

**Presented:**  
The University of Texas School of Law's  
15th Annual Conference on State and Federal Appeals

June 2-3, 2005  
Austin, Texas

**ALL I REALLY NEED TO KNOW  
ABOUT ETHICS  
I LEARNED IN KINDERGARTEN**

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## ACKNOWLEDGMENTS

The author would like to thank those whose assistance made this paper come together. In particular, many thanks are owed to Beth Yusi and Marianne Sulser, associates at Andrews Kurth LLP, who assisted with the initial sweep of the case law to find and sort the worthy candidates for inclusion in the paper. Likewise, Marianne Sulser co-authored the section about keeping one's promises. It would violate the playground ethos if I were to take full credit. Thanks also to Teresa Hicks and Mike Kohler, whose business it is to make sure my prose and cite form are without error, even if I have not rendered them so in the original drafting.

Finally, in the interest of full disclosure, I used some portions of this paper several years ago when I spoke at the advanced civil appeals seminar presented by the State Bar. While most of this paper is new, those few old cases were just too colorful to leave out. Besides, if you can't even plagiarize from yourself, what's the point?

## I. INTRODUCTION

When studying for the MPRE, I became very suspicious of those who were able to obtain dizzyingly high marks on the practice exams. I cannot really trust a person who knows *precisely how far* one can stray before crossing some ethical prohibition. Do you really want to rely upon a person who knows *exactly* how familiar he can get with a female client or what type of business arrangement comes *just* inside the line? Aren't you more comfortable with someone whose ethical antennae tingle long before a compromising situation becomes visible over the horizon? Does this not indicate a more highly developed moral compass? Which type of person is more likely to handle your fiduciary charge with faithfulness?

Obviously, there is a place for knowing the disciplinary standards with precision. My thesis, however, is that one can avoid the majority of problems by simply minding some basic principles that keep lawyers far back from the edge of the precipice. More than that, those basic principles are the type of things that you learned in kindergarten or at your mother's knee. The same norms that allow one to "play well with others" on the playground often help one to "work well with others" as a grownup. What follows are some cases to which I applied the question: "What kindergarten playground rule might have saved these lawyers the obvious grief that they are in?" Look at the law through this filter, and you too might agree, "all I really need to know about ethics I learned in kindergarten."

## II. RECESS

### A. Play By The Rules

Every activity has its rules, and the less "game-like" an activity is, the more important the rules are. Nothing is less of a game for a client than litigation. Clients' interests can seldom be advanced, and can often be harmed when lawyers do not play by the rules—even the most mundane rules.

In *Sossi v. Willette & Guerra*,<sup>1</sup> for example, the rules about docketing statements actually played a role in the imposition of appellate sanctions.<sup>2</sup> The appellant in *Sossi* sought to disguise the fact that his order was not subject to interlocutory appeal by mis-naming the order in the docketing statement and failing to attach the order as the rules required.<sup>3</sup> The appellant then filed a brief in the interlocutory appeal with no appendix as the rules required.<sup>4</sup> Did he *really* think the other side would fail to point out the lack of jurisdiction? Opposing counsel pointed out the true jurisdictional facts to the appellant; but, still the appellant refused to dismiss the

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<sup>1</sup> 139 S.W.3d 85 (Tex. App.—Corpus Christi 2004, no pet.).

<sup>2</sup> *Id.* at 90.

<sup>3</sup> *Id.* at 89-90.

<sup>4</sup> *Id.* at 90

appeal. The charade ended when the appellee brought the jurisdictional question to the attention of the court of appeals.<sup>5</sup>

The court of appeals not only sanctioned the appellant for trying to hide the jurisdictional ball, it made special mention of the burden that such tactics place upon the system:

[W]e cannot conclude that appellant had any reasonable expectation that this Court would assume jurisdiction of the appeal. . . . Moreover, appellant, who has mischaracterized the nature of the appeal as an interlocutory appeal, which requires that judgment be rendered not later than the 120th day after the date of the perfection of the appeal, has imposed a hardship on this reviewing Court and its staff, as well as on other appeals pending before this Court.<sup>6</sup>

