring to his chambers.[191] The attorney returned two hours later and upon being informed that the case had been reset, became angry and abusive toward court personnel and made anti-Semitic remarks about the judge.[192] On review, the court of appeals held that the evidence was more than sufficient to establish that the attorney violated the TDRPC.[193]

Rule 3.02 of the TDRPC mirrors the prohibition against disruption embodied in Rule 3.04(c)(5).[194] Rule 3.02 states: "In the course of

185. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 cmt. 5.

186. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(3) ("A judge shall require order and decorum in proceedings before the judge."); *id.* Canon 3(B)(4) ("A judge shall be patient, dignified[,] and courteous to litigants, jurors, witnesses, lawyers[,] and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials[,] and others subject to the judge's direction and control."); *see also* Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247, 1254 (Miss. 2005) (determining that the judge did not violate the duty to maintain order and decorum in the proceedings with angry persistence during the bench conference before another judge).

187. *See In re* Moore, 665 N.E.2d 40, 42 (Ind. 1996) (per curiam) (striking opposing counsel during pretrial conference in chambers violated the rule against disrupting proceedings); *In re* Thomas, 976 So. 2d 1245, 1254 (La. 2004) (per curiam) (holding that an attorney's shouting confrontation with another attorney in the anteroom of judge's chambers, forcing the judge to interrupt a regular docket proceeding, was intended to disrupt tribunal); *In re* Madison, 282 S.W.3d 350, 358–59 (Mo. 2009) (per curiam) (deciding that there was an intent to disrupt proceedings where an attorney sent repeated harassing letters to the judge after she postponed the case for a personal emergency, causing her to become so upset she recused herself from case); *In re* Disciplinary Action Against Kirschner, 793 N.W.2d 196, 201 (N.D. 2011) (per curiam) (failing to appear at trial violated the rule against disrupting proceedings); *In re* Disciplinary Proceeding Against Scannell, 239 P.3d 332, 339 (Wash. 2010) (filing lawsuits against members of the hearing board individually, then moving to disqualify them on grounds of conflict of interest violated the rule against disrupting proceedings).

188. Love v. State Bar of Tex., 982 S.W.2d 939 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

189. *Id.* at 941.

190. *Id.*

191. *Id.*

192. *Id.* at 941, 944.

193. *Id.* at 944.

194. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.02 (prohibiting a lawyer

litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[195] Under Rule 3.02, "reasonable delays in some matters in order to permit the competent discharge of a lawyer's multiple obligations" does not constitute professional misconduct.[196] Instead, the Rule seeks to prevent a lawyer from delaying proceedings primarily to harass or maliciously injure another.[197] A course of action will not violate the Rule if a "competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or maliciously injuring" a party.[198]

Similarly, Rule 3.02 prohibits conduct that increases the expense or burdens of litigation for the sole purpose of gaining a tactical advantage over an opponent unable to bear those burdens.[199] Such concerns are of particular relevance to a state attorney's prosecution of private individuals or to a representative of a wealthy defendant who seeks to overburden a small jurisdiction with endless, unmeritorious motions and demands.

D. *The Duty Not to Knowingly Disobey Court Rules*

Rule 3.04(d) of the TDRPC requires an attorney not to "knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal."[200] The Rule imposes two duties: (1) the duty to obey the standing rules or individual rulings of a court,[201]

from unreasonably causing delays, resulting in the increase of costs and other burdens), *with id.* R. 3.04(c)(5) (forbidding conduct calculated to disrupt the proceedings).

195. *Id.* R. 3.02.

196. *Id.* R. 3.02 cmt. 3. *See generally id.* R. 3.02 cmt. 4–5 (acknowledging that delays have legitimate uses, yet cautioning against delay intended to harass or maliciously injure).

197. *Id.* R. 3.02 cmt. 5.

198. *Id.*

199. *See id.* R. 3.02 cmt. 7 (suggesting lawyers should not seek to increase the burdens of litigation because their client can more readily bear the burden).

200. *Id.* R. 3.04(d).

201. *Id.*; *see* McIntyre v. Comm'n for Lawyer Discipline, 247 S.W.3d 434, 439–42 (Tex. App.—Dallas 2008, pet. denied) (holding that a lawyer who knowingly failed to forward a check to the Internal Revenue Service as expressly stated in an agreed court order violated Rule 3.04(d) despite claiming that he needed documentation before sending the check); *see also In re* Cash Media Sys., Inc., 326 B.R. 655, 670–71 (Bankr. S.D. Tex. 2005) (determining that a lawyer's filing of subsequent motions with the bankruptcy court without moving for admittance before the court was a violation of the local court rule requiring membership, as well as a violation of Rule 3.04(d)); *In re* Lanahan, 389 P.2d 263, 265 (Ariz. 1964) (per curiam) (disbarring a lawyer for not answering interrogatories after the court issued an order compelling answers); *In re* Slomski, No. 02-1506, 2004 WL 5730513, at *3 (Ariz. Disciplinary Comm'n Oct. 13, 2004) (disciplining an attorney for repeatedly failing to abandon closing argument after the judge ordered the attorney to stop); People v. Huntzinger, 967 P.2d 160, 161–62 (Colo. 1998) (per curiam) (upholding suspension of a lawyer

and (2) the duty to counsel clients to obey standing rules and orders.[202] The Rule prohibits knowing violations of standing rules and orders, not just intentional violations.[203]

At least one commentator has asserted that the obligation to obey "standing rules of a tribunal" includes the local rules of a court and "more widely applicable standards, such as rules of procedure or evidence."[204] However, Rule 3.04(c)(1) contradicts the commentator's theory by specifically prohibiting only habitual violations of established rules of procedure or evidence, and the comment to the subsection expressly declares that the Rule was purposely limited.[205] If the drafters had wished to subject single knowing violations of the rules of procedure or evidence to disciplinary action, the language would have reflected such.

The only exception to either Rules 3.04(c)(1) or 3.04(d) lies in "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."[206] Rule 3.01 implicitly prohibits disobedience that is not open, regardless of the basis for the claim.[207] Therefore, a lawyer must

for not paying court-ordered fees and failing to appear for his own court-ordered deposition); Fla. Bar v. Wishart, 543 So. 2d 1250, 1252 (Fla. 1989) (per curiam) (suspending the attorney for unilaterally claiming the custody orders void and refusing to obey the orders); Att'y Grievance Comm'n v. Hermina, 842 A.2d 762, 771 (Md. 2004) (finding the attorney's failure to participate in a court-ordered pretrial conference to violate the duty to obey court orders); *In re* Petition for Disciplinary Action Against Nathan, 671 N.W.2d 578, 584 (Minn. 2003) (per curiam) (holding that an attorney in a custody case violated the duty to obey court orders when he refused to reveal where his client was located after the court ordered him to do so); Ramsey v. Bd. of Prof'l Responsibility, 771 S.W.2d 116, 123 (Tenn. 1989) (refusing to answer judge's question concerning plea-bargain agreement violated the duty to obey court orders); *In re* Disciplinary Proceedings Against Ratzel, 578 N.W.2d 194, 198 (Wis. 1998) (per curiam) (holding that it was a violation of a court order to continue to represent parties after the court discharged the attorney from the case).

202. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(d); *see* Iowa Bd. of Prof'l Ethics & Conduct v. Hughes, 557 N.W.2d 890, 894 (Iowa 1996) (disciplining a lawyer for violating the duty to advise clients to obey a court order after the lawyer advised the client to ignore the order to obtain the presentence evaluation).

203. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(d); *see Cash Media*, 326 B.R. at 670–71 (concluding that the lawyer knowingly violated a standing rule and, thus, knowingly violated Rule 3.04(d)); *McIntyre*, 247 S.W.3d at 439–42 (holding that the lawyer knowingly violated a court order and Rule 3.04(d) by failing to forward a check to the IRS).

204. 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:4, at 85–86 (2010); *accord* Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 289 (1990) (reiterating that "standing rules of the tribunal" includes local rules and rules of procedure).

205. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(1) & cmt. 3.

206. *Id.* R. 3.04(c)(1), (d).

207. *See id.* R. 3.04(d) & cmt. 6 (clarifying that the Rule forbids lawyers from failing to disclose a client's intended or actual noncompliance).

"openly acknowledge the client's noncompliance."[208] The comments to the Rule also note that "to assure due regard for formal rulings and standing rules of practice or procedure," a lawyer asserting that they do not have an obligation to obey an order or rule must base the assertion on a reasonable belief.[209] Thus, the Rule does not penalize a good faith refusal, even if the basis for the refusal later proves incorrect.

Even though the exception to Rule 3.04(d) is drafted in terms of a "client's willingness to accept any sanction," the exception may actually apply to a prosecutor's actions in a criminal case.[210] To illustrate this principle, the comments provide an example of an informant's identity ordered to be disclosed to the court.[211] If the State decides "that it would prefer to allow the case to be dismissed rather than to make that disclosure," the state attorney would not be subject to discipline under the Rule for his refusal to comply with the court's order of disclosure.[212]

E. *The Duty Not to Request a Third Party to Refrain from Voluntarily Giving Information*

Rule 3.04(e) of the TDRPC limits the circumstances in which a lawyer can "request a person other than a client to refrain from voluntarily giving relevant information to another party."[213] A lawyer shall not request a third party to refuse to give relevant information unless "the person is a relative or an employee or other agent of a client" and "the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."[214] The Rule is similar to, but much narrower than, Rule 3.04(a), which prohibits a lawyer from obstructing "another party's access to evidence."[215] Moreover, since the Rule applies to dealings with persons who are not the lawyer's clients, Rules 4.01, 4.02, 4.03, and 4.04 are also implicated in any interaction

208. *See id.* (explaining that open acknowledgement of noncompliance is mandatory under the Rule).

209. *Id.* R. 3.04 cmt. 7.

210. *Id.* R. 3.04(d); *see id.* R. 3.04 cmt. 7 ("The second circumstance is that a lawyer may acquiesce in a client's position that the sanctions arising from noncompliance are preferable to the costs of compliance.").

211. *Id.* R. 3.04 cmt. 7.

212. *Id.*

213. *Id.* R. 3.04(e).

214. *Id.*

215. *Compare id.* R. 3.04(a) (prohibiting a lawyer from obstructing the opposing party's access to evidence), *with id.* R. 3.04(e) (limiting the ability to ask a third party to obstruct the other party's access to information).

between counsel and a third party.[216]

Rule 3.04(e) prohibits attorneys from unilaterally barring opposing counsel from access to witnesses.[217] Nevertheless, witnesses are entitled to decline to speak with defense counsel,[218] and the Rule does not prevent counsel from advising witnesses that they are not obligated to cooperate with counsel for the opposing party.[219] Criminal law practitioners utilizing such methods should act cautiously, however, due to the risks of ethical censure and potential violations of due process or other constitutional or statutory rights.[220] Lacking a compelling justification, a

216. *See id.* R. 4.01 (regulating truthfulness in statements to third parties); *id.* R. 4.02 (outlining confidentiality in communications with third parties); *id.* R. 4.03 (explaining a lawyer's obligations in dealing with unrepresented persons); *id.* R. 4.04 (respecting the rights of third parties).

217. *Cf.* Stearnes v. Clinton, 780 S.W.2d 216, 224 (Tex. Crim. App. 1989) (en banc) (opining that a local rule permitting defense counsel to interview state's witnesses only with the permission of the prosecutor is "a legal nullity").

218. *See* United States v. Pinto, 755 F.2d 150, 152 (10th Cir. 1985) ("A witness in a criminal case has the right to refuse to be interviewed." (citing United States v. Fischel, 686 F.2d 1082, 1092 (5th Cir. 1982); Byrnes v. United States, 327 F.2d 825, 832 (9th Cir. 1964))); United States v. White, 454 F.2d 435, 439 (7th Cir. 1971) (summarizing that witnesses are free to grant or reject interviews); State v. Guzman, 71 P.3d 468, 470 (Idaho Ct. App. 2003) (recognizing that witnesses may refuse to speak with counsel for the defendant).

219. *See* United States v. Black, 767 F.2d 1334, 1338 (9th Cir. 1985) (agreeing with other circuits that an attorney may inform witnesses of the right to decline to interview); United States v. Rich, 580 F.2d 929, 934 (9th Cir. 1978) (recognizing that an FBI agent's advice that a witness is not required to meet with defense counsel is permissible when the witness is aware of the choice to speak); *White*, 454 F.2d at 439 (advancing that the government may inform witnesses of their right to reject interviews); *Guzman*, 71 P.3d at 470 (acknowledging that the prosecution may inform witnesses of the right to refuse to speak with defense counsel). *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2002) (asserting that a lawyer shall not "request a person . . . to refrain from *voluntarily giving* relevant information to another party" (emphasis added)).

220. *See Rich*, 580 F.2d at 934 (expressing concern for (1) how easily abuses can occur when "officials elect to inform potential witnesses of their right not to speak with defense counsel" and (2) the importance of prosecutors remaining neutral in advising witnesses); People v. Steele, 464 N.E.2d 788, 793–94 (Ill. App. Ct. 1884) (informing a witness of the right to decline to speak with defense counsel and advising that a state's attorney be present for the interview does not constitute error); State v. Simmons, 203 N.W.2d 887, 892 (Wis. 1973) (recognizing that a prosecutor advising a witness to decline to provide the defense with relevant information constitutes unprofessional conduct); *see also* Alaska Bar Ass'n, Ethics Op. 84-3 (1984), *available at* https://www.alaskabar.org/servlet/content/324.html (determining that a prosecutor's advice should be limited to advising a witness of the freedom to choose whether to be interviewed; overstepping this limitation may lead to due process and professional conduct violations); Colo. Bar Ass'n Ethics Comm., Formal Op. 65 (1984), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1786/CETH/Ethics-Opinion-65:-Guidelines-for-Opposing-Counsel-Contacting-Witnesses,-03/17/84/ (declaring it unethical for attorneys or representatives to suggest to witnesses that they decline pretrial interviews with opposing counsel); State Bar of Mich. Prof'l Ethics Comm., Informal Op. RI-302 (1997), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ri-302.htm (announcing that it is professional misconduct for a prosecutor to request a witness to decline to speak with defense counsel); Va. State Bar Disciplinary Bd., Op. 1741 (2000), *available at* http://www.vsb.org/docs/va

prosecutor should not discourage a witness from speaking with the defense in order to avoid potentially violating a defendant's rights to due process and elemental fairness.[221]

III. THE ETHICAL DUTIES OF "CANDOR TOWARD THE TRIBUNAL": RULE 3.03

The conduct of an attorney "should be characterized at all times by honesty, candor, and fairness."[222] Accordingly, Texas Disciplinary Rule 3.03 outlines the duties regarding candor to the tribunal.[223] Tribunal, as defined in the terminology of the TDRPC, "denotes any governmental body or official . . . engaged in a process of resolving a particular dispute or controversy," and includes "such institutions as courts . . . , judges, magistrates, [and] special masters . . . empowered to resolve or to recommend a resolution of a particular matter."[224] The terminology specifically declares that the term tribunal does not include jurors and prospective jurors.[225] Therefore, based on a literal reading of the terminology, the Rule mandating candor toward the tribunal does not apply to jurors, and the responsibilities under Rule 3.03 are inapplicable to

lawyermagazine/may00leos.pdf (concluding that prosecutors may inform witnesses of their right to speak with defense investigators, but prohibiting prosecutors from making further comments that might encourage information withholding); Wash. State Bar Rules of Prof'l Conduct Comm., Informal Op. 1020 (1986), *available at* http://mcle.mywsba.org/IO/print.aspx?ID=13 (recognizing that denial of the opportunity to prepare for trial due to prosecutorial interference with witness access implicates constitutional concerns); *cf.* State v. York, 632 P.2d 1261, 1269 (Or. 1981) ("[D]ue process does not require 'fair opportunity for interview.'").

