

The Windshield and the Bug:
Sometimes, when TDRCP meets TOMA,
Splat Happens.

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Quit trying to be ethical!

Four progressive levels of behavioral standards.

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- **1st is simply compliance with the law.**
Team members unduly focused on the legal standard are often searching for loopholes and opportunities to work in the dark. The legal benchmark is avoiding criminal prosecution.

Quit trying to be ethical!

Four progressive levels of behavioral standards.

- **1st is simply compliance with the law.**
- **2nd is compliance with ethical standards.**
Ethics can generally be described as a formally adopted set of behavioral standards. The ethics benchmark is avoiding suspension of your law license.

TDRCP Preamble: The rules provide “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.”

Quit trying to be ethical!

Four progressive levels of behavioral standards.

- 1st is simply compliance with the law.
- 2nd is compliance with ethical standards.
- 3rd is integrity-driven.

Integrity has been described as what you do when no one is watching. The benchmark here is not what is allowable, but what is RIGHT.

Quit trying to be ethical!

Four progressive levels of behavioral standards.

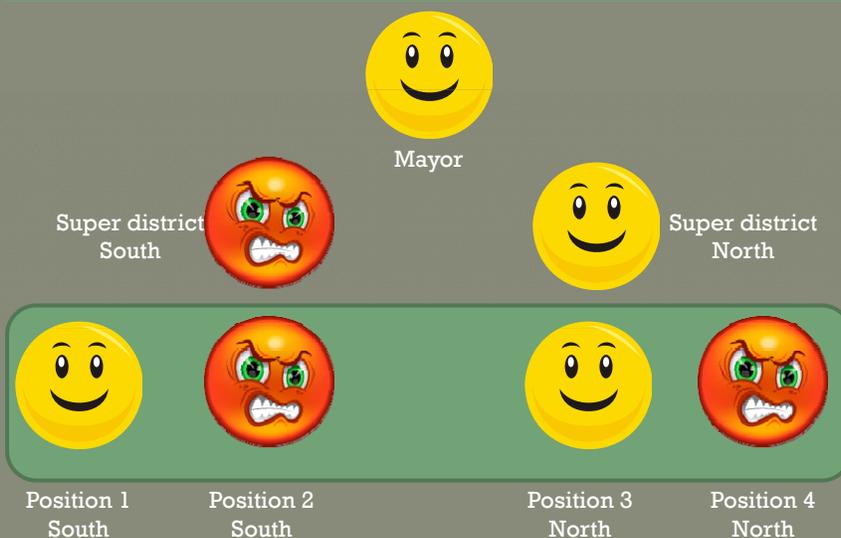
- 1st is simply compliance with the law.
- 2nd is compliance with ethical standards.
- 3rd is integrity-driven.
- 4th is character-driven.

Character-driven decision making is doing the right thing when you are under immense pressure to do the wrong thing. The benchmark here is whether you have the courage to pay the price to do what is right in spite of the pressures.

Be character-driven!

Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

A bit of history



After the election

Mayor

Super district South

Super district North

Position 1 South

Position 2 South

Position 3 North

Position 4 North

Voting to pay outside counsel

Mayor

Super district South

Super district North

Position 1 South

Position 2 South

Position 3 North

Position 4 North

Discovering adversity

Newly elected Council member is VP of association granted plaintiff status in contested case hearing.

An "adverse party" is a party whose interests are opposed to another party to a legal action.



- Highsmith v. Tyler State Bank & Trust Co., 194 S.W.2d 142, 145 (Tex. Civ. App.-Texarkana 1946) writ ref'd;
- Tex. Atty Gen. ORD-551 (1990) at 4-5;
- Tex. Atty Gen. LO-89-77, at 3
- Black's Law Dictionary 1144 (7th ed. 1999)

Communication



Rule 1.03: Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.

Communication



Rule 1.03: Communication Comment 2:

The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

“As [attorney] Eureste notes, the record shows numerous telephone conversations between Granado and Eureste's office. Eureste contends the only evidence of inadequate communication with Granado was Granado's testimony that he did not believe Eureste communicated with him enough.

However, Granado assailed the quality as well as the quantity of Eureste's communication with him. It is clear from Granado's testimony that his expectations were not met.”