Another example: What do you call a party that objects 95 times over a span of 76 pages in a deposition, often on the basis of attorney-client privilege where there was no attorney-client relationship? Unfortunately, you call it the State of Texas. In *State v. Delany*,<sup>7</sup> the witness for the State served in the capacities of “program manager,” “assistant administrative director,” or a “supervisor of the litigation support division.”<sup>8</sup> When asked whether he was ever hired by the State as an attorney to represent it in connection with legal matters, he said no.<sup>9</sup>

Nevertheless, the State repeatedly objected, and instructed the witness to not answer questions about the facts of the case.<sup>10</sup> The State asserted objections to such things as the witness’ involvement in the case, the names of people he had met with, and even the existence or non-existence of a road in front of the appellee’s property.<sup>11</sup> As in *Sossi*, the tactics profited the game player nothing. The State was sanctioned; but more than that, who is to say that the State’s behavior did not play a part in the damage award of \$497,637.80.<sup>12</sup>

What about local rules? Can ignoring local rules rise to the level of an ethical problem? It can when the violation seeks to keep a court from having both sides of the story before granting extraordinary relief. That was the case in *Howell v. Texas Workers’ Compensation Commission*.<sup>13</sup> *Howell* is only one brief chapter in a repetitive and abusive litigation saga over

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 149 S.W.3d 655 (Tex. App.—Houston [14th Dist.] 2004, pet. filed).

<sup>8</sup> *Id.* at 662.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 662 n.28.

<sup>12</sup> *Id.* at 657.

<sup>13</sup> 143 S.W.3d 416 (Tex. App.—Austin 2004, pet. denied).

the compensation of chiropractors who provide services to workers' compensation claimants and their attempts to be free of the administrative regime for workers' compensation benefits.<sup>14</sup> The effort involved filing over 700 lawsuits for chiropractors over a period of less than two months rather than squarely adjudicating whether the administrative remedies were mandatory.<sup>15</sup> After a fairly Herculean effort to shepherd that beast to a single trial, a chiropractor sought and obtained a TRO for purposes of delaying the trial.<sup>16</sup> He obviously knew his counterparties *and their counsel*; nevertheless, he sought to do so *ex parte*.

Beyond not "playing fair," which is addressed in the next section, the chiropractor did not comply with the local rules. Those rules required that he certify that "to the best of his knowledge the party against whom the relief is sought is not represented by counsel in the matter made the basis of the suit," or that the opposing party's counsel had been notified and did not wish to appear, or that counsel had been unable, despite his diligence, to contact opposing counsel.<sup>17</sup> Such a rule is intended to preserve the very essence of the adversary system—both sides having their say. The TRO movant, however, purported to certify that "it is believed that notice prior to the issuance of the temporary restraining order will result in additional and unnecessary duplicitous litigation."<sup>18</sup>

This noncomplying certification was the nail in the coffin. It not only showed a violation of the rules, but a *knowing* violation:

This fails to comply with either the Cameron County local rule or the rule of civil procedure 680. Further, it demonstrates that the law firm was aware before obtaining the TRO that [respondent] was represented by counsel. Accordingly, some evidence supports the district court's finding that obtaining the *ex parte* TRO constituted a bad-faith abuse of the judicial process.<sup>19</sup>

## B. Play Fair

Failing to play by the rules, especially in trying to thwart the adversary process, can obviously create chaos and get one in trouble. But is strictly complying with the rules enough? I do not think so. The potential fisticuffs of mandamus practice, especially in *In re Terminix International, Co.*,<sup>20</sup> illustrate this point with particular clarity.

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<sup>14</sup> See *id.* at 429-31.

<sup>15</sup> *Id.* at 447.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 447-48.

<sup>19</sup> *Id.* at 448.

<sup>20</sup> 131 S.W.3d 651 (Tex. App.—Corpus Christi 2004, orig. proceeding).

