

## **When Does Zealous Advocacy Cross the Line and Become an Ethical Violation?**

**By David J. Beck  
Beck, Redden & Secrest, L.L.P.**

### **I. INTRODUCTION**

Zealous advocacy is one of the most basic duties that we have as lawyers. Certainly, in the eyes of clients, it is the paramount duty owed by lawyers. However, under the various rules governing the professional conduct of lawyers, the duty of zealous advocacy is not absolute. For instance, Article 3 of the Preamble to the Texas Disciplinary Rules of Professional Conduct admonishes that “[i]n all professional functions, a lawyer should zealously pursue clients’ interests *within the bounds of the law*” (emphasis added). In fact, in every instance where the duty of zealous advocacy is mentioned in the Disciplinary Rules, it is qualified upon adherence to the rules of law and rules of professional conduct. Plainly, the lawyer’s duty to act as a zealous advocate is never allowed to compromise the lawyer’s ethical obligations especially with respect to the duty of candor and honesty to the court and third parties.

In practice, our adversarial system can work to blur the line between zealous advocacy and the lawyer’s ethical obligations. The instances in which the lawyer’s role as zealous advocate and the lawyer’s ethical obligations may conflict are too many for this presentation to cover. For that reason, we will examine the common instances where a lawyer’s role as zealous advocate is most likely to conflict with the lawyer’s ethical obligations and, in particular, the lawyer’s duty of candor to the court.

### **II. DUTY OF CANDOR**

The first area and the central focus of this presentation will be the lawyer’s duty of candor to the court and to third persons. This includes the duty to correct false testimony and the principles governing the ethical preparation of witnesses. The second area will address the other ethical considerations including situations where ethical obligations require the attorney to disclose confidential client information even if such disclosure adversely affects the interests of the client.

Throughout this presentation, we refer to the Texas of Disciplinary Rules of Professional Conduct. However, the underlying principles of ethical and professional conduct generally appear in some form or variation in the Model Rules, the Canons of Professional Ethics, and the various Disciplinary Rules of Professional Conduct promulgated in the individual states.

The general duties owed by the lawyer with respect to the duty of candor to the court and third persons are stated in TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 & 4.01. At all times, lawyers have the duty to be honest and candid while zealously advocating the merits of their clients’ claims or defenses. This duty encompasses not only statements made by the lawyer but testimony and evidence that the lawyer allows to be offered to the Court.

A. Representations of Fact or Law Made by the Lawyer

1. Representations of Fact

**TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(1): A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.**

Most lawyers think of this duty in terms of an affidavit submitted and signed by the attorney such as an affidavit in support of attorneys' fees. However, this duty applies in a far wider range of instances. For example, even when signing a certificate of conference, the attorney is making a factual representation to the court.

*Example:* In a case involving voluminous and contested discovery, the court requires that the attorneys-in-charge for each party file an affidavit attesting that all relevant documents have been produced. TEX. R. CIV. P. 191.3. In such a case, if the lawyer makes a factual representation to the court that is purported to be within the lawyer's own knowledge, the Disciplinary Rules require that either the lawyer must *know* that the factual representation is true or the lawyer's belief in the truthfulness of the assertion must be based on a *reasonably diligent inquiry*.

- a. The lawyer's belief in the truthfulness of the factual representation must be based on a reasonably diligent inquiry.

Problems most commonly arise where the lawyer fails to conduct a reasonable inquiry before making the factual representation to the court. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 2.

- (1) The reasonableness of the attorney's inquiry depends on the specific facts and circumstances. However, it should be noted that the Rules require that the attorney's inquiry be *diligent*. As with all aspects of the legal services performed by the attorney, whether the attorney acted with enough diligence is dependent not on the schedule of the attorney but the needs of the case. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.02 cmt. 6 (emphasis added) ("A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or *personal inconvenience to the lawyer*.").

2. Truthfulness in Statements to a Third Person

**TEX. DISCIPLINARY R. PROF. CONDUCT 4.01: In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.**

An often overlooked problem occurs when the lawyer makes a routine representation to opposing counsel without actually conducting a reasonably diligent inquiry into the matter for that particular instance.

