Case No. 02-14-00286-CV

IN THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS
Fort Worth, Texas

FRANCIS W.S. CHAN,
Appellant

V.

J. SHELBY SHARPE, HENRY CHANG, KAREN CHANG & THE LAW OFFICES OF J. SHELBY SHARPE, A PROFESSIONAL CORPORATION,
Appellees

Appealed from the 48TH District Court of Tarrant County, Texas
Cause No. 48-243228-10; *Honorable David L. Evans, Presiding*

APPELLANT'S REPLY BRIEF

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III. Sharpe argues that (i) an attorney can only be held liable for misuse of "privileged" "confidential information", (ii) attorney's fees are only recoverable pursuant to contract or statute, (iii) a non-movant has a duty to show prejudice on a motion for severance, and (iv) the TUFTA severance order and the attorney disqualification order are not ripe for appeal unless summary judgment is reversed. Appellees' arguments are based on **incorrect, incomplete, and/or misleading statements of Texas law**. "Confidential information" includes both "privileged" and "unprivileged" client information. Attorney's fees are also recoverable in equity as a form of damage. When bifurcation is an option, as it was here, the movant has the burden to show how he would be prejudiced if his motion for severance is denied. Pretrial interlocutory orders are simultaneously appealable with a final judgment because they merge into the final judgment. *See Sections B(1), G, K(1), K(2) and L(2) of this Reply.*……...2

IV. Sharpe argues that (i) certain of Appellant's statements of facts are "incorrect", (ii) he did not switch sides for a profit motive, (iii) he never met with the Changs to discuss how appellant could be prevented from receiving money, (iv) he never disclosed to the Changs the content of any conversations he had with Appellant, (v) he declined to represent Appellant at the October 2004 preliminary consultation because he was friends with the Changs, (vi) Appellant judicially admitted suit should have been filed by 12/31/09, (vii) the interlocutory discovery orders discussed in Appellant's brief are not ripe for appeal, and (viii) the TUFTA claims are "standalone" claims. Appellees arguments are **irrelevant, frivolous, and/or not supported by Texas law**. *See Sections A, B(4), D, E, F(3), H(2), I(1), J, and K(3) of this Reply.*……2

V. The Changs argue that (i) summary judgment was proper pursuant to a statutory claim made under §21.223 of the Tex. Bus. Orgs. Code, (ii) whether a fiduciary duty exists between the Changs and appellant has no bearing on the court's summary judgment, and (iii) Appellant cannot bring a tort cause of action against them because the relief he seeks is for breach of contract damages. Appellees arguments are **irrelevant, frivolous, and/or not supported by Texas law**. *See Sections N(1), N(2), O(3), P(1) and P(4) of this Reply.*……2

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VII. The Changs argue that under Texas law it is necessary for Appellant to pierce the corporate veil in order to impose liability on them because of their status as "shareholders" under Tex. Bus. Orgs. Code §§21.223-224. This argument fails because the *Walker v. Anderson* case clearly holds that these statutory defenses do not "shield" the Changs from personally liability for their participation in tortious conduct. The Changs also argue that Appellant waived his arguments with respect to said statutory sections because he failed to present them to the trial court. **This is a substantial, if not also a patent, misrepresentation of what the record shows.** Appellant presented the subject arguments, in part, in his summary judgment response and also in his August 22, 2014 motion for new trial. *See Section P(5) of this Reply.*.....3

VIII. The rules governing attorney conduct state that a lawyer (i) shall not knowingly make a false statement of material fact or law to a tribunal or offer or use evidence that the lawyer knows to be false;[1] (ii) should not misrepresent or mischaracterize the factual record or legal authorities;[2] and (iii) shall not engage in conduct involving dishonesty, deceit, or misrepresentation.[3] Mr. John Proctor maintains that: (i) certain of Sharpe's evidence remains "undisputed" or "uncontradicted", (ii) there is "no evidence" or "nothing in the record" to support certain of appellant's claims or arguments, (iii) appellant failed to cite any legal authority to support certain of his arguments, and (iv) Amin was disqualified because of his "continued insistence on being a witness" at jury trial. In this regard, Appellant points to approximately half a dozen instances where Mr. Proctor makes **patent misrepresentations.** *See Sections B(3), C(3), F(1), F(2), I(2), I(3), K(4) and L(1) of this Reply.* On about four other occasions, he **substantially mischaracterizes** the record. *See Sections B(2), C(1), C(2), F(3), and H(1) of this Reply.*.....3

[1] Tex. Disciplinary R. Prof. Conduct 3.03(a);
[2] Rule 3 of the Standards of Appellate Conduct (Lawyers' Duties to the Court)
[3] Tex. Disciplinary R. Prof. Conduct 8.04(a)(3);

[4] It also puts appellant's counsel in the same difficult position. See Rule 8.03 of the Tex. Disciplinary R. Prof. Conduct.

[5] Admittedly, Amin too has acted unconsciously at some time or another, just as we all have. We are only human. The key is that when we realize this truth, we strive to improve; no matter how often we may fall.

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SUMMARY OF THE ARGUMENT

Appellees' arguments fail because (1) they have been waived; (2) they are supported by materially distinguishable cases; (3) they are supported by incorrect, incomplete, and/or misleading statements of Texas law; (4) they are irrelevant; (5) they are frivolous; (6) they are based on misrepresentations about and/or mischaracterizations of the factual record; and/or (7) they are based on substantially and/or patently false statements or arguments.

ARGUMENT

I. Sharpe argues that Appellant's claims are barred by limitations because Appellant judicially admitted that his claims should have been filed before 12/31/09. The Changs argue that the "continuing tort doctrine" does not apply to Appellant's claims because he suffered only "one distinct injury". The appellees **waived** these arguments because they were never presented to the trial court. Sharpe's argument also fails because there is **no evidence in the record** to support it. The Changs further argue that judgment was proper on limitations because appellant failed to prove that the "continuing tort doctrine" applied. This argument fails because they filed a defective motion. The burden of proof does not shift unless a proper motion is filed. In any case, it is the movant's duty to conclusively establish the "accrual date" when seeking summary judgment on a limitations defense. *See Sections I(1) and O of this Reply.*

II. Sharpe argues that the *PDG Group* case is controlling on the fiduciary breach and civil conspiracy claims. The Changs argue that the *Lone Star* case is controlling on the issue of a "no evidence" motion made pursuant to §21.223 of the Tex. Bus. Orgs. Code. They also argue that the *Palombo* and *Butler* cases are controlling on a "no evidence" motion made on a limitations defense. Appellees' cases are **materially distinguishable.** The attorney sued in *PDG Group* was not found to have switched sides on the "same matter" and did not participate in an on-going fiduciary breach. Appellant here did not plead "veil piercing theories" and the "alter ego doctrine" as a basis to hold the Changs liable as did the *Lone Star* appellant. The *Palombo* and *Butler* cases involve traditional summary judgment motions; not a pure "no evidence" motion on limitations as the Changs filed here. *See Sections B(5), H(3), N(3) and O(2) of this Reply.*