*Terminix* involved a motion for emergency stay and faxed response, both of which contemplated that Terminix intended to seek mandamus relief before an imminent trial setting.<sup>21</sup> In view of the immediacy of the trial setting, the court of appeals granted the emergency stay and Terminix filed its petition for writ of mandamus. Here is where the gamesmanship began, and again it was gamesmanship calculated to keep the court from hearing both sides of the story. Terminix sent the court its petition by federal express, yet it served the other side by the equivalent of carrier pigeon: certified mail . . . on a Thursday.<sup>22</sup> As a result, at 4:00 p.m. on Friday, the real parties in interest received a fax from the court of appeals requesting a response to a mandamus petition they had never seen.<sup>23</sup> They verified with the court that a petition had been filed and called Terminix to request a fax copy of the petition without exhibits.<sup>24</sup> Terminix refused on the lame excuse that “it was almost 5:00 p.m. on Friday, and no one was available in [the] office to send the fax at that time.”<sup>25</sup> Anyone ever heard of Kinko’s?

Terminix argued that it could not be sanctioned because “the rules” did not require it to send a fax, even if its behavior was “rude,” “ill-advised” or exhibited a “lack of professional courtesy.”<sup>26</sup> Relying upon its inherent power to discipline an attorney’s behavior,<sup>27</sup> the court rejected the offender’s technical argument, concluding instead that the lawyer’s refusal to fax a copy of the petition for writ of mandamus was “unreasonable and designed to thwart opposing counsel’s ability to timely and effectively respond to the petition.”<sup>28</sup> The court of appeals punished this excuse-making, though in my humble opinion, not severely enough.<sup>29</sup>

### C. Honesty Is The Best Policy

The cases in this section illustrate the proverb that honesty is the best policy. They even illustrate that one can borrow a whole lot of trouble without telling a literal “lie.”

One attorney borrowed trouble with the Bar by disguising his advertisement as a referral service, and depriving prospective clients of a chance to evaluate his credentials before he had them on the phone. In *Rodgers v. Commission for Lawyer Discipline*,<sup>30</sup> the lawyer involved ran

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<sup>21</sup> *Id.* at 652.

<sup>22</sup> *Id.* at 653.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 654.

<sup>29</sup> The court of appeals ordered that Terminix’s counsel pay sanctions of \$1,500 to counsel for the real parties in interest. *Id.* at 654. From an appellate lawyer’s point of view, making life difficult during an emergency mandamus proceeding is a hanging offense.

<sup>30</sup> 151 S.W.3d 602 (Tex. App.—Fort Worth 2004, pet. denied).

an advertisement under the name “Accidental Injury Hotline” in the “Attorney Referral & Information Service” section of the yellow pages.<sup>31</sup> The advertisement did not identify the attorney; however, he was the only attorney available through the “hotline.” A caller would not learn his name until pressing “0” to speak to an attorney.<sup>32</sup> Thus, a caller wishing to speak to an attorney would not be able to verify any information regarding the attorney before being connected to the attorney’s office.<sup>33</sup> The discussion in the case deals a lot with changes in the advertising rules, but on a deeper level, even if the rules allowed this, would your mother be proud of it? Is this the type of promotion in which a scrupulously honest fiduciary would participate?

Here, we can digress to actually discuss the rules a bit. The advertising rules recently changed for Texas attorneys. A redline version of the rule changes, taken from the State Bar website, is included as Appendix A to this paper. One positive is that we are rid of the “not board certified” disclaimer—in all its many illegible and highly abbreviated forms, which were themselves deceptive. Likewise, my common sense side appreciates the new commentary that is illustrative of the type of lawyer advertising that would be considered misleading or deceptive. Some might complain that companies use these same forbidden techniques all the time to sell toothpaste or shaving cream. We lawyers, however, are not selling toothpaste or shaving cream. We are responsible for professional services. Clients can lose their livelihoods and freedom, even when services are performed flawlessly by the best available counsel. Any rule that prevents clients from having unjustified expectations is a good thing.