221. *See* United States v. Soape, 169 F.3d 257, 270 (5th Cir. 1999) (discussing compelling circumstances under which access to witnesses may be limited); *Black*, 767 F.2d at 1337 ("Absent a fairly compelling justification, the government may not interfere with defense access to witnesses." (citing United States v. Cook, 608 F.2d 1175, 1180 (9th Cir. 1979))); United States v. Peter Kiewit Sons' Co., 655 F. Supp. 73, 77 (D. Colo. 1986) (explaining that absent exceptional circumstances, both parties have a right to converse with the witness before trial); *Guzman*, 71 P.3d at 470 ("This right of defendants to interview witnesses without prosecutorial interference is grounded in the constitutional guarantee of due process and notions of 'elemental fairness.'" (quoting Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966))); *see also Gregory*, 369 F.2d at 188 (holding that the prosecution's advice to witnesses not to speak to anyone without the prosecutor present inhibited defendant's right to fair trial, a right demanded by "elemental fairness and due process"); People v. Avery, 377 N.E.2d 1271, 1276 (Ill. App. Ct. 1978) (reversing a conviction on the grounds that the prosecution's efforts to keep witness incommunicado violated the defendant's right to present a defense); State v. Williams, 485 S.E.2d 99, 102 (S.C. 1997) (remarking that intimidation of a witness by the government may violate the due process rights of the defendant).

222. *In re* J.B.K., 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ).

223. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03.

224. *Id.* terminology.

225. *Id.*

jury trials.[226]

Nevertheless, while the duties provided in Rule 3.03 will often apply to counsel's dealings with a judge instead of encounters with a jury, situations can be easily envisioned where the duties outlined in the Rule might apply to jurors.[227] The terminology of the Rules notwithstanding, it would behoove counsel to think of the duties of candor and impartiality as frequently encountered during interactions with the judge, but still applicable in dealings with the jury.

In fulfilling professional duties, "a lawyer must be ever mindful of the profession's broader duty to the legal system."[228] This is particularly true for attorneys on both sides of the docket in criminal litigation. A prosecutor's primary duty is "not to convict, but to see that justice is done," and both prosecutors and defense counsel are charged under the Code of Criminal Procedure "to so conduct themselves as to insure a fair trial for both the state and the defendant."[229]

Rule 3.03 of the TDRPC addresses counsel's broad duty of honesty toward a tribunal.[230] The Rule covers five different aspects of truthfulness: (1) making false statements of law or fact; (2) failing to disclose a fact when "necessary to avoid assisting a criminal or fraudulent act"; (3) failing to disclose unprivileged facts in an ex parte proceeding; (4) failing to disclose controlling precedent; and (5) offering or using false evidence.[231]

A. *The Duties Not to Offer or Use False Evidence, or Make False Statements of Fact*

Texas Disciplinary Rule 3.03(a)(1) prohibits counsel from knowingly making "a false statement of material fact or law to a tribunal."[232] In the

226. *See id.* R. 3.03 (regulating candor with the tribunal); *id.* terminology (excluding jurors and potential jurors from the definition of tribunal).

227. *See generally id.* R. 3.03 cmts. 1–15 (discussing a lawyer's duties in terms of candor to the tribunal with scant mention of impact on the jury).

228. *J.B.K.*, 931 S.W.2d at 583 (citing SUPREME COURT OF TEX. & COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (1989), *available at* http://www.supreme.courts.state.tx.us/pdf/TexasLawyersCreed.pdf).

229. TEX. CODE CRIM. PROC. ANN. art. 2.01, 2.03(b) (West 2005).

230. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 (outlining prohibited actions and the necessity of taking remedial measures when possible).

231. *Id.* R. 3.03(a).

232. *Id.* R. 3.03(a)(1); *see* McIntyre v. Comm'n for Lawyer Discipline, 169 S.W.3d 803, 811–12 (Tex. App.—Dallas 2005, pet. denied) (upholding sanctions against attorney for pleading before court that he represented a trustee whom he had not yet even contacted); Bond v. State, 176 S.W.3d 397, 401 n.3 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (concluding that "[c]ounsel's argument goes beyond the limits of zealous advocacy" because he "misrepresented the facts, distorted the record, and falsely accused the trial court of highly unprofessional and unethical conduct," which

same vein, Rule 3.03(a)(5) requires a lawyer not to knowingly "offer or use evidence that the lawyer knows to be false."[233] Accordingly, Rule 3.03(a)(1) is both broader and narrower than Rule 3.03(a)(5). Rule 3.03(a)(1) is narrower in that it encompasses only material facts, as opposed to the proscription in Rule 3.03(a)(5) that a lawyer not offer evidence known to be false, regardless of its materiality.[234] On the other hand, Rule 3.03(a)(1) is broader than Rule 3.03(a)(5) because Rule 3.03(a)(1) applies not just to evidence offered at trial but also to any material fact, implicitly including facts urged in support of motions and requests to the court.[235]

the court found offensive); Sossi v. Willette & Guerra, 139 S.W.3d 85, 89–90 (Tex. App.—Corpus Christi 2004, no pet.) (quoting Rule 3.03(a)(1) in sanctioning a lawyer for mischaracterizing the trial court's ruling to file an interlocutory appeal); *In re* Lerma, 144 S.W.3d 21, 26, 29 (Tex. App.—El Paso 2004, orig. proceeding) (filing an appendix to the petition for mandamus that included a copy of an order that counsel knew had been withdrawn by the trial court violated 3.03(a)(1)); *In re* Goldblatt, 38 S.W.3d 802, 805 n.2 (Tex. App.—Fort Worth 2001, orig. proceeding) (cautioning counsel against violating Rule 3.03(a)(1) with statements during oral argument that flatly contradicted representations made in the petition for mandamus); *In re* Guevara, 41 S.W.3d 169, 172 (Tex. App.—San Antonio 2001, no pet.) (per curiam) (sanctioning counsel who "grossly misstated an obviously important and material fact" that was potentially dispositive of the litigation); Schlafly v. Schlafly, 33 S.W.3d 863, 872–74 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that an attorney violated Rule 3.03(a)(1) by misrepresenting the trial court's ruling and by failing to disclose facts "essential to a proper determination of his claim"); *see also In re* Warren, 321 F. App'x 369, 372–73 (5th Cir. 2009) (per curiam) (disbarring a lawyer from court for ineffective assistance and for making false statements of fact concerning his handling of the defendant's appeal); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239 (W. Va. 2000) (per curiam) (concluding that the lawyer's sidebar reference to a witness's purported polygraph examination, where the witnesses never submitted to polygraph, violated the rule against making a false statement of material fact).

233. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(5).

234. *Compare id.* R. 3.03(a)(1) (requiring a lawyer not to knowingly "make a false statement of material fact or law to a tribunal"), *with id.* R. 3.03(a)(5) (prohibiting use of any evidence the lawyer knows to be false).

235. *Compare id.* R. 3.03(a)(1) (promulgating that no attorney should knowingly fabricate a material fact or law when communicating with the tribunal), *with id.* R. 3.03(a)(5) (declaring that an attorney "shall not knowingly offer or use evidence that the lawyer knows to be false"). Rule 3.03(a)(1) is implicated in all dealings with the tribunal. *See* Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (holding that an attorney violated Rule 3.03(a)(1) by representing during docket call that the bankruptcy court had reopened the case and the automatic stay was in effect); Cap Rock Elec. Coop. v. Tex. Utils. Elec. Co., 874 S.W.2d 92, 98 (Tex. App.—El Paso 1994, no writ) (affirming the trial court's sanctions for false and misleading statements made to the court during a discovery dispute); *see also* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992) (upholding the trial court's sanctions for false and misleading statements made during a hearing for a temporary restraining order); Burton v. Mottolese, 835 A.2d 998, 1030–31 (Conn. 2003) (maintaining sanctions for an the attorney who made false statements of material fact in an affidavit in support of the motion to recuse after counsel claimed a third party had commented on the judge's purported gender bias); Att'y Grievance Comm'n v. Hermina, 842 A.2d 762, 770 (Md. 2004) (violating the duty not to mislead the court

Under Rule 3.03(a)(1), misleading statements of fact,[236] as well as affirmative falsehoods,[237] are subject to sanctions. However, as already

when an attorney represented to the court that he had been enjoined from proceeding with discovery although the sister court had issued only a protective order); *In re* Neal, 81 P.3d 47, 50–51 (N.M. 2003) (per curiam) (concluding that counsel made repeated false statements of material fact to the trial court in attempt to secure postponement of scheduled trials).

236. *See Schlafly*, 33 S.W.3d at 873 (complaining of distribution of community assets, counsel misleadingly failed to recognize or even mention distribution of community debts, violating Rule 3.03(a)); Am. Paging of Tex., Inc. v. El Paso Paging, Inc., 9 S.W.3d 237, 242 (Tex. App.—El Paso 1999, pet. denied) (holding that counsel violated Rule 3.03(a)(1) by complaining that a default judgment had been taken against their client without notice, but failed to apprise the appellate court that the trial court had conducted a hearing on their motion for new trial and overruled their claim of lack of notice); *see also* Schledwitz v. United States, 169 F.3d 1003, 1016 (6th Cir. 1999) (presenting an expert as independent that had actually been part of the investigating team for years was egregiously misleading); SMS Data Prods. Grp., Inc. v. United States, 900 F.2d 1553, 1558 (Fed. Cir. 1990) (sanctioning a party for misleadingly suggesting that attached exhibits, which were themselves misleading, had been presented before an administrative board); Dreamlite Holdings Ltd. v. Kraser, 890 F.2d 1147, 1149 (Fed. Cir. 1989) (denouncing the lawyer's claim that he cooperated with discovery because he had been examined four times, when the record clearly established "that four examinations were required precisely because of [appellant's] repeated and continued-to-this-day refusals to answer proper questions and to produce discoverable documents"); Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir. 1984) ("Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of the candor required by . . . Rule 3.3."); Fox v. State, 779 P.2d 562, 571–72 (Okla. Crim. App. 1989) (determining that the expert should not have been encouraged to present imprecise conclusions that defendant had been at the scene of the crime based on analysis of a hair sample); McCarty v. State, 765 P.2d 1215, 1218 (Okla. Crim. App. 1988) (declaring that omission of hair analysis results made the report inaccurate and misleading, and deprived council of essential information); Cook v. State, 940 S.W.2d 623, 626 (Tex. Crim. App. 1996) (en banc) (regarding testimony of the age of fingerprints left at the scene, placing the defendant at the crime scene at the time of the murder, was misleading); Comm. on Legal Ethics of the W. Va. State Bar v. Faber, 408 S.E.2d 274, 281 (W. Va. 1991) (holding that a lawyer violated the duty of candor when he used an ellipsis in a quote from an affidavit altering the meaning of the document, even though counsel attached the entire affidavit to the motion); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA CITY U. L. REV. 17, 30 (2003) (recounting a prosecutor's use of fraudulent scientific evidence and purportedly discredited or untrustworthy experts).

237. *See* Maddox v. Lord, 818 F.2d 1058, 1062 (2d Cir. 1987) (reviewing the false testimony of a serologist about his academic credentials); Doepel v. United States, 434 A.2d 449, 460 (D.C. Cir. 1981) (describing an FBI serologist's testimony that he held a master's degree in science, "whereas in fact he never attained a graduate degree," and testimony stating that no lab tests were conducted, though results were reported); State v. Griffith, 161 P.3d 675, 686 (Idaho Ct. App. 2007) (explaining that a testifying expert in mechanical physics misrepresented his affiliation with a university physics department, but the error was harmless); People v. Cornille, 448 N.E.2d 857, 865–66 (Ill. 1983) (reversing a conviction on the basis that the fire expert lied about his qualifications because "it is obvious that every party, including the State, has an obligation to verify the credentials of its expert witnesses"); People v. Alfano, 420 N.E.2d 1114, 1116 (Ill. App. Ct. 1981) (declaring that an arson expert testified falsely about his academic credentials); State v. Elder, 433 P.2d 462, 463–64 (Kan. 1967) (convicting a lab technician of perjury for testifying that he had attended two universities that had no record of him); State v. Ruybal, 408 A.2d 1284, 1285 (Me. 1979) (stating the FBI analyst reported results of lab tests he never conducted); State v. DeFronzo, 394 N.E.2d

observed, the Rule applies only to material facts or law.[238] Materiality in the context of Rule 3.03(a)(1) "encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act on in making a ruling."[239] Material matters are not limited simply to facts that might control or determine the outcome of the case, but may include "rulings that might delay or impair the proceedings, or increase the costs of litigation."[240]

Although Rule 3.03(a)(1) states only that a lawyer shall not knowingly make a false statement to a tribunal, the comment to the Rule suggests that the Rule may be interpreted broadly to include statements made by implication or silence.[241] The comment vaguely warns that circumstances may exist "where failure to make a disclosure is the equivalent of an affirmative misrepresentation," without specifying precise circumstances.[242]

In Opinion 504, the Texas Committee on Professional Ethics addressed the issue of whether silence may constitute a statement for the purposes of Rule 3.03(a)(1).[243] The facts considered in Opinion 504 were straightforward. During a punishment hearing, the State mistakenly declared to the court that the defendant had no prior felony convictions, implying that the defendant was eligible for probation.[244] The "prosecutor [then] turned to the defendant and asked, 'Right?'"[245] Defense counsel did not reply despite knowledge of the defendant's prior convictions, leading the court to erroneously grant the defendant probation.[246]

To determine if silence amounts to a statement, the committee reviewed

1027, 1033 (Ohio Ct. Com. Pl. 1978) (concluding that a police officer lied about his various expert credentials and that a certain test was conducted); Commonwealth v. Mount, 257 A.2d 578, 579 (Pa. 1969) (vacating a capital murder conviction on the basis that state's expert lied about her professional qualifications and never in fact "fulfilled the educational requirements for a laboratory technician"); *see also* United States v. Stewart, 433 F.3d 273, 295–302 (2d Cir. 2006) (holding that an expert's perjury that he was present when certain tests were conducted was immaterial where the defendant was acquitted only on counts to which the expert's testimony was relevant).

238. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(1) & cmt. 2 (prohibiting false statements regarding facts or law, and affirmative misrepresentations).

239. *Cohn*, 979 S.W.2d at 698.

240. *Id.*

241. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 2 (suggesting that an attorney's failure to disclose material facts is akin to affirmatively proposing them).

242. *Id.*

243. *See* Tex. Comm. on Prof'l Ethics, Op. 504, 58 TEX. B.J. 718, 718 (1995) (reviewing a fact scenario where defense counsel made no attempt to correct a prosecutor's mistaken statement to the tribunal).