III. Sharpe argues that (i) an attorney can only be held liable for misuse of "privileged" "confidential information", (ii) attorney's fees are only recoverable pursuant to contract or statute, (iii) a non-movant has a duty to show prejudice on a motion for severance, and (iv) the TUFTA severance order and the attorney disqualification order are not ripe for appeal unless summary judgment is reversed. Appellees' arguments are based on **incorrect, incomplete, and/or misleading statements of Texas law**. "Confidential information" includes both "privileged" and "unprivileged" client information. Attorney's fees are also recoverable in equity as a form of damage. When bifurcation is an option, as it was here, the movant has the burden to show how he would be prejudiced if his motion for severance is denied. Pretrial interlocutory orders are simultaneously appealable with a final judgment because they merge into the final judgment. *See Sections B(1), G, K(1), K(2) and L(2) of this Reply.*

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[1] Tex. Disciplinary R. Prof. Conduct 3.03(a);
[2] Rule 3 of the Standards of Appellate Conduct (Lawyers' Duties to the Court)
[3] Tex. Disciplinary R. Prof. Conduct 8.04(a)(3);

IX. Given the overall tenor of the brief he signed and the sheer number of misrepresentations involved, one must reasonably conclude that Mr. Proctor acted knowingly, if not intentionally. Such conduct is not befitting of a lawyer of Mr. Proctor's age, intelligence, experience, and caliber. First, it shows disdain and disrespect for this court. Second, it puts members of this court in a difficult position.[4] They must now consider their responsive obligations under Canon 3D(2) of the Texas Code of Judicial Conduct. Third, and even more troubling, is that it shows a general lack of concern for one's own reputation. This is a clear indication that Mr. Proctor is acting unconsciously.[5] Maybe this argument will bring some awareness. Maybe that awareness will allow Mr. Proctor to conclude that candidly reporting himself to the State Bar for disciplinary action is in his own best interest. The ultimate and only purpose of human life is spiritual development; of which truth, ethics, integrity and discipline are prerequisites.

REPLY TO SHARPE'S BRIEF SECTION TITLED:

A.
"Challenge to Appellant's Statement of Facts"[6]

Sharpe lists seventeen statements of fact from Appellant's Brief and characterizes them as being "incorrect". However, Sharpe fails to explain why they are [allegedly] incorrect and fails to "contradict" them [in any manner that would be readily discernable by this court] pursuant to Tex. R. App. P. 38.1(g). To the extent that Sharpe classifies one or more of the subject statements as "incorrect" because Sharpe disputes Appellant's evidence with conflicting

[4] It also puts appellant's counsel in the same difficult position. See Rule 8.03 of the Tex. Disciplinary R. Prof. Conduct.

[5] Admittedly, Amin too has acted unconsciously at some time or another, just as we all have. We are only human. The key is that when we realize this truth, we strive to improve; no matter how often we may fall.

[6] Sharpe's Brief – pg. 1;

evidence of his own, this type of argument is wholly **irrelevant** on an appeal from summary judgment. The standard of review here is that this court is to take Appellant's evidence as true, indulge every reasonable inference in favor of Appellant, and resolve all doubts in favor of Appellant. *M.D. Anderson Hosp. & Tumor Inst. V. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

B.
"Trial Court Properly Granted Summary Judgment on Claim for Breach of Fiduciary Duty"[7]

(1) Sharpe argues that in order for Appellant to establish a breach of fiduciary duty claim, Appellant must show that he gave Sharpe information not already known to the other defendants. In other words, Sharpe implies that a fiduciary breach based on an attorney's misuse of information is limited only to an attorney's misuse of "privileged" confidential information. Sharpe has cited no legal authority to support the proposition that this is an "essential element" of a breach of fiduciary duty claim under Texas law.[8] In his response, Appellant objected to such unsubstantiated legal conclusions. [CR 1107-09] See also page 21 of Appellant's Brief. Sharpe fails to recognize that under Texas law "confidential information" is defined to include both "privileged" and "unprivileged" client information. See page 28 of Appellant's Brief.

[7] Sharpe's Brief – pg. 7;
[8] *Id;*

(2) Sharpe argues that there is "no evidence" to show that he ever used any information he received from Appellant to Appellant's detriment.[9] More than a scintilla of evidence shows that Appellant was injured by Sharpe's misuse of his confidential information. See pages 28-32, 49-51, and 63 of Appellant's Brief. Sharpe also argues there is "no evidence" to show that he ever benefited from use of any information he received from Appellant.[10] More than a scintilla of evidence shows that Sharpe benefited from use of such information. See pages 32-39, 52-53, and 63 of Appellant's Brief.

(3) Sharpe argues that it is "undisputed" that Tammy Chan was present during the entire October 2004 preliminary consultation meeting with Appellant.[11] **This is patently false.** In Appellant's affidavit he states: "My ex-wife was not there during the entire meeting as she stepped out to go to the bathroom shortly after the meeting started." [CR 1220]

(4) Sharpe argues that his affidavit asserting that he [purportedly] never disclosed to the Changs the content of any conversations he had with Appellant is "undisputed" and thus dispositive of the fact that there was no fiduciary breach.[12] Sharpe has cited no legal authority to establish that this is an essential element of a

[9] Sharpe's Brief – pg. 8;
[10] *Id;*
[11] *Id;*
[12] *Id;*

breach of fiduciary duty claim (i.e. that showing this type of disclosure to have occurred is the only manner by which one can establish a fiduciary breach under Texas law). Since Appellant has shown at least four other ways a fiduciary breach may be established, Sharpe's argument is **irrelevant and misleading.** See pages 28, 40, 43, and 47 of Appellant's Brief. Further, Appellant objected to the court's use of this evidence as a basis to grant summary judgment. This is because Sharpe's evidence on this issue "could not be readily controverted". [CR 1109-11] See also page 67 of Appellant's Brief.

(5) Sharpe argues that the *PDG Group* case is controlling on Appellant's breach of fiduciary duty claims.[13] Appellant objected to Sharpe's repeated attempts to misapply the facts of that case to his. [CR 1108, 1116] Sharpe previously filed a motion for summary judgment by trying to misapply the *PDG Group* case and it was denied. The *PDG Group* case is **materially distinguishable** because the attorney sued there did not become "aware of the events made the basis of plaintiff's claims against the other business owners until <u>after</u> these events transpired." *PDG Group Inc. v. Holloway et al*, 2006 Tex.App. LEXIS 5168 (Tex.App.-Fort Worth 2006, no pet.) In our case, Sharpe assisted with and participated in the breaching of **an on-going** fiduciary duty between WFFI and

[13] Sharpe's Brief – pg. 9;

Appellant. See pages 54-61 of Appellant's Brief. Furthermore, there was no finding in *PDG Group* that attorney Holloway unlawfully switch sides on the "same matters" like Sharpe has done here. See pages 40-42 of Appellant's Brief.