*Example:* In a response to a request for production, the attorney makes the familiar objection that production would cause an undue burden on his client. Although this and other similar objections are generally made as a matter of course, the lawyer should always consider the truthfulness of the objection in each instance. *See Braden v. South Main Bank*, 837 S.W.2d 733, 737 (Tex. App.–Houston[14<sup>th</sup> Dist.] 1992, writ denied) (affirming sanctions ordered by trial court and rejecting defendant’s attorney’s argument that duty to act as zealous advocate for client justified the numerous and frivolous objections to discovery requests); *American Bankers Ins. Co. v. Caruth*, 786 S.W.2d 427 (Tex. App.–Dallas 1990, no writ) (affirming sanctions against defendant’s attorney where attorney misrepresented that gathering the information requested by plaintiff would require manual inspection of 30,000 boxes of documents where, in reality, the information could be generated by defendant’s computer system in two days).

a. Potential Liability for Fraud and/or Negligent Misrepresentation

In addition to violating an ethical duty, an attorney that knowingly makes a false statement may be liable for the injuries to third parties when his conduct is fraudulent. *See Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.–Houston[1<sup>st</sup> Dist.] 1985, no writ) (“[A]n attorney is liable if he knowingly commits a fraudulent act that injures that third person, or if he knowingly enters into a conspiracy to defraud a third person.”). Moreover, the failure to conduct a reasonably diligent inquiry before making a representation subjects the attorney to potential liability to third parties for negligent misrepresentation without regard to the third party’s lack of privity to the attorney. *McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999) (holding that attorney could be liable to non-client, third party for negligently misrepresenting that the client had approved the settlement agreement).

b. Settlement and Negotiations

It is a common tactic in settlement negotiations for attorneys to understate or overstate the actual dollar value for which their client is willing to settle a claim. Arguably, this is a type of misrepresentation. However, both the Texas Disciplinary Rules and the ABA’s Model Rules of Professional Conduct recognize that such tactics are a necessary part of the settlement and negotiation process and should not be considered as an ethical violation. TEX. DISCIPLINARY R. PROF. CONDUCT 4.01 cmt. 1 (“[U]nder generally accepted conventions in negotiation, a party’s supposed intentions as an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact.”); MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (1983) (acknowledging that “[e]stimates of price or value placed on the

subject of a transaction and a party's intentions as to an acceptable settlement of a claim" are not material facts under Rule 4.01). This exception, however, does not allow the attorney to deliberately deceive adversaries about all issues and facts relating to settlement; nor does it allow attorneys to make misrepresentations regarding their clients settlement intentions to the court.

### 3. Ex Parte Proceedings

**TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(3): A lawyer shall not knowingly, in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known to that tribunal for it to make an informed decision.**

In the unique situations of ex parte proceedings, the lawyer's duty of candor entails not only refraining from making false representations of fact but also an affirmative duty to inform the court of any unprivileged information that the lawyer reasonably believes is necessary for the court to make a just decision. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 4. Thus, in ex parte proceedings, the lawyer cannot use the opposing party's absence to its advantage even if beneficial to the client.

### 4. Advocate of the Law

**TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(4): A lawyer shall not knowingly fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by the opposing counsel.**

This duty is easy to overlook since relevant authority and case law including adverse case law is readily available to both the court and opposing counsel and the attorney may feel little obligation to give the opposing party the fruits of his or her legal research. However, Rule 3.03(a)(4) is unequivocal that, as an officer of the court, a lawyer must disclose *all* case law that is both adverse and controlling even if the opposing party fails to do so.

- a. Compliance with Rule 3.03(a)(4) is limited to *controlling* case law and does not require the lawyer to write a general exposition on the law or to cite merely persuasive adverse authority from other jurisdictions.