*Bennett v. Cochran*<sup>34</sup> also involves “advertising,” even if it is “advertising” aimed at potential law partners. In *Bennett*, the lawyers decided to form a partnership without the benefit of a written partnership agreement. One later claimed the other boasted of a “formaldehyde docket” that consisted of “good cases” on which “there was a lot of money to be made.”<sup>35</sup> Unfortunately, the “good cases” ran headlong into federal preemption and were worth less than “a lot.”<sup>36</sup> The appellate court ultimately held that the statements were non-actionable puffery, but the fact that they were made at all resulted in an appeal after a full jury trial.

When the very object of a representation is questionable, it becomes even more important to stick with the unvarnished truth. *Richards v. Commission for Lawyer Discipline*<sup>37</sup> is the story of H, an attorney sued for malpractice, and W, his wife.<sup>38</sup> H wanted to “protect” his assets, so he

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<sup>31</sup> *Id.* at 607.

<sup>32</sup> *Id.* at 612.

<sup>33</sup> *Id.* at 613.

<sup>34</sup> No. 14-00-01160-CV, 2004 WL 852298, at \*1 (Tex. App.—Houston [14th Dist.] Apr. 22, 2004, no pet. h.).

<sup>35</sup> *Id.* at \*5.

<sup>36</sup> *Id.* at \*6.

<sup>37</sup> 35 S.W.3d 243 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

<sup>38</sup> *Id.* at 246.

essentially instructed his lawyer/friend Richards to obtain a “pretend” divorce.<sup>39</sup> With nary a meeting or a discussion with W, Richards filed a divorce petition on her behalf.<sup>40</sup> Although W later paid Richards a retainer as H instructed, she thought it was only in the event she and H later decided that a divorce was necessary.<sup>41</sup> If this were not enough, Richards’ office *also* prepared an answer and cross-petition for H, and thus represented both parties to the divorce proceeding.<sup>42</sup> H presented W with a final decree, which she reluctantly signed, but she confided in “her” attorney (Richards) that she did not understand what was going on and that she did not want a divorce.<sup>43</sup> “Her” attorney (Richards) reassured her that she was doing the right thing to protect their assets, and that H really did love her after all.<sup>44</sup> Unfortunately for W (and “their” attorney), H *really* remarried and *really* evicted W from their home shortly after their *pretend* divorce was final.<sup>45</sup> Richards took the fall for neglecting a legal matter entrusted to her, failing to provide reasonable explanation to W, representing opposing parties to the same litigation, and failing to exercise independent professional judgment and render candid advice.<sup>46</sup>

#### D. People Will Fight To Keep Their Toys

Anyone who has spent any time around toddlers knows that the first argument these future attorneys learn to make is “Mine! Mine! Mine!” As children, the argument is made over and over, the louder the better. As we age, the oral argument technique may become more sophisticated, but the substance of many potential conflicts is the same.

In times past, we would fight over Tonka trucks or Barbies. Now, we just scream “show me the money.” Conflict over fees generates the most extraordinary donnybrooks. Witness the 100 plaintiffs who filed 89 individual and sanctionably frivolous lawsuits against a firm and its lawyers over fees collected in connection with toxic tort settlements.<sup>47</sup> This is not to say that a fight over money is necessarily wrong or immoral or unethical or illegal. An attorney who performs properly is entitled to be paid under the terms of a fee agreement, and sometimes one must fight to preserve that right. I only point out that if one wants to *avoid* conflict, the antennae ought to quiver whenever the question of money arises.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 247.

<sup>46</sup> *Id.* See also TEX. DISCIPLINARY R. PROF’L CONDUCT 1.01(b)(1), 1.03(b), 1.06(a) & 2.01, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

<sup>47</sup> See *Malone v. Abraham, Watkins, Nichols & Friend*, No. 01-99-01192-CV, 2004 WL 1120005, at \*1-2 (Tex. App.—Houston [1st Dist.] May 20, 2004, no pet.) (mem. op.).

For example, *Law Offices of Windle Turley, P.C. v. French* involved a tug of war between attorneys dueling over a contingency fee.<sup>48</sup> The French family originally signed a contingent fee contract with the Turley firm to represent them in a medical malpractice suit.<sup>49</sup> A particular attorney at the firm filed the petition and began serving as lead counsel; however, that attorney left the firm two and a half years later and the clients wanted to go with him. The clients called and informed his successor not to perform any more work on the case until they could meet with Mr. Turley himself.<sup>50</sup> Despite the assurances they received from the firm and its board certified personal injury lawyer, the clients decided to take their case to the old attorney's new firm.