C.
"Chan's Flawed Breach of Fiduciary Duty Argument"[14]

(1) Sharpe argues that he never raised the issue of the existence of an "attorney-client" relationship as a challenged element in his underlying third and fourth summary judgment motions.[15] **This is substantially false**. Sharpe's third "no evidence" motion for summary judgment states: "While Sharpe and the firm still contend there was never a fiduciary relationship with plaintiff Wing-Sing Chan…" [CR 957] Under a "no-evidence" motion might a court not interpret this as a challenge to the "relationship" element?

(2) Sharpe argues that Tammy Chan's affidavit "unequivocally" establishes that he never had an "attorney-client" relationship with Appellant.[16] **This is substantially false.** More than a scintilla of evidence shows that Sharpe in fact had such a relationship. See pages 23-27 of Appellant's Brief. Further, Tammy Chan's affidavit is defective as it fails to affirmatively show she is competent to testify. See page 67 of Appellant's Brief.

[14] Sharpe's Brief – pg. 10;
[15] *Id.*
[16] *Id.*

(3) Sharpe argues that it remains "uncontradicted" that Appellant asked his wife to help him find a lawyer after the October 2004 preliminary consultation meeting.[17] **This is patently false.** In his summary judgment response affidavit, Appellant states: "I did not ever tell my ex-wife after the meeting in October 2004 that Mr. Sharpe had refused to represent me nor did I ask her to help me find a lawyer immediately thereafter as implied in her affidavit." [CR 1220]

D.
"Sharpe's Beneficence"[18]

Based on an affidavit he signed just fourteen days before filing the underlying April 2014 summary judgment motions, Sharpe wants this court to believe that he told Appellant during the October 2004 preliminary consultation that he would not represent him because Sharpe had a personal friendship with the Changs. [CR 982-83] Yet, in his own discovery responses made four years prior to the affidavit, Sharpe could not answer [even after a diligent search] questions about when or under what circumstances he first met the Changs. [CR 1415] Similarly, the Changs could not recall when they first met Sharpe. [CR 1460] All the credible evidence shows that Sharpe only came to know the Changs on a personal and professional basis after his October 2004 preliminary consultation with Appellant. See pages 32-39 of Appellant's Brief. Sharpe's argument here is

[17] *Id.*
[18] Sharpe's Brief – pg. 11;

irrelevant because this court is to take Appellant's evidence as true, indulge every reasonable inference in favor of Appellant, and resolve all such doubts in favor of Appellant. *M.D. Anderson Hosp.*, 28 S.W.3d at 23.

E.
"Switching Sides"[19]

Sharpe argues that he could not have switched sides [in June of 2005] to represent the Changs and WFFI for a profit motive because he [allegedly] knew then that all these defendants were in serious financial trouble.[20] **This argument is irrelevant and frivolous.** First, if the Changs were so poor at that time, how were they able to give "WFFI a capital infusion of massive amounts of money" to keep WFFI "afloat"?[21] Second, Sharpe admits to switching sides on June 23, 2005. WFFI did not close its doors until some four and a half years later in October of 2009 [and after the U.S. economic downturn in 2008]. See pages 4-5 and 32-39 of Appellant's Brief. Third, all doubts on conflicting evidence are to be resolved in Appellant's favor.

[19] Sharpe's Brief – pg. 12;
[20] *Id.*
[21] Sharpe's Brief – pgs. 3 & 12;

F.
"No One Benefited"[22]

(1) Sharpe argues that there is "no evidence" to support Appellant's claim that the other shareholders received dividends that he did not receive.[23] **This is a substantial, if not also patent mischaracterization of the factual record.** First, Appellant cannot be faulted for allegedly having relatively little evidence to support this aspect of his claim because the Changs wrongfully destroyed and/or concealed the very records by which Appellant could more fully prove it. See pages 112-14 of Appellant's Brief. Second, Appellant in fact did present more than a scintilla of evidence to show he was excluded from at least the 2005 dividend payments. WFFI admitted this in its discovery responses and as a result of a sanctions default. See pages 110-111 of Appellant's Brief.

(2) Sharpe argues that there is "nothing in the record" to show a "contractual agreement" between Appellant and WFFI.[24] **This is patently false.** Appellant testified that he had an agreement that WFFI would employ him so long as he owned WFFI stock and that this promise was central to his decision to invest $60,000 in WFFI. WFFI admitted to the existence of this agreement. [CR 1220, 1235, 15, 1503, 532, 1505] See also page 1 of Appellant's Brief.

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[22] Sharpe's Brief – pg. 12;
[23] *Id.*
[24] Sharpe's Brief – pg. 13;

(3) Sharpe argues that he did not benefit from representing the Changs and WFFI because he always represented them [allegedly] on a pro-bono basis.[25] More than a scintilla of evidence shows that Sharpe benefited from his wrongful conduct and/or that reasonable and fair minded jurors could, under these facts, differ in their conclusions about whether Sharpe only represented the primary defendants on a pro-bono basis in all instances. See pages 32-39, 52-53, and 63 of Appellant's Brief. Sharpe's argument is **irrelevant** because all doubts on conflicting evidence are to be resolved in Appellant's favor.

G.
"Attorney's Fee Damages"[26]

Sharpe argues that under Texas law attorney's fee cannot be recovered "absent a statute or contract that allows this recovery." **This is an incomplete statement of the law.** It ignores the whole line of Texas cases that support recovery of attorney's fees "as damages" in equity. See the *Estate of Arlitt* and *Baja* cases cited in Appellant's Brief at pages 51 and 96.

[25] *Id.*
[26] Sharpe's Brief – pg. 14;

H.
"Trial Court Properly Granted Summary Judgment on Claim for Civil Conspiracy"[27]

(1) Sharpe argues that "there is no direct evidence anywhere in the record of a civil conspiracy."[28] **This is substantially false.** Please see Appellant's summary judgment response at [CR 1133-41]. See also Appellant's Brief on pages 54-63.

(2) Sharpe argues that Appellant's conspiracy claim should fail because there [allegedly] is no evidence to show that Sharpe ever met with the Changs to discuss how Appellant could be prevented from receiving any money.[29] **This argument is frivolous.** How did Sharpe come to defend the Changs and WFFI against Appellant's claims on multiple occasions between 2004 and 2011 if he never met with the Changs? See pages 34-35 of Appellant's Brief.

(3) Sharpe argues that the *PDG Group* case is controlling on the conspiracy claim.[30] Again, Sharpe is attempting to misapply the facts of a **materially distinguishable** case.