### B. False Testimony or False Evidence

**TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(5): A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false.**

A lawyer is expressly prohibited from offering or submitting testimony or evidence to the court that the lawyer knows to be false. However, the real danger arises when *the client* is insistent on offering false testimony or fabricated evidence in support of their claims or defenses. In order to provide zealous representation, the lawyer may feel obligated to allow the client to

testify as he or she desires or, in the very least, to refrain from preventing the client from taking such fraudulent action. However, the Disciplinary Rules are clear that the prohibition of Rule 3.03(a)(5) applies whether the offer of false testimony comes from the lawyer's own desire to zealously advocate his clients position or at the direction of the client. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmts. 5-6.

#### 1. Anticipated False Testimony

If the lawyer develops a reasonable belief that a witness will testify falsely despite the lawyer's general admonition to testify truthfully, the Disciplinary Rules require the attorney do everything in his or her power to persuade the witness from submitting false testimony. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 6. The following points are especially useful in dissuading a witness from giving false testimony, *see* Patricia J. Kerrigan, *Witness Preparation*, 30 TEXAS TECH L. REV. 1367, 1370 (1999):

- It is likely that any false or misleading testimony will be discovered by the opposing counsel with adverse consequences.
- It is likely that the jury will perceive that the witness is being untruthful.
- Giving untruthful testimony subjects the witness to criminal prosecution for perjury.
- If the witness is the client, the lawyer should inform the client that, regardless of the client's own desire to give false testimony, the attorney cannot assist the client to offer false testimony, and the attorney may be required to withdraw from further representation. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 6. Furthermore, even if the attorney withdraws, the attorney may still be required to disclose to the court or the subsequently retained counsel of the client's intention to give false testimony if the disclosure is necessary to prevent the commission of a fraud by the client. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(2) & cmt. 6 (noting that even if the court allows the attorney to withdraw, the attorney may be authorized under Rule 1.05(c)(7) to reveal the reasons for the withdrawal either to the court or to the subsequently retained attorney for the client).

#### a. Remedial Steps

If the lawyer forms the reasonable belief that a witness will offer false testimony, the Disciplinary Rules require the following remedial actions by the lawyer:

- (1) The lawyer must first vigorously urge the witness against offering the false testimony.

- (2) If the witness chooses to ignore the lawyer's admonition and insists on giving false testimony, the lawyer must nonetheless refuse to offer the false testimony even if it means that the lawyer cannot call that witness to testify.
- (3) If the client continues to insist on giving false testimony, the lawyer is justified in withdrawing from further representation. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 6.
- (4) Moreover, the attorney may have a duty to inform the court of the witness's or client's intention to give false testimony if the lawyer has reason to believe that disclosure is necessary to prevent the client from committing a fraudulent act. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c) (emphasis added) ("A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or *fraudulent*."); *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(7) (allowing the attorney to reveal confidential client information if necessary to prevent the commission of fraud by the client).

b. The witness is not excluded from truthfully testifying on other matters.

The lawyer's knowledge that the witness will testify falsely on certain matters does not preclude the lawyer from calling that witness to testify on other matters. Rather, like a motion in limine, the Rules only prohibit the lawyer from asking questions that the lawyer knows will procure false testimony. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 6.

## 2. Witness Preparation

Because witnesses, especially clients, have a natural tendency to believe the version of the facts that is most favorable to their side, there is a real potential that a witness may give false testimony even without any actual intent to commit perjury. In fact, without proper warnings and instruction from the lawyer, witnesses may form the erroneous belief that giving strongly slanted and favorable testimony is part of the adversarial legal process.

### a. General Precautionary Steps

In order to avoid the possibility that a witness will give false or misleading testimony, the lawyer should take the following steps in preparing a witness to testify:

- Advise the witness to tell the truth. Every attorney is aware that it is an ethical violation to knowingly participate or assist in the presentation of false testimony or evidence. However, a lawyer does not fulfill his

ethical obligations under the Rules by staying ignorant as to whether or not his or her witness is testifying falsely. The better practice is for the lawyer to view the task of making witnesses fully aware that their testimony must be truthful as a requirement under the Disciplinary Rules.