The Turley firm intervened in the medical malpractice action to protect its fee interest, and somewhat ironically, refused to take the case back some months later when the former client asked that it do so.<sup>51</sup> Even more bizarre, the old attorney moved to withdraw and to substitute the Turley firm as counsel for the plaintiff. The firm consented to the withdrawal but again refused to take up the case.<sup>52</sup> The firm's intervention was struck in December, re-filed in January (after a favorable jury verdict for the plaintiffs), and then disposed of on summary judgment in February. The court of appeals ultimately applied the general rule that allows attorneys to collect their full contingent fee when the client terminates the contract without good cause.<sup>53</sup> None of the clients' defenses to this rule could be established as a matter of law, and so the case was remanded for trial on the firm's entitlement to be paid.

*Hoeffner, Bilek & Eidman, L.L.P. v. Guerra*<sup>54</sup> is another tug-of-war. Like *Turley*, it illustrates the wisdom of "dancing with the one that brung ya." In *Hoeffner*, two attorneys intervened in a toxic tort case to be paid for their services as local counsel.<sup>55</sup> Notwithstanding a written employment agreement, the *Hoeffner* firm sought to reduce its local counsel fees while retaining another firm for trial.<sup>56</sup> The negotiations involved use of the words "over a barrel" and descriptions of various adult activities that rhyme with "ducked."<sup>57</sup> Such a high intensity conflict over filthy lucre is bound to buy trouble, and one wonders whether it could possibly have been worth the potential savings of chiseling local counsel.

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<sup>48</sup> 140 S.W.3d 407, 408-09 (Tex. App.—Fort Worth 2004, no pet.).

<sup>49</sup> *Id.* at 408.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 409.

<sup>52</sup> *Id.* at 409-10.

<sup>53</sup> *Id.* at 412 n.14 (citing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)).

<sup>54</sup> No. 13-01-503-CV, 2004 WL 1171044 (Tex. App.—Corpus Christi May 27, 2004, pet. denied) (mem. op.).

<sup>55</sup> *Id.* at \*1

<sup>56</sup> *Id.* at \*1-2.

<sup>57</sup> *Id.* at \*3.

The duty of truthful, clear communication obviously extends to the fee agreement at the inception of the attorney-client relationship. *Curtis v. Commission for Lawyer Discipline*<sup>58</sup> illustrates this point with an extreme set of facts. In *Curtis*, two individual plaintiffs were represented by one lawyer who associated a second attorney (officing in the same building) to help with the cases.<sup>59</sup> The second attorney contacted the plaintiffs, convinced them to execute a *second* fee contract requiring the payment of hourly fees plus an additional contingency percentage, and misrepresented to the clients that their original attorney was so ill that she probably could not handle their cases. The second fee contract would have gobbled up *all* of the client's recovery if enforced.<sup>60</sup> Not surprisingly, the attorney was disciplined for charging an unconscionable fee, misrepresenting that she was partnered with the originating attorney, making a false or misleading communication about another lawyer and general misconduct.<sup>61</sup>

Again we can digress to include some vegetables in the midst of this confectionary buffet. There are actually *rules* and stuff for the dividing of fees and hiring on of additional counsel to represent a client. Moreover, those rules have recently changed, effective March 1, 2005. For an appellate lawyer, the new rules might be in play if one is hired to protect a judgment on appeal in exchange for a portion of the contingency fee. The State Bar's website contains a useful redline copy of the rule changes, and I have provided a manuscript version of the redline in Appendix A to this paper. Likewise on the website, you will find form language for doing a proper referral or association of counsel. The form is included in Appendix B.