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[27] *Id;*
[28] Sharpe's Brief – pg. 15;
[29] Sharpe's Brief - pgs. 15-16;
[30] Sharpe's Brief – pg. 16;

I.
"Claims Barred by Limitations"[31]

(1) Sharpe argues that Appellant judicially admitted that his claims should have been filed before 12/31/09. Sharpe bases this argument on the allegation that Amin, at a 2012 summary judgment hearing, stated that Appellant's "…got at least four years" from 2005 to avoid the statute of limitations.[32] This argument has several problems. First, note that the summary judgment transcripts that Sharpe cites as supporting proof in footnotes 56-57 of his brief are **not part of the record on appeal** and thus they contain no record references.[33] Second, Sharpe previously presented this argument in his December 18, 2012 motions for summary judgment and those were denied on May 31, 2013 by Judge Wilkinson. [CR 1713, 1715] Third, this argument is **frivolous** because it contains the words "at least" which means that Amin's statement leaves open the possibility of a post 12/31/09 accrual date. Fourth, Sharpe has **waived this argument** as it was never presented to Judge Evans in his April 2014 summary judgment motions which are the subject of this appeal. [CR 956-983] See *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 675 (Tex. 1979). Note that the transcripts Sharpe references for supporting proof are not attached to his April 2014 summary judgment motions. [CR 956-983]

[31] Sharpe's Brief – pg. 17;
[32] *Id.*
[33] *Id.*

(2) Sharpe argues that Appellant has alleged the "continuing tort" doctrine but that "he cites no authority to support the argument."[34] **This is patently false.** Please see footnotes 395-403 in Appellant's summary judgment response at [CR 1175-1178]. See also page 65 of Appellant's Brief where he cites the *First General Realty* and *S.V. v. R.V* cases. Furthermore, even absent use of the "continuing tort" doctrine, by definition and pursuant to the holding in *Willis v. Maverick*, Appellant's malfeasance claim against Sharpe accrued sometime after January 22, 2006; when WFFI became insolvent. See pages 64-65 of Appellant's Brief.

(3) Sharpe argues that none of the authorities cited by Appellant supports his legal argument that "fraudulent concealment" and "the discovery rule" are theories by which "to defer the accrual date to avoid limitations."[35] **This is patently false.** The *S.V. v. R.V.* case cited by Appellant on page 65 of his brief states:

> *"Accrual of a cause of action is deferred in two types of cases. In one type, those involving allegations of fraud or fraudulent concealment, accrual is deferred because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run. The other type, in which the discovery rule applies, comprises those cases in which "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable."*

See *S.V. v. R.V.,* 933 S.W.2d 1, 4-7 (Tex. 1996).

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[34] Sharpe's Brief – pg. 18;
[35] *Id.*

J.
"Evidentiary Arguments"[36]

Sharpe argues that the discovery related orders that Appellant addressed under Sections III, VI, VII, and VIII of his brief cannot be appealed because Appellant made no showing that the exclusion of the evidence sought caused the trial court to render an improper summary judgment.[37] **This argument is frivolous.** First, this argument confuses discovery issues with evidentiary issues pertaining to the "admission" or "exclusion" of evidence [that has already been discovered]. As supported by the *Allied Chemical* and the *Webb* cases cited by Appellant, an interlocutory order refusing to compel discovery is normally reviewed on appeal after a final judgment because such orders merge into the final judgment whether or not they are named therein. See page xxx of Appellant's Brief. Second, Sharpe's argument ignores the possibility that a trial court could grant final summary judgment based on liability issues alone; while an appeal from such a judgment might also include erroneous discovery orders pertaining to, for example, the issue of "the amount of damages." The orders on appeal under Sections VI, VII, and VIII of Appellant's Brief fall under this category. See pages 77-85 of Appellant's Brief. Third, with respect to the discovery order addressed under Section III, it would be impracticable, if not impossible, for Appellant to

[36] Sharpe's Brief – pg. 18;
[37] Sharpe's Brief – pgs. 18-19;

prove that the exclusion of certain evidence caused "the rendition of an improper judgment" if he does not first know the nature and content of said evidence. This can only be done properly after discovery and with evidence in hand. This is why Appellant objected to Sharpe's summary judgment affidavit. Without having the benefit of discovery on the crucial element of fiduciary breach sought under Section III, Appellant could not "readily controvert" certain of Sharpe's summary judgment proof. Please see page 67 [at ¶ (4) (b)] and pages 69-70 of Appellant's Brief.

K.
"Texas Uniform Fraudulent Transfer Act Claim"[38]

(1) Sharpe implicitly argues that Appellant had a duty to show how the trial court's severance of his TUFTA claims prejudiced him.[39] **This is misleading and false.** One can only conclude that Mr. Proctor knowingly included this argument to confuse the court. The *Allstate Texas Lloyds* case cited by Appellant on page 71 of his brief clearly shows that when bifurcation is an option, the party moving for severance has the burden to show how he would be prejudiced by a denial of his motion. See also *In re Ben E. Keith Co.*, 198 S.W.3d 844, 851 (Tex.App.-Fort Worth 2006, orig. proceeding).

[38] Sharpe's Brief – pg. 19;
[39] *Id.*

(2) Sharpe argues that this court may not consider the TUFTA severance order on appeal without first reversing the trial court's summary judgment because the granting of summary judgment made Appellant's TUFTA claims moot.[40] Sharpe cites no authority to support this and Texas law shows the opposite to be true:

> *"The Texas Supreme Court has spoken on this issue and determined that when a severance is ordered, the resulting two, or more, causes of action are equally separate and distinct and that each one of them, presuming the judgment therein is final, may be separately appealed. Kansas University Endowment Ass'n v. King, 162 Tex. 599, 350 S.W.2d 11, 19 (1961); Pierce v. Reynolds, 160 Tex. 198, 329 S.W.2d 76, 78-79 (1959). Moreover, on appeal from any of these severed causes, the order of severance is subject to being set aside. Pierce, 329 S.W.2d at 78-79. The court on appeal has jurisdiction over the order of severance even though the severed cause on appeal may not be a complete cause of action without its consolidation with the remaining cause still pending before the trial court. Schieffer v. Patterson, 433 S.W.2d 418, 419 (Tex.1968)."*

See *State v. Tamminga*, 928 S.W.2d 737, 739 (Tex. App. – Waco 1996).

(3) Sharpe argues that "it is particularly obvious the TUFTA claims are a standalone claim."[41] If that is true, then how can summary judgment on Appellant's common law tort claims render "the TUFTA claims moot"?[42] Sharpe judicially admitted that the severed TUFTA claims cannot be independently asserted in a separate lawsuit. See pages 73-74 of Appellant's Brief.

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[40] *Id.*
[41] Sharpe's Brief – pg. 20;
[42] Sharpe's Brief – pg. 19;

(4) Sharpe argues that Appellant has not established that the trial court abused its discretion in abating the severed TUFTA cause. **This is a patent mischaracterization of the record.** Under Texas law, it is an abuse of discretion for the trial court to grant abatement on an unverified motion and/or on one that was not supported by any evidence. Appellant established both of these circumstances by citations to the record. [CR 845-48] [RR 1-9] See also page 76 of Appellant's Brief.

L.
"Disqualification of Chan's Trial Counsel"[43]

(1) Without citing any record authority, Sharpe argues that Amin was disqualified because of his "continued insistence on being a witness at a jury trial to testify on facts other than attorney's fees."[44] **This is a patent mischaracterization of the record.** On the contrary, Amin stated that he "does not intend to testify at the trial of this cause and before the jury except possibly as to one or more issues covered under the exceptions to disqualification under TDRPC 3.08(a)…" [CR 1667][45] See also page 18 of Appellant's Brief. In any case, even if Amin had insisted on testifying at trial on other matters, disqualification was still improper because Sharpe's motion failed to show how

[43] Sharpe's Brief – pg. 21;
[44] *Id.*

[45] This page is part of Appellant's Reply to Sharpe's Response to Appellant's Motion for Reconsideration of the Disqualification Order.