244. *Id.*

245. *Id.*

246. *Id.*

the history of both subsections (1) and (5) of Rule 3.03(a).[247] It established that a lawyer is prohibited under Rule 3.03(a)(1) from making a false statement to the court if asked specifically about a fact.[248] The committee further speculated that

> [i]f the question by the court to the defendant's lawyer follows an inaccurate statement in court by another person . . . , the lawyer must correct the inaccurate information . . . , or make some other statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement.[249]

Alternatively, the lawyer may request to be excused from responding to the question to at least alert the court of a problem and, presumably, signaling to the court that further inquiry is needed to discover the truth.[250] Since the question directly addressed to defense counsel in Opinion 504 was posed by the prosecutor, not the court, and because neither the defendant nor his counsel used the evidence as contemplated by Rule 3.03(a)(5), the committee concluded that Rule 3.03(a) had not been violated.[251]

Consequently, Opinion 504 outlines the circumstances under which the "failure to make a disclosure is the equivalent of an affirmative misrepresentation."[252] A failure to disclose will violate Rule 3.03(a)(1) when the failure occurs during examination, either direct or indirect, by the court.[253] Silence in any other situation does not appear to run afoul of the Rule.[254]

Counsel has the additional duty under Rule 3.03(b), upon learning of the falsity of evidence already submitted to the court, to "make a good faith effort to persuade the client to authorize the lawyer to correct or

247. *Id.* at 718–19.

248. *Id.* at 719.

249. *Id.*

250. *Id.*

251. *See id.* (stating that no violation of Rule 3.03(a)(1) occurred because no false statement was asserted by the defense).

252. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 2 (noting that circumstances do exist where a knowledgeable omission by an attorney is analogous to an affirmative misrepresentation), *with* Tex. Comm. on Prof'l Ethics, Op. 504, 58 TEX. B.J. 718, 719 (1995) (clarifying that it is a violation of the Rule if an attorney fails to correct inaccurate statements posed by the court or, alternatively, fails to alert the court that he or she will not corroborate the statement).

253. *See* Tex. Comm. on Prof'l Ethics, Op. 504, 58 TEX. B.J. 718, 719 (1995) (recognizing an attorney's possible liability for failure to correct or alert the court to an erroneous statement).

254. *But see In re* Zuniga, 332 B.R. 760, 783–84 (Bankr. S.D. Tex. 2005) (proclaiming that failure of counsel to apprise the court of the nature of the fee arrangement and to notify the court that counsel had not been admitted to the local bar pro hac vice constituted the equivalent of affirmative misrepresentations, violating Rule 3.03(a)(1)).

withdraw the false evidence."[255] If the effort is unsuccessful, "the lawyer shall take reasonable remedial measures, including disclosure of the true facts."[256]

B. *The Duty Not to Make False Statements of Law or Fail to Disclose Controlling Adverse Precedent*

In addition to prohibiting a lawyer from knowingly making "a false statement of material fact" to a tribunal, Rule 3.03(a)(1) also restricts counsel from making false statements of law.[257] "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal," subject to discipline under Rule 3.03(a)(1).[258] The Rule is ambiguous on whether it applies only to material law and material facts, or whether any misstatement, material or nonmaterial, violates the Rule.[259]

255. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(b).

256. *Id.*; *see In re* City of Lancaster, 228 S.W.3d 437, 440–42 (Tex. App.—Dallas 2007, orig. proceeding) (holding that counsel violated Rules 3.03(b) and (c) by failing to notify the appellate court that the lower court had modified its ruling, rendering many of the issues raised in the petition for mandamus moot).

257. TEX. DISCIPLINARY RULES PROF'L CONDUCT 3.03(a)(1).

258. *Id.* R. 3.03(a)(1) & cmt. 3; *see In re* Core Constr. Servs. of Tex., Inc., No. 05-09-00665-CV, 2009 WL 1801242, at *1 (Tex. App.—Dallas June 24, 2009, orig. proceeding) (mem. op.) (chastising appellate counsel for "[d]eliberately misrepresenting the law" and violating Rule 3.03(a)(1) in claiming a particular case was "the only Texas case" addressing the issue when at least two other cases were cited by opposing counsel); Ins. Co. of Pa. v. Lejeune, 261 S.W.3d 852, 856 n.2 (Tex. App.—Texarkana 2008) (explaining that counsel violated Rule 3.03(a) by failing to inform court that the case he was relying upon had been explicitly overruled by the Texas Supreme Court in a later decision), *rev'd per curiam on other grounds*, 297 S.W.3d 254 (Tex. 2009); Twist v. McAllen Nat'l Bank, 248 S.W.3d 351, 366–68 (Tex. App.—Corpus Christi 2007, orig. proceeding) (sanctioning an attorney for creating a nonexistent quote, purportedly from a Texas Supreme Court opinion, and misrepresenting the holding, as well as counsel's failure to cite or analyze the applicable law and his "refusal to accept this Court's disposition of arguments previously presented"); *see also* Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1349 (Fed. Cir. 2003) (criticizing the Department of Justice's appellate attorney for using an ellipsis in a quotation to make the opinion appear broader); Kho v. Pennington, 846 N.E.2d 1036, 1043–44 n.6 (Ind. Ct. App. 2006) (admonishing counsel for mischaracterizing a statute as prohibiting a suit when it explicitly authorized it), *aff'd in part, vacated in part*, 875 N.E.2d 208 (Ind. 2007); Federated Mut. Ins. Co. v. Anderson, 920 P.2d 97, 103–04 (Mont. 1996) (punishing an attorney's attempt to mislead a court by altering the holding by use of an ellipsis); Sobol v. Capital Mgmt. Consultants, Inc., 726 P.2d 335, 337 (Nev. 1986) (per curiam) (misquoting the dissent as though it were the case holding and misrepresenting stipulated facts warranted sanctions on counsel); Lieber v. ITT Hartford Ins. Ctr., Inc., 15 P.3d 1030, 1038–39 (Utah 2000) (pointing out that appellant implied in the brief that the legislature had adopted a decision in a subsequently amended statute when the legislature had actually rejected the decision, and criticizing counsel for misrepresenting the state of the law in other jurisdictions); Comm. on Legal Ethics of W. Va. State Bar v. Farber, 408 S.E.2d 274, 280–81 (W. Va. 1991) (suspending a lawyer for misrepresenting a paraphrase as though it were an accurate quote).

259. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(1) (missing the word

Unlike subsection (a)(1), Rule 3.03(a)(4) specifically delineates when a lawyer's silence becomes an ethical violation.[260] The Rule declares that an attorney "shall not knowingly . . . fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[261] The comment to Rule 3.03(a)(4) acknowledges that a lawyer "is not required to make a disinterested exposition of the law," but emphasizes the obligation to "recognize the existence of pertinent legal authorities."[262]

The fundamental concept promoted by Rule 3.03(a) is that a legal argument constitutes a dialogue centered on determining the legal grounds pertinent to the case.[263] Therefore, with the focus of the Rule upon the discussion of the legal premises of the case, simply citing adverse authority for a different proposition is not sufficient to comply with the Rule.[264] Withholding the discussion of adverse authority from the opening brief in the hope that the contrary authority can be discussed later in a reply brief also does not comply with the spirit or the letter of Rule 3.03(a).[265]

Occasionally, the courts struggle to differentiate between subsections (a)(1) and (a)(4).[266] Several courts of appeals have rightly held counsel's failure to cite precedent from the immediate court or a higher court to violate Rule 3.03(a)(4).[267] Such holdings are consistent with the specific

"material" before the word "law" in the Rule creates an issue left open for interpretation).

260. *Id.* R. 3.03(a)(4).

261. *Id.*

262. *Id.* R. 3.03 cmt. 3.

263. *Id.*

264. Tyler v. State, 47 P.3d 1095, 1111 (Alaska Ct. App. 2001) (citing ALASKA RULES OF PROF'L CONDUCT R. 3.3(a) cmt. 4).

265. *See* White v. Carlucci, 862 F.2d 1209, 1213 (5th Cir. 1989) (admonishing counsel for failure to cite controlling precedent, which opposing counsel later cited, of which counsel was aware because he had participated in the earlier appeal).

266. *Compare In re* Core. Constr. Servs. of Tex., Inc., No. 05-09-0065-CV, 2009 WL 1801242, at *1 (Tex. App.—Dallas June 24, 2009, orig. proceeding) (mem. op.) (applying Rule 3.03 when counsel represented that his case was the case that addressed the issue), *with* HL Farm Corp. v. Self, 820 S.W.2d 372, 375 n.2 (Tex. App.—Dallas 1991) (holding counsel was in violation of Rule 3.03(a)(4) for knowingly failing to cite authority directly on point), *rev'd on other grounds*, 877 S.W.2d 288 (Tex. 1994).

267. *See* Ibarra v. State, 782 S.W.2d 234, 235 (Tex. App.—Houston [14th Dist.] 1989, no writ) (ruling that there was a violation of the State Bar Rules where counsel filed identical briefs in separate appeals, one of which resulted in a published opinion, and counsel subsequently failed to cite or distinguish the published case in the instant case); *see also Tyler*, 47 P.3d at 1101–02 (sanctioning a lawyer who failed to cite a decision from the Alaska Supreme Court that was directly adverse to defendant's position and which the lawyer had previously argued before the Supreme Court); *In re* Thonert, 733 N.E.2d 932, 933–34 (Ind. 2000) (per curiam) (reprimanding a lawyer for failing to disclose directly adverse authority from the state supreme court); State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (criticizing the failure to discuss a controlling Supreme Court decision upon

wording of the Rule, which mandates that counsel bring to the court's attention "authority in the controlling jurisdiction known to the lawyer to be directly adverse."[268] However, at least one Texas court chastised an attorney for failing to cite a case directly contrary to his position from a sister intermediate court.[269] Even though the court cited Rule 3.03(a)(4), the actual theory underpinning the court's decision appeared to be based on Rule 3.03(a)(1), which indicates that counsel's failure to discuss authority directly on point from a sister court constitutes a false statement of law.[270] The court seemed to assert that discussing or representing the law as though the issue presented was undecided, or decided in the party's favor, without disclosing contrary opinions from sister courts, is the equivalent of an affirmative misrepresentation and violates Rule 3.03(a)(1).[271] Otherwise, the court's opinion is arguably a misapplication of Rule 3.03(a)(4) because subsection (a)(4) requires an attorney to disclose only "authority in the controlling jurisdiction."[272]

The drawback with an interpretation of Rule 3.03(a)(1) that includes the disclosure of adverse authority from sister jurisdictions is that it wholly subsumes Rule 3.03(a)(4).[273] Distinguishing where the line should be drawn regarding the disclosure of contrary decisions becomes difficult to locate in particular cases—either from opinions of intermediate Texas courts, supreme courts of other states, or intermediate courts of other states.

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which the lower court had relied).

268. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(4).

269. *See HL Farm*, 820 S.W.2d at 375 n.2 (criticizing counsel's actions of admittedly disregarding contrary persuasive case authority).

270. *Id. Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(4) & cmt. 3 (clarifying that (a)(4) obligates counsel to divulge any authority directly adverse to the client, but on the condition that such authority is in the controlling jurisdiction and opposing council failed to introduce it), *with id.* R. 3.03(a)(1) & cmt. 1, 2 (interpreting (a)(1) broadly by recognizing that a failure to identify the existence of relevant legal authorities can be construed by the tribunal as dishonest).

271. *See HL Farm*, 820 S.W.2d at 375 n.2 (reprimanding counsel for ignoring contrary authority); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(1) & cmt. 2 (acknowledging that a failure to identify or distinguish on point sources of law contrary to the client's interests could be viewed as purposeful deceit).

272. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(4). *See generally* TEX. CODE CRIM. PROC. ANN. art. 4.03 (West Supp. 2011) (identifying the controlling jurisdiction for the appellate courts as "coextensive with the limits of their respective districts in all criminal cases").

273. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(1) (stating simply that a lawyer shall not make a "false statement of material fact or law" without addressing whether adverse authority must be disclosed), *with id.* R. 3.03(a)(4) (specifying disclosure of adverse rulings from the controlling jurisdiction). *See generally* TEX. GOV'T CODE ANN. § 311.026(a) (West 2005) ("[T]he provisions shall be construed, if possible, so that effect is given to both.").

Even under a broad interpretation of Rule 3.03(a)(1), subsections (a)(1) and (a)(4) can be reconciled. An attorney in Texas is ethically bound under subsection (a)(4) to cite only decisions from the United States Supreme Court, the Texas Supreme Court, the Texas Court of Criminal Appeals, the relevant appeals court, or, where applicable, district court opinions for the district in which the case is being tried or appealed.[274] If counsel incorrectly asserts, directly or indirectly, that the authority relied upon is the only authority to address the issue, or that the issue is undecided, counsel will be subject to sanction under subsection (a)(1).[275] "Authority" includes statutes, administrative rules, codes, ordinances, regulations, rules, and judicial opinions.[276]

274. *See* Ambulatory Infusion Therapy Specialist, Inc. v. N. Am. Adm'rs, Inc., 262 S.W.3d 107, 120 n.10 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (stating that a failure to cite the interpretation of a federal statute from federal district court on almost identical facts, in which the same party was represented by the same counsel, violated Rule 3.03(a)(1) and (4)); *see also* Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990) (rejecting the argument that a decision is not authority simply because it arises from the trial court within the controlling jurisdiction); Piambino v. Bailey, 757 F.2d 1112, 1131 & n.44 (11th Cir. 1985) (observing that counsel failed to inform the court that a month earlier a United States district court dismissed with prejudice the same claim); Schoofield v. Barnhart, 220 F. Supp. 2d 512, 522 n.10 (D. Md. 2002) (criticizing the commissioner for failure to disclose a case from the same circuit); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (failing to disclose a case from the same judicial district on identical issues resulted in a violation of the rules of professional conduct); Schutts v. Bently Nev. Corp., 966 F. Supp. 1549, 1563 (D. Nev. 1997) (proposing sanctions for the failure to cite relevant legal authority from the controlling judicial circuit); Massey v. Prince George's Cnty., 907 F. Supp. 138, 142–43 (D. Md. 1995) (directing counsel to show cause for failing to cite a case from the same federal circuit); Time Warner Entm't Co. v. Does Nos. 1–2, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) (finding a breach of responsibility for failing to cite cases from the controlling jurisdiction); *In re* Thonert, 733 N.E.2d 932, 934 (Ind. 2000) (per curiam) (reprimanding a lawyer for failing to disclose directly adverse authority from a state supreme court case in which the lawyer served as the defendant's counsel); Shank v. Newman, 69 Pa. D. & C.4th 48, 57 n.3 (Com. Pl. 2004) (failing to reveal a decision by the same state court judge on the same issue); State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (criticizing lawyers for failing to discuss a controlling Supreme Court decision on an important issue with the lower court). *But see* Pannell v. McBride, 306 F.3d 499, 502 n.1 (7th Cir. 2002) (per curiam) (warning the attorney general that failure to disclose cases from same federal circuit in the future would result in sanctions, but excusing the instant nondisclosure); Shelton v. S. Energy Homes, Inc., 420 F. Supp. 2d 579, 583 n.1 (S.D. Miss. 2006) (concluding that failing to cite a Supreme Court case and a case from the governing judicial district was a forgivable mistake); Chew v. KPMG, LLP, 407 F. Supp. 2d 790, 802 n.13 (S.D. Miss. 2006) (finding the failure to cite a case from the controlling judicial district an excusable oversight).

275. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(1) (prohibiting false statements to the tribunal); *cf., e.g.*, *HL Farm*, 820 S.W.2d at 375 n.2 ("[W]e do not condone the action of HL Farm's attorney of knowingly ignoring contrary authority that is directly on point.").