Eureste v. Comm'n For Lawyer Discipline, 76 S.W.3d 184, 200 (Tex. App.—Houston [14th Dist.] 2002, no pet.)

Confidentiality



Rule 1.05: Confidentiality of Information

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

- (1) Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

Confidentiality



“Confidential information” includes both “privileged information” and “unprivileged client information.”

TX ST RPC Rule 1.05

“... an attorney's duty of confidentiality is broader than just client communications, and extends to all confidential information, whether privileged or unprivileged, and whether learned directly from the client or from another source... Thus, Skelton's testimony that he never learned any confidential information directly from Fletcher is simply not probative with respect to whether Skelton learned confidential information about Fletcher's case during the course of his lengthy professional relationship with Fletcher.”

Perillo v. Johnson, 205 F.3d 775, 799 (5th Cir. 2000)

Confidentiality



a lawyer shall not knowingly: ... Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

TX ST RPC Rule 1.05

Kirk & Carrigan seek to avoid this claim of breach, on the ground that the attorney-client privilege did not apply to the present statement, because unnecessary third parties were present at the time it was given.

However, ... regardless of whether from an evidentiary standpoint the privilege attached, Kirk & Carrigan breached their fiduciary duty to Perez either by wrongfully disclosing a privileged statement or by wrongfully representing that an unprivileged statement would be kept confidential. Either characterization shows a clear lack of honesty toward, and a deception of, Perez by his own attorneys regarding the degree of confidentiality with which they intended to treat the statement.

Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied)

Organization as a client



Rule 1.12: (a) A lawyer employed or retained by an organization represents the entity.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

- (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
- (2) the violation is likely to result in substantial injury to the organization; and
- (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

Reasonable remedial actions



... Such procedures, actions and measures may include, but are not limited to, the following:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Then what?



Comment 7: The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization.

Then, what?



Comment 7: The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization.

Texas Open Meetings Act



(a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Tex. Gov't Code Ann. § 551.143 (Vernon)

The first exception



A governmental body may not conduct a private consultation with its attorney except:

(1) when the governmental body seeks the advice of its attorney about:

- (A) pending or contemplated litigation; or
- (B) a settlement offer; or

(2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.

Tex. Gov't Code Ann. § 551.071 (Vernon)

Others in closed session



“... the commissioners court may include the county auditor in a closed discussion of litigation or settlement offers if it determines that the auditor is necessary to the discussion, that the auditor's interests are not adverse to the county's, and that the auditor's presence is consistent with the attorney-client privilege. If, however, a court subsequently finds that, because of the auditor's presence, the communications are not privileged, then the commissioners court may also be found to have violated section 551.071 of the Government Code.”

Op. Tex. Att'y Gen. No. JC-0506 (2002)

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Op. Tex. Att'y Gen. No. JC-0506 (2002)

Closed session penalties



(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

- (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
- (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
- (3) participates in the closed meeting, whether it is a regular, special, or called meeting.

Tex. Gov't Code Ann. § 551.144 (Vernon)

The first exception



A governmental body may not conduct a private consultation with its attorney except:

(1) when the governmental body seeks the advice of its attorney about:

- (A) pending or contemplated litigation; or
- (B) a settlement offer; or

(2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.

Tex. Gov't Code Ann. § 551.071 (Vernon)

Excluding Adversaries



Governmental bodies may admit to executive sessions ... those officers and employees ... whose presence is necessary to effective communication with the attorney.

Furthermore, the governmental body may not admit to its closed discussion of litigation those third parties who are adversaries or whose presence would otherwise prevent privileged communication from taking place.

Op. Tex. Att'y Gen. No. JM-238 (1984)

Excluding council members?



“When one member’s disagreement with the board leads him to invoke the adversary system of justice against the rest of the board, there is little likelihood that a composite judgment on the matter can be reached through discussion. Thus, no injury is done to the policy entitling all board members to attend all board meetings if the plaintiff board member is excluded from the board’s private consultations with its attorney.

“... a public officer holds a public trust, and he should discharge his duties with honesty and integrity. Given these responsibilities, a public officer who is suing or planning to sue his governmental body should avoid using his public position to secure access to information related to the litigation, for example, by voluntarily refraining from attending executive sessions regarding the litigation and from accepting confidential documents related to the litigation.”

Op. Tex. Att’y Gen. No JM-1004 (1989)

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