Amin's dual roles as witness and trial counsel would have caused him "actual prejudice". See pages 14-15 of Appellant's Brief.

(2) Sharpe argues that it is somehow improper for this court to consider the order disqualifying Amin on appeal because this is an appeal from summary judgment; as opposed to an appeal after trial to a jury.[46] Sharpe has cited no authority for this argument and **Texas law shows the opposite to be true**. The *Rogers v. Walker* case cited by Appellant on page 12 of his Brief is a case where the court of appeals reversed the trial court's attorney disqualification order on an appeal from summary judgment. Further, in the *Webb* case, the Texas Supreme Court has stated that preceding interlocutory orders merge into a final judgment whether or not they are named therein. See page xxx of Appellant's Brief.

REPLY TO THE CHANGS' BRIEF:

M.
General Reply to the Changs' Brief:

The Changs accuse Appellant of attempting to "skirt" or "sidestep" a number of issues in this case.[47] Given the admitted "length, width, and depth" of Appellant's brief and his underlying summary judgment responses, the Changs' accusation is neither honest nor rationale. The Changs **lack standing** to make such

[46] Sharpe's Brief – pg. 21;
[47] See page 11 of the Changs' Brief.

an accusation. Their brief wholly or substantially fails to address the arguments presented under at least the following Sections of Appellant's Brief:

A. IX-A (6) at page 86;
B. IX-C (3) at page 90;
C. IX-F at page 96;
D. IX-G at page 98;
E. IX-H at page 102;
F. IX-I at page 108;
G. IX-J (2) thru (6) at page 118; and
H. X thru XVI at pages 120-134.

N.
Reply to Section II of the Changs' Brief:

(1) The Changs argue that summary judgment was proper with respect to a statutory claim under Tex. Bus. Orgs. Code §21.223(b) because Appellant failed to produce evidence showing that they engaged in actual fraud for their direct personal benefit.[48] This argument is **frivolous** because Appellant never pled this statutory claim as a basis to hold the Changs liable. [CR 12-23] In fact, Appellant specifically objected to the trying of any unpled statutory claims and/or defenses in his response to the Changs' summary judgment motion. [2SUPP-CR 46, 47, 69] Thus, it was error for the court to grant judgment on such an unpled claim. See page 86 of Appellant's Brief. Further, more than a scintilla of evidence shows that the Changs acted for their "personal benefit". *See Section P(3) of this Reply.*

(2) The Changs argue that summary judgment was proper with respect to the statutory defense provided under Tex. Bus. Orgs. Code § 21.223(a) because the

[48] See the Changs' Brief at pg. 6;

debts that Appellant seeks to hold the Changs liable on are [allegedly] the corporate "contractual obligations" of WFFI.[49] The problem with this argument is that the Changs cannot properly make a "no evidence" summary judgment motion with respect to an affirmative defense they have the burden to prove at trial. *Thomas v. Omar Investments, Inc.*, 156 S.W.3d 681, 685 (Tex.App.-Dallas 2005, no pet.); Tex. R. Civ. P. 166a(i). See pages 88-89 of Appellant's Brief. Here, the Changs judicially admit that their statutory defense under § 21.223(a) is an "affirmative defense".[50] Case law confirms that defendants seeking exculpation from liability under a statutory shield normally bear the burden of proof as to each of its elements. See *In re ParkCentral Global Litigation*, No. 3:09-CV-0765-M (Lead Case) 2010 WL 3119403 at *22-24 (N.D. Tex. August 5, 2010) (mem. op.)

(3) The Changs then argue that the *Lone Star* case they cite is an example of where an appellate court properly affirmed a "no-evidence" motion pertaining to Tex. Bus. Orgs. Code § 21.223[51]. The *Lone Star* case cited by the Changs is **materially distinguishable** on several grounds. First, the Powers appellee there filed "a hybrid no-evidence and traditional summary judgment motion on Lone Star's "veil piercing claims," including fraud and alter ego." *Lone Star Air Sys., Ltd. V. Powers*, 401 S.W.3d 855, 857 (Tex.App.-Houston [14th Dist.] 2013, no pet.)

[49] See the Changs' Brief at pgs. 6-8;
[50] See page 2 of the Changs' Brief;
[51] See pages 9-10 of the Changs' Brief;

Here, the Changs only filed a pure "no-evidence" motion. [2SUPP-CR 36] Second, appellant Lone Star specifically pled that "…David Powers is personally liable because he used the corporate fiction to commit fraud." *Lone Star*, 401 S.W.3d at 863. Lone Star further pled that David Powers Homes, Inc. and David Powers "were inextricably tied together under an alter ego theory." *Id.* Here, Appellant has made no such vicarious liability allegations against the Changs. [CR 12-23] Third, even if we assume Appellant had pled the alter-ego doctrine, fraud, or a sham to perpetrate a fraud as vicarious common law theories upon which to hold the Changs liable, the Changs would still have the burden of proof at trial to show that Appellant [as the alleged obligee under § 21.223(a)] was seeking to hold the Changs liable for WFFI's "contractual obligations". See *Thomas,* 156 S.W.3d at 685; *Doyle v. Komtemporary Builders, Inc.*, 370 S.W.3d 448, 457-58 (Tex.App.-Dallas 2012, pet. denied).

O.
Reply to Section III of the Changs' Brief:

(1) The Changs argue that summary judgment was proper on their affirmative defense of limitations.[52] This argument fails because the Changs cannot move for "no-evidence" summary judgment based on an affirmative defense that they have the burden to prove at trial. *Thomas v. Omar Investments, Inc.*, 156 S.W.3d 681,

[52] See pages 2 and 11-12 of the Changs' Brief;

685 (Tex.App.-Dallas 2005, no pet.); Tex. R. Civ. P. 166a(i). The Changs judicially admit that their limitations defense is an "affirmative defense".[53] Further, nowhere in their entire summary judgment motion do the Changs ever mention the "continuing tort doctrine". [2SUPP-CR 36-41]

(2) The Changs argue that Appellant has the burden at trial to prove the elements of the "continuing tort doctrine" and thus a "no-evidence" motion on the same is proper. Even if we assume [for a moment] that is true, then, with respect to this "continuing tort" claim/defense, the Changs first had a duty to "state the elements as to which there is no evidence". Tex. R. Civ. P. 166a(i). Once a proper motion is filed, only then does the burden shift to the non-moving party to present evidence raising any issues of material fact. *Thomas*, 156 S.W.3d at 684. Since the Changs wholly failed to even mention the subject doctrine, their no-evidence motion is fundamentally defective and insufficient to support summary judgment as a matter of law. *Mott v. Red's Safe and Lock Services, Inc.*, 249 S.W.3d 90, 97-98 (Tex.App.-Houston [1 Dist.] 2007, no pet.). Courts decline to extend a "fair notice" exception to this requirement. *Id.* See pages 88-90 of Appellant's Brief. Notwithstanding any of the foregoing, Appellant actually presented more than a scintilla of evidence to create at least an issue of fact on each element of the doctrine. [2SUPP-CR 64-69] The *Palombo* and *Butler* cases