276. *See* Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551, 556, 559 (Minn. App. 1991) (describing a lawyer's failure to disclose an applicable statute as an affirmative misrepresentation), *aff'd in part, rev'd in part*, 482 N.W.2d 771 (Minn. 1992); *see also* Dilallo *ex rel.* Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (stating that counsel

The American Bar Association (ABA) and a number of courts also broadly interpret Rule 3.03(a)(4) to require counsel to cite not merely controlling authority that is dispositive of the litigation, but a "broader range of cases and statutes."[277] Focusing on the phrase "directly adverse," courts and commentators conclude that a court decision "can be 'directly adverse' to a lawyer's position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case."[278]

In response, the ABA suggests:

> An attorney should advise the court of decisions adverse to his case which opposing counsel has not raised if the decision is one which the court should clearly consider in deciding the case, if the judge might consider himself misled by the attorney's silence, or if a reasonable judge would consider an attorney who advanced a proposition contrary to the undisclosed opinion lacking in candor and fairness to him.[279]

Though no court has completely adopted the ABA's expansive definition of directly adverse precedent, a number of courts and commentators have cited the ABA opinion approvingly.[280] Thus,

had a duty to disclose that a statute immunizing the party from liability was not effective until after the accident at issue).

277. Tyler v. State, 47 P.3d 1095, 1104 (Alaska Ct. App. 2001); *see In re* Greenberg, 104 A.2d 46, 48–49 (N.J. 1954) (addressing the opinion of the ABA broadly defining "directly adverse").

278. *Tyler*, 47 P.3d at 1105–06 (quoting ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 280 (1949)); *see also* Jorgenson v. Cnty. of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988) (per curiam) (characterizing efforts to distinguish cases as not controlling as "post hoc efforts to evade" sanctions); *Greenberg*, 104 A.2d at 48–49 (deciding that controlling authority applies to any decision by the state court, or "with respect to federal questions, to decisions of the courts of the United States," that are "directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case" (quoting ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 280 (1949)) (internal quotation marks omitted)); *cf. In re* Colonial Pipeline Co., No. 13-97-808-CV, 1998 WL 1021722, at *1 (Tex. App.—Corpus Christi 1998, orig. proceeding) (withdrawing sanctions after counsel distinguished controlling authority not cited, but observing that "[t]he far better practice would have been for relators to put the two opinions in juxtaposition [to] one another and contrast them, distinguishing the one not supporting their claim for relief, rather than ignoring unfavorable authority").

279. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 280 (1949).

280. *See* Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539–40 (W.D. Pa 2001) (advancing the ABA opinion regarding lawyers having a duty to cite adverse authority), *vacated on other grounds*, No. 99-CV-1707, 2002 WL 1473165 (W.D. Pa. June 14, 2002); *Tyler*, 47 P.3d at 1104–06 (using the ABA opinion in its decision and referencing other courts' use of the opinion); *Greenberg*, 104 A.2d at 49 (applying and analyzing the ABA opinion); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1505 (1984) (asserting that the lawyer must disclose newly

although the outer reaches of what constitutes directly adverse authority are not definitively set, a lawyer will do well "not [to] ignore potentially dispositive authorities"[281] applicable to "any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case."[282]

C. *Other Duties Under the Rules*

The TDRPC also covers several other duties under Rule 3.03. Rule 3.03(a)(3) governs required disclosures made in an ex parte hearing.[283] Lawyers are prohibited from offering or using evidence known to be false under Rule 3.03(a)(5).[284] Finally, Rule 3.03(b) addresses a lawyer's duty to counsel his client not to testify falsely.[285] These Rules have been or will be examined in this Article in the context of other applicable disciplinary rules.[286]

D. *The Duration of the Duty of Candor*

Texas Disciplinary Rule 3.03(c) states that the duty of candor outlined in Rule 3.03(a) continues "until remedial legal measures are no longer reasonably possible."[287] In most instances, the duty will last for defense counsel at least until the end of trial and for prosecutors until the period for a motion for new trial has concluded.[288] Theoretically, a prosecutor's

discovered authority promptly); 2 GEOFFERY C. HAZARD JR. ET AL., THE LAW OF LAWYERING § 29.12 (3d ed. Supp. 2007) (agreeing with the ABA opinion that the determination should based on whether the judge would consider the omitted authorities important or whether the judge would believe he has been misled if not notified of the authorities); RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 163 (3d ed. 1992) ("The ABA Formal Opinion . . . rejects the narrow view that the lawyer must only cite decisions that are decisive of the pending case.").

281. *Tyler*, 47 P.3d at 1106 (quoting Mannheim Video, Inc. v. Cook Cnty., 884 F.2d 1043, 1047 (7th Cir. 1989)) (internal quotation marks omitted); *see* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1505 (1984) (opining that newly discovered authority must be promptly disclosed, and subsequently distinguished or challenged).

282. *Tyler*, 47 P.3d at 1106 (quoting RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 163 (3d ed. 1992)); *accord Smith*, 170 F. Supp. 2d at 539 (explaining that the ABA opinion recommends a lawyer provide any law expressly relied on and important to the judge); *Greenberg*, 104 A.2d at 48 (discussing the ABA opinion as it relates to directly adverse authority).

283. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(3).

284. *Id.* R. 3.03(a)(5).

285. *Id.* R. 3.03(b).

286. Rules 3.03(a)(5) and 3.03(b) are discussed in conjunction with Rule 3.04(b) and the duty not to falsify evidence in *supra* Part I.B. Rule 3.03(a)(3) is examined with Rule 3.05(b) and the duty to avoid ex parte communications in *infra* Part III.B.

287. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(c).

288. *See id.* R. 3.03(c) cmt. 14 (specifying that the obligation continues until corrective legal action is no longer possible); Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 700 (Tex.

duty to correct a violation that deprives a defendant of due process rights remains until the defendant obtains relief through a writ of habeas corpus or executive clemency.[289] A knowing failure to attempt to correct a severe breach of the duty of candor violates not only Rule 3.03(c) but also a prosecutor's overarching duty to "see that justice is done."[290]

IV. THE ETHICAL DUTIES OF "MAINTAINING THE IMPARTIALITY OF A TRIBUNAL": RULE 3.05

The third broad obligation of an attorney in trial is the duty to maintain the impartiality of the tribunal.[291] The obligation as established in Rule 3.05 of the TDRPC is separated into the general ethical duty not to improperly influence a judge and the practical procedural safeguard prohibiting ex parte communications.[292]

A. *The Duty Not to Improperly Influence a Judge*

The primary duty of maintaining impartiality requires counsel to avoid seeking to "influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure."[293] Means prohibited by law naturally include bribery of a judge[294] but may also involve improper influence,[295] coercion of,[296] or offering a gift to a

App.—Houston [14th Dist] 1998, no pet.) (illustrating that even after the judge has given an order, time is still available for a reasonable possibility of taking corrective action).

289. *See Ex parte* Patrick, 977 S.W.2d 588, 589 (Tex. Crim. App. 1998) (en banc) (Baird, J., concurring) (asserting that exculpatory evidence must be disclosed despite the case's postconviction status); *see also* TEX. CODE CRIM. PROC. ANN. art. 48.01 (West Supp. 2011) (granting the governor the right to grant reprieves postconviction).

290. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09 cmt. 1. *See generally id.* R. 3.03(c) (requiring remedial measures).

291. *Id.* R. 3.05.

292. *Id.* R. 3.05(a)–(b).

293. *Id.* R. 3.05(a).

294. *See* TEX. PENAL CODE ANN. § 36.02(a)(2) (West 2011) (mandating that an offense is committed if a person "intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another . . . any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding").

295. *See id.* § 36.04(a) (creating an offense for "privately address[ing] a representation, entreaty, argument, or other communication . . . with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law").

296. *See id.* § 36.03(a)(1) (prohibiting the use of coercion to pressure or attempt to pressure "a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty").

public servant.[297] Means prohibited by rules of practice or procedure include statutes governing disqualification or recusal on the basis of a potential conflict of interest,[298] improper communications with the jury,[299] a violation of the Rule barring witnesses from hearing testimony in a case,[300] and the presentation of evidence ruled inadmissible by the court.[301]

Comment 1 to Rule 3.05 also mentions that while "[m]any forms of improper influence . . . are proscribed by criminal law or by applicable rules of practice or procedure," other forms "are specified in the Texas Code of Judicial Conduct"; however, the comment does not refer to any specific canon of the code.[302] Presumably, the purpose of the comment is to direct attention to Canon 3, which concerns a judge's obligation to perform his judicial duties "impartially and diligently."[303]

Canon 3 of the Texas Code of Judicial Conduct enumerates the adjudicative, administrative, and disciplinary responsibilities of a judge.[304] Several of the adjudicative responsibilities directly involve the maintenance of impartiality.[305] For example, Canon 3(B)(2) mandates that a judge "not be swayed by partisan interests, public clamor, or fear of criticism."[306] Hence, in the context of Rule 3.05(a) of the TDRPC, a lawyer should not seek to influence a judge through "partisan interests,

297. *See id.* § 36.08(e) (banning a public servant with judicial or administrative authority, employed by a tribunal, or who enforces the tribunal's decision from soliciting or accepting "any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal"); *id.* § 36.09(a) (West Supp. 2011) ("A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting.").

298. *See* TEX. CODE CRIM. PROC. ANN. art. 30.01 (West 2006) (requiring that a judge be removed from a case when the judge is the party injured, has bias for one party, or has a familial connection within the third degree to the injured party). *See generally* TEX. R. APP. P. 16.1 ("The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.").

299. *See* CODE CRIM. PROC. art. 36.22 (West 2006) ("No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.").

300. *See id.* art. 36.05 (West 2007) (providing that if the rule is invoked, witnesses are barred from hearing any testimony relevant to the case).

301. *See* TEX. R. EVID. 103 ("[P]roceedings shall be conducted . . . to prevent inadmissible evidence from being suggested to the jury by any means.").

302. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05 cmt. 1.

303. TEX. CODE JUD. CONDUCT, Canon 3.

304. *Id.* Canon 3(B)–(D).

305. *See id.* Canon 3(B) (containing numerous provisions related to the performance of judicial duties without being swayed, influenced, biased, or prejudiced).

306. *Id.* Canon 3(B)(2).

public uproar, or [the] fear of criticism."[307] Similarly, Canon 3(B)(5) requires that a judge "perform judicial duties without bias or prejudice."[308] Thus, in the context of Rule 3.05(a), a lawyer should not appeal to a judge's bias or prejudice in seeking rulings from the court.[309]

Disciplinary Rule 3.05(a), at first glance, may appear redundant in light of Rule 8.04(a)(6), which states that a lawyer shall not "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."[310] But Rule 3.05(a) prohibits counsel from *seeking to influence* a tribunal through improper means, while Rule 8.04(a)(6) bars a lawyer from *assisting* a judge in conduct that violates the Judicial Code.[311] Under Rule 3.05(a), a mere attempt by a lawyer to improperly influence a judge is subject to discipline, regardless of whether the attempt is successful.[312] Under Rule 8.04(a)(6), however, a lawyer violates the Rule only if the judge actually attempts to violate a rule of judicial conduct or other law, and the lawyer assists him.[313]

B. *The Duty to Avoid Ex Parte Communication with a Judge*

Rule 3.05(b) prohibits ex parte communications between a lawyer and a

307. *Id.*; *see* TEX. DISCIPLINARY RULES PROF'L CONDUCT 3.05(a) (prohibiting influence of the tribunal with methods banned by law or rules of practice); *In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 926 (N.D. 2002) (per curiam) (holding that an attorney's threat to sue a judge personally if he proceeded with a ruling constituted an attempt to influence a judge by means prohibited by law).

308. TEX. CODE JUD. CONDUCT, Canon 3(B)(5); *see id.* Canon 3(B)(6) (requiring that a judge not manifest bias or prejudice against protected classes).

309. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(a) (barring any influence of the tribunal that conflicts with a law or rules of practice); TEX. CODE JUD. CONDUCT, Canon 3(B)(7) (directing judges to require lawyers to refrain from manifesting bias or prejudice against a protected class); *cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.08(a) (stating that a lawyer shall not manifest bias or prejudice against protected classes).

310. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(a) (providing that a lawyer not "seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure"), *with id.* R. 8.04(a)(6) (mandating that a lawyer not "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law").

311. *Compare id.* R. 3.05(a) (specifying that a lawyer not attempt to influence a tribunal), *with id.* R. 8.04(a)(6) (asserting that a lawyer not assist an officer of the tribunal in violating a rule or law). A lawyer is also subject to censure by the State Bar of Texas for violating any Canon of the Texas Code of Judicial Conduct. TEX. CODE JUD. CONDUCT, Canon 6(H).

312. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(a); *cf. In re* Conduct of Burrows, 629 P.2d 820, 826 (Or. 1981) (per curiam) (explaining that the fact the prosecutor's ex parte communication inadvertently benefitted defendant did not alter the character of the communication as one that sought to influence the court).

313. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(6).

tribunal, except under certain narrow circumstances.[314] The Rule bars all ex parte communications "with a tribunal for the purpose of influencing that entity or person concerning a pending matter," beyond the exceptions outlined in the Rule itself.[315] "[Ex parte] communications are 'those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter.'"[316] The bar on ex parte communications is to "ensure that every person who is legally interested in a proceeding [is given the] full right to be heard according to law,"[317] and to guarantee that the public's business is conducted in open court.[318] The general prohibition even extends to communications regarding the assertion of a privilege or other sensitive issues.[319]

314. *Id.* R. 3.05(b).

315. *Id.*

316. *In re* J.B.K., 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ) (quoting JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 6.01, at 145 (1990)); *see* State v. Watson, 122 P.3d 903, 905 (Wash. 2005) (defining an ex parte communication as a "communication between counsel and the court when opposing counsel is not present" (quoting BLACK'S LAW DICTIONARY 296 (8th ed. 2004)) (internal quotation marks omitted)); BLACK'S LAW DICTIONARY 657 (9th ed. 2009) ("Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested . . . ."). *Compare* State v. Johnson, 844 N.E.2d 372, 378 (Ohio Ct. App. 2005) (determining that a judge's review of the case the with prosecutor and the victim advocate did not constitute ex parte communication because the defense counsel was present during the discussion), Mosley v. State, 141 S.W.3d 816, 836–37 (Tex. App.—Texarkana 2004, pet. ref'd) (concluding that a scheduling conference between the judge who had recused himself and the judge recently assigned to the case did not constitute an ex parte proceeding where counsel for both parties were present), Spigener v. Wallis, 80 S.W.3d 174, 183 (Tex. App.—Waco 2002, no pet.) (holding that a conference at the bench between the judge and opposing counsel during the hearing, which the party could not overhear from counsel table, did not constitute ex parte communication because the conference was conducted in open court), *and* State v. Perala, 130 P.3d 852, 859 (Wash. Ct. App. 2006) (ruling that a letter from the district attorney's office to judges and corrections officials informing them that prosecutors would no longer recommend alternative sentencing did not constitute ex parte communication because communication was made prior to any specific proceeding), *with* State v. Birano, 126 P.3d 357, 365–66 (Haw. 2006) (finding a meeting in chambers between the judge, prosecutor, and one codefendant, but not the other, to be an improper ex parte communication), *In re* Hasler, 447 S.W.2d 65, 65 (Mo. 1969) (disciplining a judge for engaging in ex parte communications outside of court with the litigant in a divorce action), *and In re* Thoma, 873 S.W.2d 477, 499–500 (Tex. Rev. Trib. 1994, no appeal) (holding direct communications between a judge and a defendant, outside of the courtroom and without the district attorney's representative present, constituted ex parte communication).