We need rules concerning fees, not only to keep lawyers in line, but also because clients *will* initiate conflict over money. *Santos v. Commission for Lawyer Discipline*<sup>62</sup> illustrates that point. In *Santos*, the lawyer was defending a grievance that arose out of his failure to appear at a hearing in an immigration matter in which he had been retained.<sup>63</sup> The court of appeals *twice* mentioned that the client demanded a return of his retainer and the lawyer refused, after which the client chose to file a grievance.<sup>64</sup> One cannot know that a grievance would *not* have been filed had a properly contrite lawyer returned the \$500 retainer. That said, it cannot have helped client relations when the lawyer refused to return the retainer and threatened to call the police in throwing the former client out of his office.<sup>65</sup>

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<sup>58</sup> 20 S.W.3d 227 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

<sup>59</sup> *Id.* at 230, 233.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 232-34. *See also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), 7.01(d), 7.02(a)(1) & 8.04(a).

<sup>62</sup> 140 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

<sup>63</sup> *Id.* at 400.

<sup>64</sup> *Id.* at 400, 406.

<sup>65</sup> *Id.* at 406.

## E. Keep Your Promises

Every parent has heard the refrain “That’s not fair! You promised!” Even a child knows the outrage felt when promises are broken. It is no surprise then that kids everywhere admire Horton the elephant who hatched the egg. In Horton’s words,

I meant what I said  
And I said what I meant. . . .  
An elephant’s faithful  
One hundred percent.<sup>66</sup>

Neither we nor our clients outgrow this childlike sense of fair play, which insists that promises be kept. When that expectation is violated, conflict ensues.

*In re Mitcham*,<sup>67</sup> for example, involves a plaintiff’s law firm that promised not to sue TXU, a routine toxic tort defendant. The plaintiff’s law firm had hired a lawyer who had previously worked as a legal assistant for TXU’s local counsel. To do so, they entered an agreement limiting their ability to sue TXU and requiring it to preserve TXU’s confidences.<sup>68</sup> The firm held up its end of the agreement—that is, until the tainted legal assistant left the firm to work elsewhere. Within the same month, the firm filed suit against TXU, and TXU’s counsel moved to disqualify plaintiff’s law firm on the basis of the agreement.

The parties argued over which disqualification standard applied—the standard governing legal assistants,<sup>69</sup> or the standard governing lawyers,<sup>70</sup> since the legal assistant turned lawyer was a legal assistant at the defense firm and a lawyer at the plaintiff’s firm. The supreme court applied a more childlike standard. Under the facts of the case, the plaintiff’s law firm was disqualified based upon its promises. The agreement contained a confidentiality agreement in addition to an agreement not to sue:

Because the duty to guard confidences is permanent . . . , we cannot imply a termination date that applies to only some of the provisions and some of the parties.<sup>71</sup>

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<sup>66</sup> Dr. Seuss, *Horton Hatches the Egg* (Random House 1968) (1940).

<sup>67</sup> 133 S.W.3d 274 (Tex. 2004) (orig. proceeding) (per curiam).

<sup>68</sup> *Id.* at 277.

<sup>69</sup> For legal assistants, there is an irrebuttable presumption that they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer. *Id.* at 276, citing *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994).

<sup>70</sup> For lawyers, there is an irrebuttable presumption they gain confidential information on every case at the firm where they work (whether they work on the case or not), *In re Mitcham*, 133 S.W.3d at 276 (citing *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 131, (Tex. 1996)), and an irrebuttable presumption they share that information with the members of a new firm, *id.* (citing *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995) (per curiam)).

<sup>71</sup> *Id.* at 277.

The circumstances in *Bellino v. Commission for Lawyer Discipline*<sup>72</sup> violate the “keep your promises” rule with gusto. The attorney represented his second-cousin and her four-year-old son in a personal injury suit involving a car accident. After promising his cousin that he would handle her claims for free “because she was family,” he broke his promise—and then some. First, he settled the claims with the insurance company without her permission, then “invested” the child’s money in the “family business,” in which the lawyer was the sole shareholder. Despite saying he would not charge her for handling the case, he proceeded to keep 45% of her settlement, the remainder of which she received only after demanding it.<sup>73</sup>