[53] See page 2 of the Changs' Brief.

cited by the Changs in support of their limitations arguments are **materially distinguishable.** Those cases involve traditional motions of summary judgment; not a pure "no-evidence" motion like the one the Changs filed. See *Butler v. Lowe's Home Ctrs., Inc.,* No. 14-10-00297-CV, 2011 WL 1709898, at *2 (Tex.App.-Houston [14th Dist.] 2011, pet. denied) and *Palombo v. Sw. Airlines Co*., No. 04-05-00825-CV, 2006 WL 1993783, at *3 (Tex.App.-San Antonio 2006, pet. denied).

(3) In any case, the Changs fail to recognize that, when moving for summary judgment on limitations, they actually bear the burden to **conclusively** establish the "accrual date"; even if that would be appellant's burden at trial under the continuing tort doctrine. The *Palombo* case states:

> *"In a motion for summary judgment based upon the affirmative defense of limitations, the burden is on the movant to establish as a matter of law that the applicable statute of limitations bars the action. KPMG Peat Marwick., 988 S.W.2d at 748. The movant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule…"*

There are two methods for determining the "accrual date". Under the "legal injury rule", a cause of action accrues on the date the defendants' wrongful act caused some legal injury. *Lubbock City v. Trammel's Lubbock Bail Bonds,* 80 S.W.3d 580, 585 (Tex. 2002). The "continuing tort" doctrine is an exception to the "legal injury rule". *First Gen. Rlty. Corp. v. Maryland Cas. Co.*, 981 S.W.2d 495, 501 (Tex.App.-Austin 1998, pet. denied). Under this doctrine the action accrues when

the tortious conduct ceases. *Id.* Once the accrual date is determined, the next issues is can the accrual date be deferred either by application of "the discovery rule" or under the theory of "fraudulent concealment". *S.V. v. R.V.*, 933 S.W.2d 1, 4-7 (Tex. 1996). The Changs have wholly failed to argue at the summary judgment proceedings [and in their brief on appeal] why the evidence set forth by Appellant at [2SUPP-CR 64-69] does not extend the accrual date beyond January 22, 2006. For example, why does Karen Changs' tortious conduct of concealing dividend income records at the 2009 TBCA audits not qualify to extend the accrual date into the limitations period? Or, why does the Changs' participation in the unlawful hiring and use of Sharpe to defend them in this suit in the face of a known conflict of interest not qualify as another tortious act extending the accrual date? Since the Changs have failed refute these facts and arguments, they failed to meet their summary judgment burden to **conclusively** establish that the "accrual" date fell outside the limitations period. See pages 88-90 of Appellant's Brief.

(4) The Changs argue that the "continuing tort" doctrine does not apply to Appellant's situation since he [allegedly] suffered only "one distinct injury". "To begin with" the Changs "did not present this argument to the trial court." "Accordingly" the Changs "have **waived** this issue." *City of Houston*, 589 S.W.2d at 675 (Tex. 1979) ("[I]ssues not expressly presented to the trial court may not be

considered on appeal.")[54] Notwithstanding the fact that the Changs waived this argument, Appellant's summary judgment evidence shows that he suffered separate and distinct injuries. For example, he has alleged injuries in the form of: (a) unpaid dividend income on a monthly basis [i.e. each dividend payment typically varies based on profits and constitutes a separate injury]; (b) attorney's fees "as damage"; (c) a total loss in the value of his WFFI shares, and (d) lost wages. See pages 63 and 96-101of Appellant's Brief.

(5) The Changs assert that "…Chan can point to no dividend payment that the other WFFI shareholders took that Chan did not receive."[55] **This is a substantial, if not also a patent, mischaracterization of the record.** Appellant's summary judgment evidence clearly shows that WFFI made dividend payments to other shareholders in 2005; but none to Appellant. WFFI admitted as much in its discovery responses and through a sanctions default. See page 111 of Appellant's Brief.

P.
Reply to Section IV of the Changs' Brief:

(1) The Changs implicitly argue that Appellant is precluded, as a matter of law, from asserting any tort claims against them because "the relief" he seeks is for

[54] See page 15 of the Changs' Brief.
[55] See page 12 of the Changs' Brief.

breach of contract obligations.[56] However, Texas law is clear that a plaintiff is not precluded from pursuing a tort claim merely because the damages he seeks are analogous to damages sought in a breach of contract claim. See page 105 of Appellant's Brief.

(2) The Changs argue that due to Appellant's lack of specificity, they are unable to discern what admissions resulted in a claim of reversible error.[57] In other words, the Changs argue that Appellant presented less than a scintilla of evidence by which to create a fact issue on the elements challenged in the their no-evidence motion. This argument is false. Pages 108 thru 117 of Appellant's Brief identify the admissions which rise to a level that would at least cause reasonable and fair-minded jurors to differ in their conclusions on the issue of the Changs' liability.[58] Appellant also set forth sufficient evidence of specific participatory conduct engaged in by the Changs to establish that they aided and abetted another defendant(s)' fiduciary breach. [2SUPP-CR 55-63]

(3) The Changs argue that admissions made by WFFI due to a post-answer sanctions default could not constitute summary judgment proof against the Changs.[59] It is not quite so clear that this argument has merit. The Changs, as

[56] See page 13 of the Changs' Brief.
[57] See page 14 of the Changs' Brief;
[58] See Appellant's Brief generally; but especially Section IX-I – pages 108-117.
[59] See page 14, n.2 of the Changs' Brief;

controlling officers, were responsible for deciding when and who to retain as counsel for WFFI. In fact, they are the ones that decided to hire Sharpe to defend WFFI in this suit before Sharpe was ordered "permanently withdrawn" and WFFI was ordered to retain new counsel. [2SUPP-CR 212-13, 366-67] Since the court found that WFFI "willfully opted not to even defend its self in this suit" and since the Changs' made this decision not to hire replacement counsel for WFFI, can a legitimate argument not be made that WFFI's deemed admissions also constitute the admissions of the Changs [in their capacity as officers] at least **on the issue of whether the Changs received a "personal benefit" or "acted for personal purposes"**? The acts of a corporate agent on behalf of the principal are ordinarily deemed to be the corporation's acts. *Walker v. Anderson*, 232 S.W.3d 899, 918 (Tex.App.-Dallas 2007). The individual officer who acts for a corporation is that corporation's agent. *Id.* The acts of an agent and its principal are the acts of a single entity and cannot constitute conspiracy; unless the agent is acting for personal purposes. *Lyons v. Lindsey Morden Claims Mgmt.*, 985 S.W.2d 86, 91 (Tex.App.-El Paso 1998, no pet.); *Holloway v. Skinner*, 898 S.W.2d 793, 797 (Tex.1995). Would the following admissions by WFFI not constitute more than a scintilla of evidence that the Changs acted for personal purposes (i.e. evidence that WFFI in fact made unlawful payments to the Changs for their personal benefit)[60]:

[60] See also Appellant's Brief at page 110.