317. *J.B.K.*, 931 S.W.2d at 583 (quoting JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 6.01, at 145 (1990)); *accord Spigener*, 80 S.W.3d at 182 (explaining the reason for barring ex parte communications (quoting *Thoma*, 873 S.W.2d at 496)).

318. Erskine v. Baker, 22 S.W.3d 537, 539 (Tex. App.—El Paso 2000, pet. denied).

319. *See* Remington Arms Co. v. Canales, 837 S.W.2d 624, 626 (Tex. 1992) ("Affidavits to establish a claimed privilege for discovery may not be tendered for ex parte consideration." (citing State v. Lowry, 802 S.W.2d 669, 671 n.2 (Tex. 1991) (orig. proceeding))); Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988) (orig. proceeding) (holding that affidavits on privileges were

As the comment to Rule 3.05(b) articulates, "[h]istorically, ex parte contacts between a lawyer and a tribunal have been subjected to stringent control because of the potential for abuse such contacts present."[320] The control placed on ex parte communications constitutes a deterrent against the potential for abuse when one party attempts to influence a judge without the opposing party present.[321] Rule 3.05(b) emphasizes the attempt to influence the judge, not the mere appearance of impropriety inherent in ex parte contacts.[322] The Rule implicitly rejects the narrow position that a prohibited ex parte communication should be limited to communications concerning the merits of the case, instead, adopting a broader approach where "the critical issue is whether the *purpose* of the communication was to *influence* the tribunal concerning the matter in question."[323] If the communication is viewed as an attempt to influence,

wrongfully considered by the trial judge because the affidavits were never served on opposing counsel).

320. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05 cmt. 3; *see* United States v. Wolfson, 634 F.2d 1217, 1221–22 (9th Cir. 1980) (reversing and remanding for new punishment hearing based on the prosecutor's ex parte communication with the original sentencing judge).

321. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(b) & cmt. 3 (limiting the availability of ex parte communications to reduce the opportunities for improper influence).

322. Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 296 (1990); *see* Grievance Adm'r v. Lopatin, 612 N.W.2d 120, 135 (Mich. 2000) (holding that the ex parte memorandum to the appellate judge violated the rule even though arguments were presented in the brief and on oral argument). *But see* Wesbrook v. State, 29 S.W.3d 103, 120–21 (Tex. Crim. App. 2000) (en banc) (holding that defendant failed to show the judge was biased as a result of alleged ex parte communication); Mosley v. State, 141 S.W.3d 816, 838 (Tex. App.—Texarkana 2004, pet. ref'd) (concluding that the alleged ex parte communications did not pose a substantial risk of injustice to the parties); IPCO–G.&C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252, 258 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (ruling that the arbitrator's ex parte communication with the party did not so affect opposing party's rights as to justify vacating the award); *Erskine*, 22 S.W.3d at 540 (deciding the ex parte communication was harmless where the party failed to demonstrate that the improper conduct resulted in an improper judgment).

323. Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 296 (1990) (emphasis added); *see* Fla. Bar v. Von Zamft, 814 So. 2d 385, 388–89 (Fla. 2002) (per curiam) (discussing the denial of the state's continuance with the judge over lunch constituted an attempt to influence judge); Fla. Bar v. Bailey, 803 So. 2d 683, 689 (Fla. 2001) (per curiam) (ruling that the lawyer's ex parte letters to the judge violated the rule because the communications were intended to compromise the client's position); *In re* Conduct of Burrows, 629 P.2d 820, 826 (Or. 1981) (per curiam) (characterizing the ex parte communication as intended to influence the court, despite benefitting the opposing party); ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 61:806 (2006) ("Model Rule 3.5(b) says nothing directly about discussions 'on the merits.' Instead, it broadly prohibits all ex parte communication with a judge during the course of a proceeding."); Robert N. Kepple, *Communication with Witnesses, the Court, and Jurors, in* DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY 69, 73–74 (Ronald H. Clark et al. eds., 2002) (suggesting that the prohibition may encompass even discussions with a judge about upcoming dockets and other administrative issues if the

the effort is improper, regardless of whether the communication's substance concerns the pending matter's merits.[324]

Rule 3.05(b) also applies to all interested parties, not just to counsel for the parties in a case.[325] For instance, an attorney who files an amicus brief, and later engages in an ex parte communication, would be subject to the Rule.[326] Similarly, the prohibition against ex parte contact applies to more than just direct communication with the judge. The ban under Rule 3.05(b) also concerns communication with members of the court's staff[327]

communication was intended to influence the judge on such matters). *But see* Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247, 1255 (Miss. 2005) (deciding that the communications between the judge, jailer, and court personnel in an effort to have the case against the judge's son dropped did not violate the rule against ex parte communication because the case was not yet before the judge); Spigener v. Wallis, 80 S.W.3d 174, 182 (Tex. App.—Waco 2002, no pet.) (holding that ex parte hearings, during which a trial court that "did not reach the merits of the lawsuit," did not violate rule).

324. Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 296 (1990); *see Von Zamft*, 814 So. 2d at 387–88 (stating that a prosecutor not assigned the case, but who was a personal friend of the judge, violated the rule against ex parte communications by discussing a continuance with judge); Bd. of Prof'l Ethics & Conduct v. Rauch, 650 N.W.2d 574, 578 (Iowa 2002) (acknowledging that although courts permit ex parte communications for scheduling, an attorney violated the rule against ex parte communications by attempting to postpone the trial, affecting substantive issues, and not notifying the opposing party of the communication); *In re* Bolton, 820 So. 2d 548, 553 (La. 2002) (per curiam) (concluding that attorney's ex parte communication violated ethical provisions, subjecting him to sanctions); *see also* Robert N. Kepple, *Communication with Witnesses, the Court, and Jurors,* DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY 69, 73–74 (Ronald H. Clark et al. eds., 2002) (proposing that the prohibition encompass communications about dockets and administrative issues as long as the communication is intended to influence the judge). *But see* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 61:806 (2006) ("[E]x parte communications are typically barred under Model Rule 3.5 even though the lawyer might not have intended to influence the judge improperly or gain an unfair advantage.").

325. *See* State v. Birano, 126 P.3d 357, 365 (Haw. 2006) (constituting an improper ex parte communication by having a meeting in chambers between the judge, prosecutor, and one codefendant); *In re* Thoma, 873 S.W.2d 477, 499–500 (Tex. Rev. Trib. 1994, no appeal) (violating the prohibition on ex parte communications by directly communicating with the judge and defendant outside the courtroom and without the district attorney's representative); *see also* Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898, 902 (Miss. 2006) (holding that the judge violated the rule against ex parte communications when he initiated an inspection of litigant's apartment and spoke to the apartment manager without notice to either party).

326. Fla. Bar v. Mason, 334 So. 2d 1, 2–3, 7 (Fla. 1976) (per curiam); *see* United States v. Culp, 7 F.3d 613, 616 n.1 (7th Cir. 1993) (suggesting that the rule requires serving parties with a copy anytime "papers, documents[,] or exhibits" are filed with the court).

327. *See In re* J.B.K., 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996, no writ) (disciplining attorney who contacted court's law clerk); *see also* Parker v. Connors Steel Co., 855 F.2d 1510, 1524–26 (11th Cir. 1988) (concluding that the judge's failure to recuse himself on the basis that his clerk was the son of a partner in the firm representing one of the litigants was harmless error); Hunt v. Am. Bank & Trust Co., 783 F.2d 1011, 1015 (11th Cir. 1986) (per curiam) ("[A] clerk is forbidden to do all that is prohibited to the judge." (quoting Hall v. Small Bus. Admin., 695 F.2d

and other judges or magistrates who are eligible to hear and determine issues in the case.[328]

Like other ethical provisions addressing a lawyer's relationship with the court, Rule 3.05(b) has a counterpart in the Texas Code of Judicial Conduct.[329] Canon 3 requires that "[a] judge shall not initiate, permit, or consider [ex parte] communications or other communications made to the judge outside the presence of the parties," except as permitted by law.[330] Additionally, a judge "shall require compliance . . . by court personnel subject to the judge's direction and control."[331]

Both the Texas Disciplinary Rules and the Code of Judicial Conduct outline a number of exceptions to the broad prohibition against ex parte communications.[332] Naturally, Disciplinary Rule 3.05(b) does not apply to ex parte contacts "otherwise permitted by law and not prohibited by applicable rules of practice or procedure."[333] A number of statutes and rules expressly provide that defense counsel may present matters to a court

175, 179 (5th Cir. 1983)) (internal quotation marks omitted)); Noland v. State Bar, 405 P.2d 129, 130, 132 (Cal. 1965) (per curiam) (contacting the court clerk who was compiling the jury lists and suggesting that certain names be deleted was improper).

328. *See* Orion Enters., Inc. v. Pope, 927 S.W.2d 654, 660 (Tex. App.—San Antonio 1996, orig. proceeding) (submitting an affidavit on the issue of venue by the judge who originally heard the case, but later transferring the cause, involved an ex parte communication in violation of ethical rules); *see also* United States v. Alverson, 666 F.2d 341, 349 (9th Cir. 1982) (remanding for a new sentencing hearing because the case agent participated in improper ex parte communications with the sentencing judge); Fla. Bar v. Saphirstein, 376 So. 2d 7, 8 (Fla. 1979) (per curiam) (suspending a lawyer for attempting to influence the disciplinary referee ex parte in a separate disciplinary matter).

329. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8) (regulating a judge's ex parte communications). *See generally* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1387–94 (2000) (comparing duties under the Texas Code of Judicial Conduct to lawyers' duties under the Disciplinary Rules of Professional Conduct).

330. TEX. CODE JUD. CONDUCT, Canon 3(B)(8). *Compare* Mosley v. State, 141 S.W.3d 816, 836–37 (Tex. App.—Texarkana 2004, pet. ref'd) (scheduling conference between a judge who had recused himself and a judge recently assigned to the case did not constitute an ex parte proceeding because counsel for both parties was present), *with In re* Hasler, 447 S.W.2d 65, 65 (Mo. 1969) (disciplining a judge for engaging in ex parte communications outside of court with a litigant in a divorce action).

331. *J.B.K.*, 931 S.W.2d at 584 (citing TEX. CODE JUD. CONDUCT, Canon 3(B)(8)).

332. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8) (detailing the ex parte communications not prohibited); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(b) (providing exceptions to the prohibition against ex parte communications).

333. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(b). *Compare* LaChappelle v. Moran, 699 F.2d 560, 565 (1st Cir. 1983) (permitting a judge, based on the court's residual power to protect trial participants, to engage in ex parte communications with a witness regarding threats that had been made against her), *with* Hanson v. Hanson, 678 So. 2d 522, 523 (Fla. Dist. Ct. App. 1996) (discussing the final wording of an order with the prevailing party is not authorized under any exception to the rule against ex parte communications).

ex parte.[334] Rule 508 of the Texas Rules of Evidence, which allows an in camera review of the identity of an informer, is the only exception specifically applicable to prosecutors.[335] The Texas Court of Criminal Appeals and other courts, however, have created some additional prosecutorial exceptions, including in camera review of potentially exculpatory evidence and ex parte communications informing the court of an on-going investigation of a witness or juror tampering.[336]

Rule 3.05 of the TDRPC also enumerates a number of specific exceptions. The first exception, on its face, appears confusing: a lawyer may engage in an ex parte communication if the contact is "in the course of official proceedings in the cause."[337] Comment 4 explains that certain types of adjudicatory proceedings "have permitted pending issues to be discussed ex parte with a tribunal," such as certain classes of zoning issues.[338] Informal procedures recognized by all participants in an adjudicatory proceeding, though not explicitly sanctioned under law, will not violate the Rule "[a]s long as such contacts are not prohibited by law or applicable rules of practice and procedure," and the substance of the communications does not involve an improper attempt to influence the tribunal by means prohibited under Rule 3.05(a).[339]

334. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 3(b) (West Supp. 2011) (submitting a request for investigative expenses in a capital writ may be done ex parte); *id.* art. 26.052(f) (West Supp. 2011) (allowing the ex parte submission for advanced payment of investigative fees in death penalty cases).

335. TEX. R. EVID. 508(c)(3).

336. *See* Wesbrook v. State, 29 S.W.3d 103, 120–21 (Tex. Crim. App. 2000) (en banc) (holding that apprising the court through ex parte communications with the judge of an on-going investigation concerning the defendant's attempt to have the witnesses murdered did not violate the Code of Judicial Conduct); Ealoms v. State, 983 S.W.2d 853, 859 n.6 (Tex. App.—Waco 1998, pet. ref'd) (permitting the prosecution to submit evidence of privileged material for in camera review by the judge); Keith v. State, 916 S.W.2d 602, 606 (Tex. App.—Amarillo 1996, no writ) (holding that the court was allowed to review the privileged exhibit without providing the appellant the opportunity to also review it); *see also* United States v. Madori, 419 F.3d 159, 171 (2d Cir. 2005) (justifying the compelling need for ex parte proceedings based on the need to protect the witness from retaliation for cooperating with the government); United States v. Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988) (explaining that before releasing privileged material to the defendant, the judge should review it in camera); United States v. Napue, 834 F.2d 1311, 1323 (7th Cir. 1987) (holding that the defendant failed to show prejudice from an ex parte hearing).

337. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(b)(1).

338. *Id.* R. 3.05 cmt. 4.

339. *Id.*; *see* Fla. Bar v. Von Zamft, 814 So. 2d 385, 388 (Fla. 2002) (per curiam) (concluding an attorney was in violation of the rule prohibiting an attorney from seeking to influence a judge when the attorney discussed an already denied motion for continuance in an ex parte communication); *In re* Hampton, 919 So. 2d 949, 957 (Miss. 2006) (stating that contact between the judge and opposing counsel during a hearing that defendant voluntarily refused to attend did not violate the rule against ex parte communications); *Wesbrook*, 29 S.W.3d at 120–21 (explaining that

In addition, under Rule 3.05(b), a lawyer may communicate in writing with the tribunal ex parte if the lawyer "promptly delivers a copy of the writing to opposing counsel" or, if unrepresented, to the adverse party directly.[340] A lawyer may also orally communicate with a judge ex parte "upon adequate notice to opposing counsel" or to the unrepresented adverse party.[341] Presumably, these exceptions address situations in which the opposing party chooses not to respond to written communications or attend scheduled hearings because the motions or requests are unopposed.[342]

Curiously, the Texas Code of Judicial Conduct is far more explicit about what kind of ex parte contacts are permissible.[343] Canon 3(B)(8) specifically approves of ex parte "communications concerning uncontested administrative or uncontested procedural matters."[344] The Code also permits a judge to hold separate conferences with parties or their lawyers "in an effort to mediate or settle" a dispute, provided that all parties are given notice, and the judge only hears contested issues thereafter with the consent of the parties involved.[345] A judge is allowed to obtain "the advice of a disinterested expert on the law" ex parte, provided that the judge gives "notice to the parties of the person consulted and the substance of the advice," and the judge affords the parties an opportunity to respond.[346] Applying simple common sense, the Code also carves an exception for a judge's ex parte consultations with other judges and court personnel.[347] Finally, Canon 3(B)(8) provides that a judge may engage in

the ex parte communications of a judge notifying the court of an ongoing investigation into whether the defendant attempted to have witnesses murdered is permissible); *see also* MODEL CODE JUD. CONDUCT R. 2.9(A)(1) (2007) (promulgating that a judge may "initiate, permit, or consider" an ex parte communication where circumstances may require such a communication for "scheduling, administrative, or emergency purposes, which [do] not address substantive matters"); TEX. CODE JUD. CONDUCT, Canon 3(B)(8) (listing an exception allowing a judge to "initiate, permit, or consider" an ex parte communication "concerning uncontested" administrative or procedural matters).

340. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.05(b)(2).

341. *Id.* R. 3.05(b)(3).

342. *See Hampton*, 919 So. 2d at 957 (holding that no improper ex parte contact occurs when counsel refuses to attend a hearing).

343. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8)(a) (providing detailed provisions regarding exception to ex parte communications).

344. *Id.*

345. *Id.* Canon 3(B)(8)(b).

346. *Id.* Canon 3(B)(8)(c). A common procedure for obtaining the advice of a disinterested expert is to request the submission of an amicus brief. *See* State v. Phillips, 615 S.E.2d 382, 388–91 (N.C. Ct. App. 2005) (Wynn, J., concurring) (discussing the ongoing practice of judges consulting disinterested experts ex parte).

347. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8)(d) (permitting "consult[ation] with

"ex parte communication expressly authorized by law."[348]

By its very nature, even a sanctioned ex parte communication places a high degree of responsibility of candor toward the tribunal upon an attorney engaged in such conduct.[349] Accordingly, Rule 3.03(a)(3) requires a lawyer involved in an ex parte communication to not mislead or misinform the court and "to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision."[350] In view of the wording of the Rule, Comment 4 frames this affirmative responsibility not in terms of an informed decision, but a "just" one:

> The object of an ex parte proceeding is . . . to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of unprivileged material facts known to the lawyer if the lawyer reasonably believes the tribunal will not reach a just decision unless informed of those facts.[351]

The obligation established in Rule 3.03(a)(4) is perfectly consistent with a prosecutor's duties. Under Article 2.01 of the Texas Code of Criminal Procedure, the prosecutor must "see that justice is done."[352] The duty of both the prosecutor and the defense attorney under Article 2.03(b) requires that each conducts "themselves as to insure a fair trial,"[353] regardless of whether the duty to disclose is framed as providing relevant facts to make an informed decision or a just one.[354]

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other judges or with court personnel"); *see also* Miss. Comm'n on Judicial Performance v. Martin, 921 So. 2d 1258, 1267–68 (Miss. 2005) ("Conversations with a court clerk are not considered ex parte communications prohibited under [the judicial canons]."). *But see* Cannon v. State, 839 N.E.2d 185, 194 (Ind. Ct. App. 2005) (holding that notes left by the trial judge in the husband's case for the judge presiding over sentencing in the wife's case constituted improper ex parte communications), *aff'd in part, vacated in part*, 866 N.E.2d 770 (Ind. 2007).

348. TEX. CODE JUD. CONDUCT, Canon 3(B)(8)(e).

349. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 4 (explaining that in an ex parte communication, a lawyer has "the correlative duty to make disclosures of unprivileged material facts" to allow the tribunal to reach a just decision).

350. *Id.* R. 3.03(a)(3).

351. *Id.* R. 3.03 cmt. 4.

352. TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2005).

353. *Id.* art. 2.03(b).

354. *Compare id.* art. 2.01 (prohibiting the suppression of evidence that is capable of establishing innocence regardless of the final decision made by a judge based on such information), *and id.* art. 2.03(b) (providing that both defense attorneys and prosecutors must act in a manner that allows for a fair trial), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(4) (requiring disclosure to the tribunal to allow for an informed decision), *and id.* R. 3.03 cmt. 4 (clarifying that an ex parte decision should lead to a just result).

V. THE ETHICAL DUTY OF "MAINTAINING THE INTEGRITY OF THE JURY SYSTEM": RULE 3.06

The Texas Declaration of Independence characterized the right to an impartial jury as "that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen."[355] Both the United States[356] and Texas Constitutions[357] guarantee the privilege of an impartial jury. As the rules of ethics continually stress, the impartiality of the jury is "essential to the judicial process."[358] "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."[359]

Rule 3.06 of the TDRPC, therefore, outlines a number of ethical duties intended to protect jurors against extraneous influences that might compromise a juror's impartiality and thereby undermine the integrity of the jury system.[360] These include: (1) the duty not to conduct harassing investigations of jurors or potential jurors; (2) the duty to refrain from seeking to influence a juror or veniremember about the merits of the case; (3) the duty not to communicate with jurors or potential jurors during a trial outside the official proceedings; (4) the duty not to seek to influence a former juror in actions in future service; and (5) the duty to report unacceptable conduct by a veniremember, juror, or a third party toward a juror.[361]

355. Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 429 (Tex. 1998) (plurality opinion) (quoting THE TEXAS DECLARATION OF INDEPENDENCE para. 10 (1836)) (internal quotation marks omitted).

356. *See* U.S. CONST. amend. VI (granting the right to an impartial jury trial in criminal prosecutions); *id.* amend. VII (preserving "the right of trial by jury" in civil cases).

357. *See* TEX. CONST. art. I, § 10 (promulgating that an accused in criminal prosecutions has the right to a speedy public trial before an impartial jury); *id.* art. I, § 15 ("The right of trial by jury shall remain inviolate."); *id.* art. V, § 10 (reserving the right of a plaintiff or defendant to a trial by jury in all district court trials).

358. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06 cmt. 1.

359. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991).

360. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06 (listing provisions to protect the jury system); *see also id.* R. 3.06 cmt. 1 ("To safeguard the impartiality that is essential to the judicial process, venireman and jurors should be protected against extraneous influences."); *Gentile*, 501 U.S. at 1075 (declaring a court rule constitutional because it served the legitimate state interest of protecting the integrity and fairness of the judicial system, despite the limitations imposed on lawyers' free speech).

361. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06.

A. *The Duty Not to Conduct Vexatious or Harassing Investigations of Venire Members or Jurors*

Because abrasive or hostile investigations of jurors may critically damage the effectiveness of the jury system, Rule 3.06(a)(1) mandates that a lawyer "shall not . . . conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror."[362] The Rule does not wholly ban investigations of potential jurors, only vexatious or harassing investigations.[363] The language of subsection (a)(1) implies what the comment to the Rule states outright: investigations, though permissible, should be conducted "with circumspection and restraint."[364]

The Rule's intent to protect the jury system as a whole, and not simply individual cases, is reflected in the prohibition against "vexatious or harassing investigation[s]" of veniremembers as well as selected jurors.[365] In theory, even an investigation that successfully results in the removal of the potential juror from the venire, and thereby actually increases the

362. *Id.* R. 3.06(a)(1); *see id.* R. 3.06 cmt. 2 (discussing the negative effect of improper investigations on the jury system).

363. Both Rule 3.06 and the accompanying comments are void of any language that prohibits an attorney from conducting an investigation into a juror or veniremember that is not "vexatious or harassing." *Id.* R. 3.06(a)(1) & cmts. 1–4. Furthermore, courts in several jurisdictions have held that an investigation into a juror or potential juror's background information is not a ground for a new trial. *See* United States v. Falange, 426 F.2d 930, 933 (2d Cir. 1970) (dismissing the argument that the investigation of potential jurors discourages individuals from serving on juries as "far[-]fetched bogies" (quoting United States v. Costello, 255 F.2d 876, 883 (2d Cir. 1958)) (internal quotation mark omitted)); Tagala v. State, 812 P.2d 604, 612 (Alaska Ct. App. 1991) (determining that a prosecutor may use criminal records of a venire member during voir dire); Losavio v. Mayber, 496 P.2d 1032, 1033, 1035 (Colo. 1972) (holding that defense attorneys are entitled to the criminal records of prospective jurors that are in the prosecution's possession); People v. Stinson, 227 N.W.2d 303, 310 (Mich. Ct. App. 1975) (noting that reports containing information about potential jurors gathered by the prosecution could be available to the defense (citing Commonwealth v. Smith, 215 N.E.2d 897, 901 (Mass. 1966))). However, other courts have determined that a lawyer does not have an absolute right to investigate jurors or veniremembers. *See* State v. Bessenecker, 404 N.W.2d 134, 139 (Iowa 1987) (requiring the prosecution to seek a court order before obtaining computerized criminal justice information about prospective jurors); People v. Burris, 713 N.Y.S.2d 552, 554 (App. Div. 2000) (Goldstein, J.P., concurring) (stating that questioning a prosecutor's use of prior records during voir dire was "dangerously close to violating" the rule against a vexatious or harassing investigation of the venire panel).

364. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06 cmt. 2; *see* United States v. McIntosh, 380 F.3d 548, 557 (1st Cir. 2004) (stating that an unrevealed background check was not vexatious or harassing); *Burris*, 713 N.Y.S.2d at 554 (Goldstein, J.P., concurring) (explaining that the prosecutor's criminal background check was not vexatious or harassing until the prosecutor used the facts gained from the investigation to intimidate potential jurors); *cf.* State v. Chesnel, 734 A.2d 1131, 1138 (Me. 1999) (acknowledging that evidence and ethical rules discourage defeated litigants seeking to overturn a verdict from contacting jurors).

365. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(a)(1).

impartiality of the jury, is nevertheless subject to discipline under Rule 3.06(a)(1).[366]

In a plurality opinion,[367] the Texas Supreme Court has opined that, to withstand a constitutional attack for vagueness, the term "harass," as used in subsection (d) of Rule 3.06, must be interpreted as "consistently includ[ing] the following elements: (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."[368] To be consistent, and to avoid a constitutional challenge, the term harass as employed in Rule 3.06(a)(1) must also incorporate the same elements.[369] Viewed in such a light, however, a situation in which that portion of the Rule might be invoked is difficult to imagine. A single investigation, no matter how intrusive or embarrassing, would not constitute a course of conduct and, thus, would not be subject to the Rule.[370] The Rule could only be invoked if a veniremember or juror was repeatedly investigated, and then only if the investigations were to cause substantial distress with no legitimate purpose.[371]

The "embarrass" portion of Rule 3.06(a)(1) is even more problematic.

366. *See id.* (prohibiting investigations that are vexatious or harassing, without language regarding the subsequent removal of a veniremember based on information obtained in such an investigation). Some courts have recognized the benefits of the prosecution investigating prospective jurors, but they have noted that principles of fairness mandate that the State share this information with the defense counsel. *See Tagala*, 812 P.2d at 612 (asserting that the prosecutor, in fundamental fairness, should share with the defense background information on veniremembers); *Losavio*, 496 P.2d at 1033, 1035 (holding that the defense is entitled to access police records of a venire member disclosed to the prosecution). *But see Falange*, 426 F.2d at 933 (allowing investigation of potential jurors by the government and denying defendant's motion for inspection (citing *Costello*, 255 F.2d at 883)); Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950) (overruling defendant's motion to inspect an FBI report on s venire member was not "fundamentally unfair"); Monathan v. State, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974) (advancing that the demand for venire records must be timely and the defendant must show that he has used due diligence to secure the information through other means); State v. Jackson, 450 So. 2d 621, 628 (La. 1984) (denying defendant's access to the state's records of venire members), *superseded by statute on other grounds*, LA. CODE EVID. ANN. art. 404 (West 2006), *as recognized in* State v. Arvie, 709 So. 2d 810, 818 (La. Ct. App. 1998); Martin v. State, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979) ("The State has no obligation to furnish counsel for accused with information he has in regard to prospective jurors." (quoting Linebarger v. State, 469 S.W.2d 165, 167 (Tex. Crim. App. 1971)) (internal quotation mark omitted)).

367. Three of the six justices in the majority concurred in the opinion, but dissented from the court's holding that portions of the rule were unconstitutionally vague. Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 443 (Tex. 1998) (plurality opinion).

368. *Id.* at 439–40.

369. *See id.* (defining harass with specific elements to avoid unconstitutional vagueness).

370. *See id.* at 440 (concluding that because it was not a repeated communication, a single letter to jurors did not constitute harassment under Rule 3.06(d)).

371. *See id.* at 439 (listing the elements included in the definition of "harass").

In *Commission for Lawyer Discipline v. Benton*,[372] the Texas Supreme Court held that the term embarrass was fatally vague because "'men of common intelligence must necessarily guess' at what speech might embarrass a juror."[373] According to the court, "the problem is not that one cannot understand what 'embarrass' means in the abstract, but that one cannot tell with any sort of accuracy what speech will trigger embarrassment in the 'average' listener."[374] The vague standard of embarrass fails to provide constitutionally sufficient notice to potential offenders, and endures the potential for arbitrary enforcement as disciplinary committee members can only reflect on their own "personal predilections" to ascertain whether the speech is embarrassing.[375]

The term "vexatious" in Rule 3.06(a)(1) is open to the same complaints. What one veniremember might find vexatious, another might not. Even though the type of investigation that might trigger vexation is difficult to establish with any accuracy, the term provides no "comprehensible normative standard" to guide conduct.[376] Furthermore, because the term essentially lacks a standard, a disciplinary commission could again consider only personal predilections to determine whether an investigation is vexatious.[377] Therefore, provided that the principal "likewise implicates . . . the concern with arbitrary enforcement,"[378] the term appears to be void based on vagueness and is constitutionally unenforceable.[379]

As currently worded, Rule 3.06(a)(1) seems to be of little use in curbing overzealous or purposely intrusive investigations of jurors or potential jurors. Nevertheless, the intent of the Rule is clear, and counsel should conduct investigations of veniremembers and jurors "with circumspection and restraint."[380]

372. Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998) (plurality opinion).

373. *Id.* at 440 (quoting Coates v. Cincinnati, 402 U.S. 611, 611 n.1 (1971)).

374. *Id.*

375. *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

376. *See id.* (noting that a word must require conduct in conformance with a "comprehensible normative standard" to avoid unconstitutional vagueness (quoting *Coates*, 402 U.S. at 611 n.1)).

377. *See id.* (applying the vagueness doctrine with respect to a term's potential for arbitrary enforcement (quoting *Goguen*, 415 U.S. at 575)).

378. *Id.*

379. *See id.* (holding that use of the word "embarrass" was unconstitutional under the vagueness doctrine).

380. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06 cmt. 2.

B. *The Duty Not to Seek to Influence a Venire Member or Juror by Prohibited Means*

Unlike the duty not to conduct "vexatious or harassing investigations," subsection 3.06(a)(2) does not appear to be constitutionally suspect.[381] The subsection mandates that a lawyer refrain from attempting "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."[382] The Texas Penal Code prohibits certain practices by law: bribery,[383] coercion,[384] obstruction,[385] and retaliation.[386] Thus, Rule 3.06(a)(2) holds a lawyer professionally responsible not simply for bribery, coercion, obstruction, and retaliation against a juror but also for attempts to conduct those prohibited actions.[387]

The second portion of Rule 3.06(a)(2) refers to "means prohibited by . . . applicable rules of practice or procedure."[388] This portion of the subsection appears primarily aimed at procedures designed to limit pretrial publicity surrounding a case[389] and voir dire questioning which seeks to impermissibly bind or influence jurors in regards to the merits of the case.[390] In addition, the provision encompasses violations of the

381. *See id.* R. 3.06(a)(2) (lacking potentially vague terms).