How much should this lawyer pay? But wait, don’t answer yet. *There’s more*. The attorney represented another accident victim, and again settled the case without his client’s permission and kept the money for *two years* before his client found out.<sup>74</sup> Even after his client requested an accounting, the accounting did not occur and the client did not receive any of his settlement.<sup>75</sup> Still, there is more. The lawyer settled a case (this time with his client’s permission) for \$24,000. He gave the client \$6,000 and a few months later, another check for \$6,000, which was returned for *insufficient funds*. When the client demanded the money in cash, he gave her the money and offered \$4,000 more if she would refrain from filing a grievance with the State Bar of Texas. Apparently she did not accept the bribe.<sup>76</sup>

Had enough? The lawyer was still not finished. He accepted over \$6,000 from an Asian restaurant owner to obtain green cards for her cooks. He guaranteed he would obtain the green cards within one year, or he would refund the money. Some *four* years after being retained, he still had not obtained the green cards. Understandably, the restaurant owner asked for her money back.<sup>77</sup> Given the broken promises, it is little wonder the clients were bent out of shape.

Also disturbing is *Acevedo v. Commission for Lawyer Discipline*.<sup>78</sup> In *Acevedo*, the lawyer was hired by a client to provide legal advice regarding a piece of property the client owned. The attorney instead obtained the client’s unlimited power of attorney and prepared legal documents transferring the property to the attorney’s wife, with neither monetary consideration nor assumption of the loan on the property, and then filed these documents with the county clerk.<sup>79</sup> He knew his client was unable to read the small print on the documents and he misrepresented the true purpose of the documents.<sup>80</sup> In another instance, he was paid \$2,000

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<sup>72</sup> 124 S.W.3d 380 (Tex. App.—Dallas 2003, pet. denied).

<sup>73</sup> *Id.* at 386-87.

<sup>74</sup> *Id.* at 387.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 388.

<sup>77</sup> *Id.* at 387-88.

<sup>78</sup> 131 S.W.3d 99 (Tex. App.—San Antonio 2004, pet denied).

<sup>79</sup> *Id.* at 106.

<sup>80</sup> *Id.* at 106.

to represent the client in a deportation matter. He failed to perform any of the work, misrepresented that he had hired an investigator for \$1,200, then refused requests for a refund of the unearned fees and the return of the file. If this were not enough, he threatened the client at the State Bar offices at the time of the investigatory hearing.<sup>81</sup> Perhaps not the best location to threaten fisticuffs with a client?

A client's sense of betrayal need not depend upon an express promise. An implied promise or even silence will do. A proper concluding letter might have ameliorated the problems in *Hines v. The Commission for Lawyer Discipline*,<sup>82</sup> arising from the dismissal of a client's claim because of inadequate pleadings.<sup>83</sup> The lawyer *did not* make clear that he no longer intended to represent her on appeal.<sup>84</sup> He simply did not return her phone calls, did not comply with reasonable requests for information, and failed to take the actions necessary to appeal the ruling.<sup>85</sup> The court correctly noted that "if appellant believed that his representation had terminated or that [another lawyer] was going to further advise [his client], he could easily have made that clear to her, either orally or in writing. He did neither."<sup>86</sup> As a result, the attorney was disciplined, but more significantly, the client suffered.

The promises need not even have legal substance to cause legal trouble. In *Gaspard v. Beadle*,<sup>87</sup> for example, the former "client" was also the attorney's former paramour with whom he had taken up while she was still married and undergoing a divorce.<sup>88</sup> According to the former client, the attorney at some point claimed he could no longer work for free, broke off the romantic involvement and, in a monumental miscalculation, sent a bill to his former love and sued.<sup>89</sup> Hell hath no fury . . . .

The client counterclaimed in the fee dispute for fraud, misrepresentation, and intentional infliction of emotional distress.<sup>90</sup> The attorney prevailed as a matter of law on the counterclaims. Feigning true love is not an actionable misrepresentation and sending a bill to a former love

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<sup>81</sup> *Id.* at 105.

<sup>82</sup> 28 S.W.3d 697 (Tex. App.—Corpus Christi 2000, no pet.).

<sup>83</sup> *Id.* at 699.

<sup>84</sup> *Id.* at 702.