(a) "[T]he manipulation of finances of WFFI so that profits were not distributed as dividends but were diverted to majority shareholders and/or their close relatives through excessive salaries, bonuses, or other personal benefits." [CR 13];

(b) "[T]he wasting of corporate funds by paying for the legal fees of individual defendants. (See September 15, 2006 Answer filed by Defendant Sharpe on behalf of Mr. Chang in a suit where Mr. Chang was sued individually by plaintiff)." [CR 14];

(c) "[T]he paying of informal dividends to only majority shareholders." [CR 14];

When corporate controllers misappropriate corporate funds for their own use, refuse to pay dividends, or pay majority shareholders outside the dividend process, they do so in violation of their fiduciary duty to the corporation and the law affords a remedy for this misconduct. See *Ritchie v. Rupe,* 443 S.W.3d 856, 885, n. 53 (Tex. 2014)

(4) The Changs argue that whether they owed a fiduciary duty to Appellant is "completely irrelevant" to the trial court's granting of summary judgment.[61] **This argument is frivolous.** The duty issue could not have been irrelevant since: (a) Appellant pled that the Changs owed him a fiduciary duty in their capacity as the controlling shareholders and officers of WFFI [CR 16-17] and (b) the trial court granted final judgment in favor of the Changs on <u>all</u> claims made by Appellant. [CR 1699]

[61] See page 14 of the Changs' Brief.

(5) The Changs **erroneously argue** that it was necessary for Appellant to pierce the corporate veil in order to impose personal liability upon them. Under Texas law, if it can be shown that a corporate officer/shareholder knowingly participated in a wrongdoing, then §21.223 of the Tex. Bus. Orgs. Code will not "insulate" or "shield" corporate agents from individual liability for their own tortious conduct. *Walker*, 232 S.W.3d at 918-19. The Changs also argue that Appellant waived any of his arguments pertaining to §21.223 because he failed to present them to the trial court.[62] **This is a substantial, if not also a patent misrepresentation of the record.** First, at [2SUPP-CR 46] Appellant specifically objected to the Changs' filing of a "no-evidence" summary judgment motion on any statutory or common law defense where they would have the burden of proof. See also Appellant's Brief at page 89. As discussed earlier in this Reply, Tex. Bus. Orgs. Code §21.223(a) is one such statutory "affirmative defense". Second, at [2SUPP-CR 47, 69] Appellant specifically objected to the trying of any unpleaded statutory vicarious liability claims by and through summary judgment. See also Appellant's Brief at page 86. Third, under Section H, at [2SUPP-CR 398] Appellant specifically presented his arguments regarding §§21.223-21.224 to the trial court in his August 22, 2014 motion for new trial. See also Appellant's Brief at page 95. When, after summary judgment is rendered, a non-movant discovers a mistake that

[62] See page 15 of the Changs' Brief.

should have been included in a summary judgment response, he can raise that issue in a motion for new trial. See *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005).

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2015 a true and correct copy of the foregoing *Appellant's Reply Brief* and attached appendix were served via electronic service and/or email to the following parties in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure:

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CERTIFICATE OF COMPLIANCE – WORD COUNT

Pursuant to Rule 9.4(i)(2)(C), I certify that this document contains 7,492 words, as indicated by the word-count function of the computer program used to prepare it, and excluding the caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of the issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

/s/ Mayur Amin
Mayur Amin

Case No. 02-14-00286-CV

IN THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS
Fort Worth, Texas

FRANCIS W.S. CHAN,
Appellant

V.

J. SHELBY SHARPE, HENRY CHANG, KAREN CHANG & THE LAW OFFICES OF J. SHELBY SHARPE, A PROFESSIONAL CORPORATION,
Appellees

APPENDIX TO APPELLANT'S REPLY BRIEF

Tab	***Any Additional Rules, Regulations, and Statutes Relied On:***
A	Tex. Code of Judicial Conduct – Canon 3D(2)
B	Tex. Disciplinary R. Prof. Conduct 3.03(a)
C.	Tex. Disciplinary R. Prof. Conduct 8.03(a)
D.	Tex. Disciplinary R. Prof. Conduct 8.04(a)
E.	Tex. Standards for Appellate Conduct – Rule 3 (Lawyers' Duties to the Court)

TEXAS CODE OF JUDICIAL CONDUCT

(As amended by the Supreme Court of Texas through August 22, 2002)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

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

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

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

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

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

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(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.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

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

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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Unreasonable Delay

3. Dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be unreasonable within the meaning of this Rule. See also Rule 1.01(b) and (c) and paragraphs 6 and 7 of the Comment thereto. This Rule, however, does not require a lawyer to eliminate all conflicts between the demands placed on the lawyer's time by different clients and proceedings. Consequently, it is not professional misconduct either to seek (or as a matter of professional courtesy, to grant) reasonable delays in some matters in order to permit the competent discharge of a lawyer's multiple obligations.

4. Frequently, a lawyer seeks a delay in some aspect of a proceeding in order to serve the legitimate interests of the client rather than merely the lawyer's own interests. Seeking such delays is justifiable. For example, in order to represent the legitimate interests of the client effectively, a diligent lawyer representing a party named as a defendant in a complex civil or criminal action may need more time to prepare a proper response than allowed by applicable rules of practice or procedure. Similar considerations may pertain in preparing responses to extensive discovery requests. Seeking reasonable delays in such circumstances is both the right and the duty of a lawyer.

5. On the other hand, a client may seek to have a lawyer delay a proceeding primarily for the purpose of harassing or maliciously injuring another. Under this Rule, a lawyer is obliged not to take such an action. See also Rule 3.01. It is not a justification that similar conduct is often tolerated by the bench and the bar. The question is whether 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 malicious injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable.

Unreasonable Costs and Other Burdens of Litigation

6. Like delay, increases in the costs or other burdens of litigation may be viewed as serving a wide range of interests of the client. Many of these interests are entirely legitimate and merit the most stringent protection. Litigation by its very nature often is costly and burdensome. This Rule does not subject a lawyer to discipline for taking any actions not otherwise prohibited by these Rules in order to fully and effectively protect the legitimate interests of a client that are at stake in litigation.

7. Not all conduct that increases the costs or other burdens of litigation, however, can be justified in this manner. One example of such impermissible conduct is a lawyer who counsels or assists a client in seeking a multiplication of the costs or other burdens of litigation as the primary purpose, because the client perceives himself as more readily able to bear those burdens than is the opponent, and so hopes to gain an advantage in resolving the matter unrelated to the merits of the clients position.

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(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.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Comment:

1. The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.

Factual Representations by Lawyer

2. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.01. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02(c) and 8.04(a).