382. *Id.*

383. *See* TEX. PENAL CODE ANN. § 36.02(a)(1) & (2) (West 2011) (prohibiting a public servant or one exercising "official discretion in a judicial or administrative proceeding" from accepting bribes).

384. *See id.* § 36.03(a)(1) (criminalizing coercion of a public servant).

385. *See id.* § 36.06(a)(2)(A) (providing that obstruction of the service of a public servant is a crime).

386. *See id.* § 36.06(a)(1)(A) (making it a criminal offense to harm or threaten a public servant in retaliation); *see also id.* § 1.07(41)(B) (West Supp. 2011) (defining public servant to include jurors and grand jurors).

387. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(a)(2) (proscribing an attorney from seeking "to influence a venireman . . . by means prohibited by law"); *cf. In re* Conduct of Burrows, 629 P.2d 820, 826 (Or. 1981) (per curiam) (determining that the prosecutor's ex parte communication benefitting the defendant did not alter the character of the communication as one intended to influence the court).

388. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(a)(2).

389. *See* Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966) (obligating the trial court and the court officers to protect the defendant's due process right to a trial untainted by publicity).

390. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(a)(2); *see* Standefer v. State, 59 S.W.3d 177, 181–83 (Tex. Crim. App. 2001) (discussing the propriety of commitment voir dire questions); DeLeon v. State, 867 S.W.2d 138, 140 (Tex. App.—Corpus Christi 1993, writ ref'd) (noting that veniremembers may not be asked "to commit themselves before hearing the evidence of the case" (citing Hernandez v. State, 508 S.W.2d 853, 854 (Tex. Crim. App. 1974))); *cf.* McCarter v. State, 837 S.W.2d 117, 120 (Tex. Crim. App. 1992) (en banc) (acknowledging that trial judges may prohibit voir dire questions "when the prospective juror has stated his position clearly, unequivocally, and without reservation" (citing Phillips v. State, 701 S.W.2d 875, 889 (Tex. Crim. App. 1985) (en

procedural rules governing juror sequestration[391] but not juror contact during deliberations, which is covered by other rules.[392]

Arguably, Rule 3.06(a)(2) also bars inappropriate actions taken during a trial, such as an improper jury argument.[393] To the extent that the Rule applies to the conduct of trial, Rule 3.06(a)(2) overlaps Rule 3.04(c)(2), which specifically cautions lawyers not to "state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence."[394] As the comment to Rule 3.04(c) explains, the obligations imposed are designed to inhibit counsel from attempting to influence the outcome of a trial "by introducing irrelevant or improper considerations into the deliberative process."[395] The same concern underlies Rule 3.06(a)(2). To at least one commentator, the wording of Rule 3.06(a)(2) stating that a lawyer shall not "seek to influence a venireman or juror"[396] implies that the Rule requires an "intentional effort to influence."[397] Such an interpretation is consistent with the general thrust of the TDRPC.[398]

banc))); Mauldin v. State, 874 S.W.2d 692, 699 (Tex. App.—Tyler 1993, writ ref'd) (stating that voir dire questions that are repetitious or vexatious, not in proper form, or which "inquire[] into personal habits rather than personal prejudices and moral beliefs" may properly be excluded (citing *McCarter*, 837 S.W.2d at 120)).

391. *See* TEX. CODE CRIM. PROC. ANN. art 35.23 (West 2006) ("Any person who makes known to the jury which party made the motion not to allow separation . . . shall be punished for contempt of court.").

392. *See, e.g.*, TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(b) & (c) (preventing a lawyer connected with a matter on which the jury is deliberating from communicating with any juror or veniremembers).

393. *See* Wilson v. State, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996) (en banc) (explaining that the prosecutor's "[j]ury argument must be confined to four permissible areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; [and] (4) a plea for law enforcement" (citing Campbell v. State, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980))), *abrogated on other grounds by* Motilla v. State, 78 S.W.3d 352 (Tex. Crim. App. 2002).

394. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(c)(2).

395. *Id.* R. 3.04 cmt. 4.

396. *Id.* R. 3.06(a)(2).

397. Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 299 (1990).

398. *See* Primrose Operating Co. v. Jones, 102 S.W.3d 188, 193–94 (Tex. App.—Amarillo 2003, pet. denied) (informing a potential juror that he could not participate in a planned mock trial did not violate Rule 3.06(a)(2) because the counsel was actually trying to avoid a violation of the rule); *cf.* People v. Schram, 142 N.W.2d 662, 668–69 (Mich. 1966) (holding that the defendant did not suffer harm because a prosecutor's conversation with jurors was brief, occurred in the public corridor, did not concern the merits of the case, and was initiated by a juror); Beall Transp. Equip. Co. v. S. Pac. Transp., 13 P.3d 130, 138 (Or. Ct. App. 2000) (affirming the denial of a motion for mistrial because a violation of the rule does not require the declaration of a mistrial unless the communication was harmful), *aff'd in part, rev'd in part*, 60 P.3d 530 (Or. 2002). *But see* Noland v.

C. *The Duty Not to Communicate with a Venire Member or Juror Until After the Jury Is Discharged*

Subsections (b) and (c) of Rule 3.06 of the TDRPC directly address attempts to communicate with venire members or jurors outside prescribed trial procedure.[399] Subsection (b) prohibits a lawyer connected with the case from communicating with or causing another "to communicate with anyone he knows to be a member of the venire from which the jury [was] selected or any juror or alternate juror."[400] The Rule limits the prohibition to the time "[p]rior to discharge of the jury," and, of course, explicitly permits communications made "in the course of official proceedings."[401] Under the Rule, a lawyer trying a case may not approach a venire member until after the jury for which the veniremember was considered is discharged; thus, Rule 3.06(b) bars contact between a lawyer or his agents and a discharged venire member while the case is still being tried, "except in the course of official proceedings."[402] The rule applies equally to jurors or alternate jurors discharged prior to a verdict.[403]

Rule 3.06(c) comprises a variation of the prohibition embodied in Rule 3.06(b).[404] Subsection (c) bars a lawyer not connected with the case from

State Bar, 405 P.2d 129, 131–32 (Cal. 1965) (per curiam) (tampering with juror lists ex parte in an attempt to keep jurors objectionable to the prosecutor's office from being called for jury duty is "contrary to justice, honesty, and good morals"); *In re* Delgado, 306 S.E.2d 591, 593–94 (S.C. 1983) (per curiam) (reprimanding lawyer for discussing ex parte with a juror his background and philosophy of criminal defense, even though no direct attempt to influence occurred).

399. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(b), (c).

400. *Id.* R. 3.06(b); *see* Fla. Bar v. Simmons, 581 So. 2d 154, 155–56 (Fla. 1991) (per curiam) (concluding that a lawyer's phone call to venirewoman to instruct her how to answer voir dire questions in order to be selected violated the rule against communications with venire members); Fla. Bar v. Peterson, 418 So. 2d 246, 247 (Fla. 1982) (per curiam) (holding that an attorney violated the rule against ex parte contact with jurors when he sat with two jurors in a restaurant during trial recess, even though he had no intent to gain an advantage by the contact); State v. Bates, 508 So. 2d 1346, 1349–50 (La. 1987) (per curiam) (determining that there was a violation of a disciplinary rule when the prosecutor contacted potential jurors by letter before trial, requesting they fill out a questionnaire); State v. Washington, 626 So. 2d 841, 843–44 (La. Ct. App. 1993) (concluding that the prosecutor violated the rule against ex parte communications when he spoke to the jury about the importance of jury participation before the defense counsel arrived in the courtroom); *cf.* Omaha Bank for Coops. v. Siouxland Cattle Co-op., 305 N.W.2d 458, 462–63 (Iowa 1981) (permitting the foreman of the jury to buy a drink for the lawyers in a tavern was a gross impropriety by the lawyers).

401. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(b).

402. *Id.*

403. *Id.*

404. *Compare id.* ("[L]awyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire . . . or any juror or alternate juror . . . ."), *with id.* R. 3.06(c) ("During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.").

communicating with or causing "another to communicate with a juror or alternate juror concerning the matter" being tried.[405] The scope of Rule 3.06(c) is necessarily narrower than Rule 3.06(b).[406] The Rule limits the restriction to "the trial of a case."[407] Additionally, Rule 3.06(c) bars only communications between a lawyer not connected with the case and jurors or alternate jurors regarding the matter being tried.[408] Therefore, attorneys representing a juror or alternate juror may, therefore, counsel a client about legal issues outside of the matter being tried without concern for whether the trial proceedings have concluded.[409]

Curiously, Rule 3.06(c) is silent about venire members. The Rule does not specifically prohibit a lawyer not connected with the case from communicating with a discharged venire member during the trial.[410] There is a logical reason for exempting venire members from the provision: no danger exists that discussion of the matter with a lawyer not connected with the case will affect the trial's outcome because a venire member has been discharged. The comment to the Rule, however, recommends that a lawyer unconnected with the case abstain from directly or indirectly "communicating with a venireman or a juror about the case."[411]

D. *The Duty to Refrain from Harassing a Juror or Influencing Future Jury Service*

Texas Disciplinary Rule 3.06(d) governs the relationship between the lawyers and discharged jurors.[412] The Rule does not completely bar communication between counsel who tried the case and the jurors who participated, but the Rule does constrain such contact.[413] After discharge

405. *Id.* R. 3.06(c).

406. *Compare id.* (prohibiting only communications concerning the matter of a case at trial), *with id.* R. 3.06(b) (forbidding all communications that are not "in the course of official proceedings").

407. *Id.* R. 3.06(c).

408. *Id.*

409. *See id.* (prohibiting communication concerning the matter being adjudicated).

410. *See id.* (referring only to "a juror or alternate juror").

411. *Id.* R. 3.06 cmt. 1.

412. *Id.* R. 3.06(d).

413. *See id.* (describing prohibited types of communications by a lawyer with a former jury member connected with the attorney's case); *cf.* Haeberle v. Tex. Int'l Airlines, 739 F.2d 1019, 1020 (5th Cir. 1984) (prohibiting counsel from contacting jurors without leave of court under local court rules). *See generally* Jennifer Adair, Comment, *Post-Verdict Contacts with Jurors by Attorneys*, 23 J. LEGAL PROF. 337, 337–45 (1999) (examining the various approaches different jurisdictions take in regard to permitting attorney contact with jurors postverdict); Karlene S. Dunn, Casenote, *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, 1080–1114

of the jury, a lawyer connected with the case "shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."[414] Although subsection (d) restricts a lawyer's free speech, proper application of Rule 3.06(d) does not violate the First Amendment.[415] Communications proscribed by the Rule create "a substantial likelihood of material prejudice to the administration of justice" and pose "a sufficiently significant threat to the fairness of jury trials to justify" regulation and the curtailment of a speaker's constitutional interests.[416]

However, one portion of the Rule has been declared unconstitutionally vague by the Texas Supreme Court, while another has been closely circumscribed.[417] In *Commission for Lawyer Discipline v. Benton*, a lawyer in a personal injury suit sent a letter to the jurors who returned a verdict against his client.[418] The attorney castigated the jurors for their finding in abusive and insulting terms, and accused the jury of breaching "its oath to render a true verdict based on the evidence."[419] The lawyer also informed jury members that the trial court had granted a new trial, making "[t]he first trial . . . nothing more than a waste of everyone's time and the

(1999) (analyzing *Gentile* and *Benton*, and recommending changes to Rule 3.06(d)).

414. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(d); *see* Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 433, 439–40 (Tex. 1998) (plurality opinion) (holding that the lawyer's letter to jurors castigating them for their verdict violated the rule prohibiting communication with discharged jurors); *see also* Orbe v. True, 201 F. Supp. 2d 671, 675 n.4 (E.D. Va. 2002) (explaining that even though counsel is permitted to communicate with jurors after discharge, once a juror makes clear that he or she does not wish to talk, counsel is obligated to terminate the interview because further questioning constitutes harassment), *aff'd*, 82 F. App'x 802 (4th Cir. 2003); *In re* Berning, 468 N.E.2d 843, 844–45 (Ind. 1984) (per curiam) (informing jurors through a letter that the attorney would no longer prosecute domestic violence due in part to the jury's verdict was harassment and intimidated jurors from future jury service).

415. *See Benton*, 980 S.W.2d at 430, 432 (concluding that under the lawyers' professional speech standard adopted by the United States Supreme Court, "the application of Rule 3.06(d) to [an attorney's] letter [did] not violate the First Amendment"). Courts also have the authority to restrict a lawyer's access to jurors without violating the First Amendment. *See* United States v. Brown, 250 F.3d 907, 918 (5th Cir. 2001) (concluding that the right to an impartial jury justified postverdict protection of jurors from harassment and did not violate the First Amendment); United States v. Radonjich, 1 F.3d 117, 120 (2d Cir. 1993) (asserting no constitutional violation in limiting postverdict access to jurors); *Haeberle*, 739 F.2d at 1021–22 (determining that an attorney's First Amendment interests in interviewing jurors are limited).

416. *Benton*, 980 S.W.2d at 432.

417. *See id.* at 439–40 (categorizing the term embarrass as unconstitutionally vague, and defining the term harass so as to avoid any suggestion of vagueness).

418. *Id.* at 428.

419. *Id.* at 428, 433.

county's money."[420] The lawyer refused to accept a public reprimand for the letter.[421] In district court, he admitted to "violating Rule 3.06(d) by attempting to influence the discharged jurors' actions in future jury service," but asserted that the Rule was unconstitutionally overbroad and vague.[422]

A majority of the justices rejected the contention that the Rule was overbroad.[423] The court held that while other portions of the Rule were constitutionally suspect, the phrase "influence [the juror's] actions in future jury service" was not.[424] It also rejected the argument that the phrase was too vague, declaring: "We are satisfied that both the lawyers subject to the rule and the Commission officials charged with enforcing it can understand what kinds of communications are reasonably likely to influence an ordinary juror's actions in future jury service."[425]

A plurality of the court, however, agreed that other sections of the Rule were void based on vagueness.[426] The court, as mentioned previously, held that the term embarrass was fatally vague because of the difficulty in determining what speech would prove embarrassing to a juror.[427] According to the court, the vague reference to embarrass fails to provide a manageable standard and carries the potential for arbitrary enforcement.[428] Thus, the court found the term unconstitutionally vague and unenforceable.[429]

The court also limited the scope of the term harass.[430] After noting that courts in other states have disagreed over whether the term survives the vagueness review, the Texas Supreme Court decided to analyze criminal stalking statutes defining the word in order to avoid unconstitutional "unpredictability and standardlessness."[431] The court concluded that the term harass, as used in Rule 3.06(d), should refer to a "course of conduct . . . directed at a specific person" or persons to cause, or "tending to cause[,] substantial distress" with no legitimate purpose.[432]

420. *Id.* at 428.
421. *Id.* at 429.
422. *Id.*
423. *Id.* at 436.
424. *Id.* at 440 (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(d)).
425. *Id.* at 440–41.
426. *See id.* at 440 (agreeing with the attorney that the term embarrass was fatally vague).
427. *Id.* (quoting Coates v. Cincinnati, 402 U.S. 611, 611 n.1 (1971)).
428. *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).
429. *Id.*
430. *Id.* at 439.
431. *Id.*
432. *Id.* at 439–40.