- Avoid trying to coach the witness to walk the line between truthful and false testimony. It is not uncommon for a witness to ask the lawyer's advice on the best way to testify as to particularly damaging facts. Even though it is appropriate to assist the witness to explain damaging facts in the best light possible, in such situations the best response includes admonishing the witness to tell the truth. To do otherwise only creates the impression that the witness's duty to be truthful is not absolute.
- Advise the witness that under no circumstances is the lawyer permitted to allow a witness to give false testimony and that the attorney has a duty under the Rules of Professional Conduct to bring any false testimony to the attention to the Court.

### C. Duty to Correct False Testimony

**TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(b): If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.**

A situation may arise where the attorney places testimony or other materials into evidence and later learns of their falsity. In such cases, the lawyer must take the following steps:

1. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(b) expressly requires that the attorney make a good faith effort to persuade the client to correct the false testimony or to withdraw the false evidence.
2. If such efforts fail, as an officer of the court, the Disciplinary Rules require that the lawyer bring the falsity to the attention of the court and disclose the true facts, even if such disclosure otherwise breaches the attorney-client privilege. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(b) & cmt. 7; TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(8) (allowing disclosure of confidential client information where necessary to rectify the consequences of the client's fraudulent action). The Disciplinary Rules make it clear that when in conflict, the attorney-client privilege and the duty of zealous advocacy must give way to the lawyer's duty of candor to the court. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 8.
3. Duration of the Duty to Correct False Testimony

The lawyer's duty to correct false testimony and other evidence continues until "remedial legal measures are no longer reasonably possible." TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(c).

#### D. Duty to Correct False Cross Examination Testimony

Where a client or witness testifies truthfully under direct examination but offers false testimony under cross examination by another party, the ethical obligations of the lawyer are not as broad.

Lawyer's duty with regard to a witness who testifies falsely under cross-examination is as follows:

- The lawyer must encourage the client or witness to voluntarily correct his or her false testimony.
- The lawyer does not have an affirmative duty to reveal the falsity of that testimony to the court or to otherwise correct the testimony.
- The lawyer, however, may not use the false testimony or evidence in support of the client's case.

Generally, as long as the attorney has taken reasonable action to encourage the client to correct the falsity and the attorney does not use the false testimony, the attorney's ethical obligation under the Rules is fulfilled. If the attorney subsequently uses the false testimony, a breach of ethics has occurred. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03 cmt. 13.

### III. Other Ethical Considerations

#### A. The Limitations of the Attorney-Client Privilege

1. The Attorney May Not Give Legal Advice for the Purpose of Knowingly Assisting the Client to Commit a Criminal or Fraudulent Act.

**TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c): A lawyer shall not assist or counsel to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning, or application of the law.**

The duty of confidentiality is considered sacrosanct in our legal system. Free communication between the attorney and the client is recognized to be a necessary prerequisite for persons to receive the full benefit of legal representation. However, the attorney-client privilege does not give the attorney the license to knowingly render legal advice for the purpose of recommending the means by which a crime or fraud might be committed. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.02 cmt. 7.

Likewise, if the client's criminal or fraudulent acts have already begun, the attorney-client privilege does not shield the attorney from liability where the attorney suggests how the crime or fraud might be concealed. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.02 cmt. 8.

Attorneys should be careful that in explaining the legal consequences of actions and in rendering legal advice they are not inadvertently counseling their client on how to commit or conceal a crime or fraud.

2. When an Attorney May Disclose Confidential Client Communication

**TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(d):** When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

**TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(e):** When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's service has been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

**TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(7):** A lawyer may reveal confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

**TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(8):** A lawyer may reveal confidential information to the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

**TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(e):** When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation appears necessary to prevent the client from committing the criminal or fraudulent act.

In every circumstance, the Disciplinary Rules require that the attorney make reasonable efforts to dissuade the client from committing a crime or fraud. TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(d) & 1.02(e). Where disclosure of confidential information is necessary to prevent the client from committing fraud or to rectify fraud already committed in which the lawyer's services had been used, the lawyer is *allowed* to make the disclosure. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(7) & 1.05(c)(8). The lawyer is *required* to make a disclosure under only very limited circumstances. The most relevant instances involve those where the attorney has a reasonable belief that the