Misleading Legal Argument

3. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in

paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

4. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless 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.

Anticipated False Evidence

5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes. As to a lawyer's right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.

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 Rules 1.15(a)(1) and (b)(2), (4). If withdrawal is allowed by the tribunal, the lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client in the matter; but normally that Rule would not allow the lawyer to reveal that information to another person or to the tribunal. If the lawyer either chooses not to withdraw or is not allowed to do so by the tribunal, the lawyer should again urge the client not to offer false testimony or other evidence and advise the client of the steps the lawyer will take if such false evidence is offered. Even though the lawyer does not receive satisfactory assurances that the client or other witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.

Past False Evidence

7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer's duty to keep the client's revelations confidential and the lawyer's duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures.

3. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.03 Reporting Professional Misconduct

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judges fitness for office shall inform the appropriate authority.

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyers report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

(1) by Rule 1.05 or

(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

Comment:

1. Self-regulation of the legal profession requires that members of the profession take effective measures to protect the public when they have knowledge not protected as a confidence that a violation of these rules has occurred. Lawyers have a similar obligation with respect to judicial misconduct.

2. There are two ways that a lawyer may discharge this obligation. The first is to initiate a disciplinary investigation. See paragraphs (a) and (b). The second, applicable only where the reporting lawyer knows or suspects that the other lawyer or judge is impaired by chemical dependency on alcohol or drugs or by mental illness, is to initiate an inquiry by an approved peer assistance program. (See V.T.C.A., Health & Safety Code, ch. 467.) Under this Rule, a lawyer having reason to believe that another lawyer or judge qualifies for the approved peer assistance program reporting alternative may report that person to such a program, to an appropriate disciplinary authority, or to both. Frequently, the existence of a violation cannot be

established with certainty until a disciplinary investigation or peer assistance program inquiry has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only such an investigation or inquiry can uncover. Consequently, a lawyer should not fail to report an apparent disciplinary violation merely because he or she cannot determine its existence or scope with absolute certainty. Reporting a violation is especially important where the victim is unlikely to discover the offense absent such a report.

3. It should be noted that this Rule describes only those disciplinary violations that must be revealed by the disclosing lawyer in order for that lawyer to avoid violating these rules. It is not intended to, nor does it, limit those actual or suspected violations that a lawyer may report to an appropriate disciplinary authority. Similarly, a lawyer knowing or suspecting that another lawyer or judge is impaired by chemical dependency on alcohol or drugs or by mental illness may inform an approved peer assistance program of that concern even if unaware of any disciplinary violation committed by the supposedly impaired person.

4. If a lawyer were obliged to report every violation of these rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. Similar considerations apply to the reporting of judicial misconduct. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term substantial refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. The term fitness has the meanings ascribed to it in the Terminology provisions of these Rules.

5. A report to a disciplinary authority of professional misconduct by a lawyer should be made and processed in accordance with the Texas Rules of Disciplinary Procedure. Comparable reports to approved peer assistance programs should follow the procedures those programs have established. A lawyer need not report misconduct where the report would involve a violation of Rule 1.05 or involve disclosure of information protected as confidential by the statutes or regulations governing any approved peer assistance program. However, a lawyer should consider encouraging a client to consent to disclosure where prosecution of the violation would not substantially prejudice the client's interests. Likewise, the duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose past professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Rule 8.04 Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

may inform an approved peer assistance program of that concern even if unaware of any disciplinary violation committed by the supposedly impaired person.

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(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

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

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsels office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorneys cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the lawyers right to practice has been suspended or terminated, including but not limited to situations where a lawyers right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

(12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, serious crime means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Comment:

1. There are four principal sources of professional obligations for lawyers in Texas: these Rules, the State Bar Act, the State Bar Rules, and the Texas Rules of Disciplinary Procedure (TRDP). Rule 1.06(O) of the TRDP contains a partial listing of the grounds for discipline under those Rules.

2. Rule 8.04 provides a comprehensive restatement of all forms of conduct that will subject a lawyer to discipline under either these Rules, the State Bar Act, the TRDP, or the State Bar Rules. In that regard, Rule 8.04(a)(1) is intended to correspond to TRDP Rule 1.06(O)(1); Rules 8.04(a)(2) and 8.04(b) are intended to correspond to the provisions of TRDP Rules 1.06(O)(8) and (9) and Rules 1.06(O) and (U), as well as certain other crimes; and Rules 8.04(a)(7)-(11) are intended to correspond to TRDP 1.06(O)(3)-(7), respectively. Rule 8.04(a)(12) of these Rules corresponds to a prohibition that was contained in the last (unnumbered) paragraph of former Article X, section 7, State Bar Rules.

3. The only provisions of TRDP Rule 1.06(O) not specifically referred to in Rule 8.04 is Rule 1.06(O)(2)s provision for imposing discipline on an attorney in Texas for conduct resulting in that lawyers discipline in another jurisdiction, which is provided for by Rule 8.05 of these Rules.

4. Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally in this state, the distinction has been drawn in terms of serious crimes and other offenses. See former Article X, sections 7(8) and 26 of the State Bar Rules (now repealed). The more recently adopted TRDP distinguishes between intentional crimes, serious crimes, and other offenses. See TRDP Rules 1.06(O) and (U), respectively. These Rules make only those criminal offenses either amounting to serious crimes or having the salient characteristics of such crimes the subject of discipline. See Rules 8.04(a)(2), 8.04(b).

5. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to his fitness for the practice of law, as fitness is defined in these Rules. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer's overall fitness to practice into question.

6. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief, openly asserted, that no valid obligation exists. The provisions of Rule 1.02(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to legal regulation of the practice of law.

7. Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyers abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust. See Rules 8.04(a)(2), 8.04(a)(3), 8.04(b).

Rule 8.05 Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for:

> (1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies

Standards for Appellate Conduct

The Supreme Court of Texas

Contact Rules Attorney Marisa Secco (512) 463-1353

Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.

The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.

Lawyers' Duties to Clients

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.

2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.

3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.

4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.

5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.

6. Counsel will not foster clients' unrealistic expectations.

7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.

8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.

9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.

12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

Lawyers' Duties to the Court

As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.

6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

8. Counsel will be civil and respectful in all communications with the judges and staff.

9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

Lawyers' Duties to Lawyers

Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

1. Counsel will treat each other and all parties with respect.

2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

3. Counsel will not request an extension of time solely for the purpose of unjustified delay.

4. Counsel will be punctual in communications with opposing counsel.

5. Counsel will not make personal attacks on opposing counsel or parties.

6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

7. Counsel will not lightly seek court sanctions.

8. Counsel will adhere to oral or written promises and agreements with other counsel.

9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

10. Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

The Court's Relationship with Counsel

Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.

1. Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.

2. The court will take special care not to reward departures from the record.

3. The court will be courteous, respectful, and civil to counsel.

4. The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.

5. The court will endeavor to avoid the injustice that can result from delay after submission of a case.

6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.

Members of the court will demonstrate respect for other judges and courts.