The court additionally examined the word "calculated," pointing out that the term modifies all three of the verbs in the Rule, harass, embarrass, and influence.[433] It concluded that both meanings of the word—"likely" and "intended"—are applicable.[434] Thus, the Rule prohibits lawyers from intentionally causing the forbidden effect, such as harassment, and from making any "communication which an ordinary reasonable lawyer would foresee" likely to cause those effects.[435] In light of *Benton*, a lawyer may not make a communication with a juror that is intended to or would likely harass a juror, or influence a juror's future service.[436]

The limitation of Rule 3.06(d) on juror questioning must be read in context with other rules proscribing a lawyer's contact with jurors in a case.[437] For example, Article 35.29 of the Texas Code of Criminal Procedure requires that "information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror . . . is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel."[438] The statute further provides that the court shall permit disclosure by a party only upon "a showing of good cause."[439]

Texas courts, including the Court of Criminal Appeals, interpret Article 35.29 broadly.[440] Good cause under the statute constitutes more than the mere "desire to probe for possible, but unspecific, issues that might give

433. *Id.* at 438.

434. *Id.*

435. *Id.* at 439.

436. *Id.* at 439, 441–42; *see In re* Berning, 468 N.E.2d 843, 844–45 (Ind. 1984) (per curiam) (communicating to jurors that the prosecutor would not prosecute domestic violence cases in the future constituted harassment and intimidated jurors from service).

437. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.29 (West Supp. 2011) (prohibiting the disclosure of a juror's personal information collected during the selection process of a criminal proceeding, except by application of specific individuals and a showing of good cause).

438. *Id.*

439. *Id.*

440. *See* Valle v. State, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (determining that an applicant's general allegation as to why disclosure of jurors' personal information was necessary was "not sufficient to establish good cause"); Esparza v. State, 31 S.W.3d 338, 340–41 (Tex. App.—San Antonio 2000, no pet.) (determining that a request for jurors' personal information was general and the failure to show good cause justified denial of the request); Hooker v. State, 932 S.W.2d 712, 716 (Tex. App.—Beaumont 1996, no writ) (holding that good cause to open sealed records containing jurors' addresses and telephone numbers was not shown by a reference to counsel's thoughts regarding the trial); Saur v. State, 918 S.W.2d 64, 66–67 (Tex. App.—San Antonio 1996, no writ) (affirming a trial court order compelling the surrender of defense counsel's annotated copy of jury information sheets because no evidence existed that the missing notes prevented counsel from effectively representing his client).

rise to allegations of jury misconduct,"[441] counsel's thoughts "regarding the trial and . . . [wish for] an opportunity to talk to the jury,"[442] or, even in a capital case, counsel's hope to interview jurors "to determine whether he should file a motion for new trial."[443] Good cause must have a basis in a firm foundation, not in mere conjecture.[444] In addition, the article does not only apply to disclosure of juror information to defense counsel at trial[445] or on appeal.[446] Furthermore, a court may deny the appointment of an investigator to interview jurors.[447]

Sound public policy reasons exist for reading Article 35.29 in broad terms. As the United States Supreme Court observed:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post[-]verdict scrutiny of juror conduct.[448]

Several courts, therefore, have held that a defendant does not possess a

441. *Esparza*, 31 S.W.3d at 340.

442. *Hooker*, 932 S.W.2d at 716.

443. *Valle*, 109 S.W.3d at 509.

444. *Esparza*, 31 S.W.3d at 340.

445. *Id.*

446. *See Valle*, 109 S.W.3d at 509 (looking to the statute to preclude disclosure of juror information that would affect appellant's decision to pursue "a motion for new trial").

447. *See id.* (affirming the denial of a request to hire an investigator to interview jurors because appellant's allegation did not establish good cause to unseal a jury list, which was the sole reason advanced for the necessity of an investigator).

448. Tanner v. United States, 483 U.S. 107, 120–21 (1987) (citations omitted), *superseded by statute on other grounds*, 18 U.S.C. § 1341 (Supp. IV 2010); *see* United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961) (listing as reasons "militating against post[]verdict inquiry into jurors' motives for decision[s]" the fact that the courts are "burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not to be increased; verdicts ought not be made so uncertain"); People v. Rhodes, 261 Cal. Rptr 1, 5 (Ct. App. 1989) (discussing public policy reasons supporting nondisclosure of juror information posttrial, including juror privacy interests, "integrity of [the] jury system, . . . encouraging public participation in the process[,] fostering free and open discussion among jurors[,] promoting verdict finality[,] reducing incentives for jury tampering[,] and discouraging harassment of jurors by losing parties eager to have the verdict set aside"), *superseded by statute on other grounds*, CAL. CIV. PROC. CODE §§ 206, 237 (Deering 2006), *as recognized in* People v. Tuggles, 100 Cal. Rptr. 3d 820 (Ct. App. 2009).

constitutional right to approach jurors after trial.[449] Furthermore, the Supreme Court has observed that the limited right to present evidence that impeaches a jury verdict is not of constitutional origin but arises from common law.[450] If the right to present evidence to impeach a verdict is not of constitutional origin, a supposed right of access to obtain evidence to impeach a verdict cannot be of constitutional magnitude either.[451] Finally, in addition to Article 35.29, trial courts possess an inherent power to regulate proceedings and, thus, control applicants' conduct toward jurors in the case.[452] Violation of statutes or orders limiting juror contact may constitute harassment subject to discipline.[453]

E. *The Duty to Reveal Improper Venire Conduct*

"Because of the extremely serious nature of any actions that threaten the

449. *See* Townsel v. Superior Court, 979 P.2d 963, 969 (Cal. 1999) ("[A] criminal defendant has neither a guaranty of post[-]trial access to jurors nor a right to question them about their guilt or penalty verdict" (quoting People v. Cox, 809 P.2d 351, 399–400 (Cal. 1991), *overruled on other grounds by* People v. Doolin, 198 P.3d 11 (2009)) (internal quotation marks omitted)); People v. Santos, 55 Cal. Rptr. 3d 1, 10 (Ct. App. 2007) (noting that there is "no authority for the proposition that there is a deeply rooted right in this nation's history to question the jury about its deliberative process after the verdict as a component of the right to an impartial jury").

450. *See Tanner*, 483 U.S. at 117 (clarifying that juror testimony was not admissible to impeach a verdict reached by the jury under the common law); Mattox v. United States, 146 U.S. 140, 149 (1892) (referring to numerous authorities to conclude that juror evidence as to jury deliberations is inadmissible to impeach the verdict, except under limited circumstances (citing Woodward v. Leavitt, 107 Mass. 453, 453 (1871))).

451. *See Tanner*, 483 U.S. at 127 (concluding that substantial and well-established concerns preclude intrusive inquiry into jury deliberations and that a defendant's constitutional interests are protected by the trial process).

452. *See* TEX. GOV. CODE ANN. § 21.001(b) (West 2004) ("A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done."); *see also Townsel*, 979 P.2d at 969–70 (explaining that subsequent statutory enactments, including one that mandated sealing of juror information, did not abrogate the trial court's inherent power to restrict a defendant's contact with jurors (citing *Cox*, 809 P.2d at 401)).

453. *See* Dietrich v. Nw. Airlines, Inc., 168 F.3d 961, 964 (7th Cir. 1999) (attempting to use interviews to impeach the verdict is unethical when the court permits attorneys to interview jurors only for the purpose of evaluating trial tactics); Orbe v. True, 201 F. Supp. 2d 671, 675 n.4 (E.D. Va. 2002) (declaring that while counsel is permitted to communicate with jurors after discharge, once a juror makes clear that he or she does not wish to talk, counsel is obligated to terminate the interview to avoid harassment), *aff'd*, 82 F. App'x 802 (4th Cir. 2003); *In re* Berning, 468 N.E.2d 843, 844–45 (Ind. 1984) (per curiam) (determining that a letter to jurors informing them that the prosecutor would not prosecute domestic violence cases any longer based on the jury's verdict was harassment and intimidated jurors); L.S. v. Miss. Bar, 649 So. 2d 810, 813 (Miss. 1994) (en banc) (contacting two jurors after trial despite the judge's order not to clearly violated a disciplinary rule); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 433, 439–40 (Tex. 1998) (plurality opinion) (holding that castigating jurors for their verdict violated the rule prohibiting communication with discharged jurors).

integrity of the jury system," Rule 3.06(f) requires a lawyer to promptly reveal improper conduct by a veniremember or juror to the court.[454] The obligation to report improper conduct also extends to prohibited actions by a third party toward a juror, a veniremember, or a family member of the juror or veniremember.[455]

The mere failure to notify the court of a juror's improper conduct does not offend due process rights, though the failure does violate the TDRPC.[456] The United States Supreme Court and several Texas courts have held that a prosecutor's negligence in informing the defense or the court of a possible bias of a juror does not violate due process as long as the defendant was ultimately tried before a fair and impartial jury.[457] Thus, a conviction may not be reversed on the basis that a prosecutor violated the duty to inform the court of misconduct unless the defendant establishes that the jury was not impartial.[458]

To stress the importance of policing jury misconduct, the comment to Rule 3.06(f) further suggests that if the improper conduct was "taken by or on behalf of a lawyer," the attorney reporting the violation or the court "normally should initiate appropriate disciplinary proceedings."[459] The

454. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(f) & cmt. 4; *see* Elisovsky v. State, 592 P.2d 1221, 1228 (Alaska 1979) (delineating "promptly" as used in the rule as a flexible term, but requiring reasonable diligence).

455. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(f).

456. *Compare* Mize v. State, 754 S.W.2d 732, 740 (Tex. App.—Corpus Christi 1988, writ ref'd) (concluding that a prosecutor's failure to bring juror misconduct to the attention of the court was not grounds for a new trial, but expressing no opinion regarding any potential violation of a disciplinary rule), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(f) (construing a lawyer's failure to report misconduct by or against a juror or veniremember as a violation of the disciplinary rules).

457. *See* Smith v. Phillips, 455 U.S. 209, 220–21 (1982) (failing to notify the court and the defense that a juror submitted an employment application with the prosecutor's office did not violate due process unless the defendant established that the juror was incapable of rendering an impartial verdict); Remmer v. United States, 347 U.S. 227, 228–30 (1954) (stating that failure to inform the defense during trial of an attempt to bribe a juror necessitated a postverdict hearing only on the issue of whether the attempt and subsequent investigation were prejudicial); Chambliss v. State, 647 S.W.2d 257, 266 (Tex. Crim. App. 1983) (en banc) (holding that the prosecutor's failure to notify the court of a juror's unauthorized conversation did not warrant reversal where the juror was not shown to be prejudiced by the conversation); *Mize*, 754 S.W.2d at 739–40 (deciding that a prosecutor's failure to notify the court of anonymous phone calls to a juror did not violate due process where the defendant failed to later establish that he was not tried by a fair and impartial jury).

458. *See Chambliss*, 647 S.W.2d at 266 (noting that although a juror engaged in misconduct, appellant did not show that the juror was influenced in the verdict); *see also* House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997) (en banc) (expressing that a violation of the State Bar Rules is not grounds for reversal unless the defendant proves actual prejudice from the alleged violation).

459. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06 cmt. 4.

comment fails to note that under Rule 8.03(a), a lawyer already has the duty to report professional misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness[,] or fitness as a lawyer."[460] Given the explicit recognition by the courts and the TDRPC of the importance of integrity in the jury system, Rule 8.03(a) appears applicable any time a lawyer becomes aware that another attorney has violated Rule 3.06.[461]

F. *The Duties Applied to Family Members of a Venire Member or Juror*

Rule 3.06(f) of the TDRPC is redundant in at least one respect because the Rule specifically admonishes lawyers to report improper conduct "by another toward a venireman or a juror *or a member of his family*."[462] However, subsection (e) of Rule 3.06 states: "All restrictions imposed by this Rule upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror."[463] Comment 3 to the Rule reiterates that "[c]ommunications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors."[464] If the restrictions of Rule 3.06 apply to communications with a juror or a veniremember's family under Rule 3.06(e), further reiteration in subsection (f) that lawyers must report improper conduct by or against a juror's family member is superfluous.[465]

G. *Jurors and Prohibited Discriminatory Activities*

Rule 5.08(a) of the TDRPC prohibits an attorney from willfully manifesting in an adjudicatory proceeding, "by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding."[466]

460. *Id.* R. 8.03(a).

461. *Compare id.* R. 3.06(f) & cmt. 4 (requiring a lawyer to report any misconduct by or toward a juror or his family to the court, including such actions taken by another lawyer), *with id.* R. 8.03(a) (mandating that a lawyer report any violation of the disciplinary rules by another lawyer concerning his or her capacity as a lawyer).

462. *Id.* R. 3.06(f) (emphasis added). *Compare id.* (referring to a lawyer's duty to reveal any improper conduct by another toward a member of a juror or veniremember's family), *with id.* R. 3.06(e) (providing that duties imposed upon a lawyer by Rule 3.06 apply to a juror or veniremember's family members).

463. *Id.* R. 3.06(e).

464. *Id.* R. 3.06 cmt. 3.

465. *Id.* R. 3.06(e), (f).

466. *Id.* R. 5.08(a).

Thus, an attorney's conduct toward a juror or potential juror manifesting bias or prejudice against the person on the basis of the prescribed conditions will be subject to discipline regardless of whether he otherwise conforms to Rule 3.06.[467]

Subsection (b) of 5.08 outlines the exceptions to the general Rule under 5.08(a).[468] Significantly, the Rule does not apply to jury selection.[469] Striking a venire member on the basis of his race, color, or other characteristics does not violate the TDRPC.[470] Paradoxically, striking a veniremember on the basis of his race or gender—but not religion—violates due process.[471] Therefore, striking a venire member on the basis of his race or gender imperils a trial or conviction but will not result in disciplinary sanctions.[472]

VI. CONCLUSION

The TDRPC work in unison to maintain the fairness, impartiality, and integrity of the criminal trial process. Each of these trial ethics outlines the expected conduct of an attorney in interactions with the tribunal, and every lawyer has the responsibility to govern behavior accordingly. By understanding the expectations under the ethical duties and the connections between the individual overlapping rules, Texas attorneys will continue to uphold the prestige of the jury system and see that justice is done.

467. *Id.*

468. *Id.* R. 5.08(b).

469. *Id.*

470. *See id.* (ensuring a lawyer's opportunity to thoroughly investigate the venire).

471. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (striking an individual during the jury selection process based on the individual's gender is a violation of the Equal Protection Clause); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that a prosecutor was forbidden from challenging "potential jurors solely on account of their race"); Goff v. State, 931 S.W.2d 537, 552 (Tex. Crim. App. 1996) (en banc) (ruling that adverse consequences from striking potential jury members based on race or gender do not extend to religion); Casarez v. State, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (determining that "the interests served by the system of peremptory challenges in Texas are sufficiently great to justify . . . exclud[ing] persons from service on juries in individual cases on the basis of their religious affiliation"). *But see* Miller-El v. Dretke, 545 U.S. 231, 271–73 (2005) (Breyer, J., concurring) (suggesting that the use of strikes based upon a perceived general characteristic of a potential juror may be improper).

472. *Compare J.E.B.*, 511 U.S. at 146 (striking venire members on the basis of gender violates due process), *and Batson*, 476 U.S. at 89 (removing venire members on the basis of race violates due process), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.08(b) cmt. 4 (providing that, in the process of jury selection, a lawyer is "free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on" the factors prohibited in subsection (a)).