<sup>85</sup> *Id.* at 701-02.

<sup>86</sup> *Id.* at 702.

<sup>87</sup> 36 S.W.3d 229 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

<sup>88</sup> *Id.* at 233.

<sup>89</sup> *Id.* The representation apparently began on an unrelated real estate matter pursuant to a formal written agreement. Although the attorney did not formally represent his romantic interest during the divorce, he assisted with a usury matter. *Id.*

<sup>90</sup> *Id.* at 234.

interest is not “outrageous” as a matter of law.<sup>91</sup> Even so, the case is a caution to any attorney who allows his or her status and payment expectations to become clouded with personal issues.

Obviously, these are extreme cases with facts chosen principally for their macabre entertainment value. That said, they have something to teach the more mundane lawyer. Clients react when their expectations have been violated. An attorney can go a long way toward avoiding trouble by carefully managing client expectations. Doing so involves not only exercising care in creating client expectations, but also when making a promise—being “faithful one hundred percent.”

## F. Obey The Grownups

Every playground has grownups who are charged with maintaining order and applying the band-aids when necessary. In our playground, the grownups wear the black robes. That is not to say that the grownups are always right or always *act* in a manner deserving of respect. Nevertheless, they are the grownups. They merit respect by virtue of position alone, not based upon their performance. Because of this, there is no shorter road to trouble than smarting off to the teacher.

In *Sears v. Olivarez*,<sup>92</sup> for example, the appellant sought (without opposition) to recuse the entire Thirteenth Court of Appeals and transfer the case to another court.<sup>93</sup> Although most lawyers have fairly good success with *unopposed* motions, the movant in *Sears* surely hurt his chances by the argument he chose. The motion states:

As you know, Mr. Condit is the only Republican candidate seeking a position on this Court that has been dominated by democratic party members.

\* \* \*

It is Mr. Condit’s and his clients’ belief that the Court will decide this case not on the well-established law cited in the briefs and not on the factual merits of this case, but solely to promote the democratic agenda in order to assist the Court’s democratic colleagues and/or relatiatie (sic) against him.<sup>94</sup>

None of the judges of the Thirteenth Court of Appeals voluntarily recused him or herself. The court, sitting *en banc* (but excluding each justice in turn), voted on and denied the appellant’s motion.<sup>95</sup>

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<sup>91</sup> *Id.* at 235-38.

<sup>92</sup> 28 S.W.3d 611 (Tex. App.—Corpus Christi 2000, no pet.) (en banc).

<sup>93</sup> *Id.* at 613.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 615-16.

Thus, as is always the case when crossing the line, the heated verbiage drew ire rather than results. *Ineffective* writing is *bad* writing, even if it is within the bounds of the rules. But more than that, it earned Mr. Condit a trip to the State Commission on Judicial Conduct.<sup>96</sup> Quoting the San Antonio Court of Appeals, *Sears* observed:

A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.<sup>97</sup>

In *Malone v. Abraham, Watkins, Nichols & Friend*, the kids tried to “get over” while the teacher's back was turned. They did not succeed. They were originally sanctioned \$60,000 in Harris County for filing 89 frivolous lawsuits over the collection of fees from toxic tort settlements.<sup>98</sup> They nevertheless tried to intervene in a Brazoria County case with the same allegations that the first court had already found to be frivolous.<sup>99</sup> The first trial court pulled out the ruler and the court of appeals affirmed.

The court of appeals rejected the argument that a court was powerless to sanction conduct occurring in another jurisdiction. Said the court:

We held, in *Miller v. Armogida*, 877 S.W.2d 361, 364 (Tex. App.—Houston [1st Dist.] 1994, writ denied), that, under the “just sanctions” provision, the court could impose sanctions on a party to prevent him from filing the same claims in another court. In *Miller*, the trial court imposed an injunction on a party to prevent him from filing the same claim in another court. *Id.* Here, as in *Miller*, the trial court that found the initial 89 claims frivolous should not have to sit idly by while [the plaintiff] files a multitude of the same claims in another court.<sup>100</sup>

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<sup>96</sup> *Id.* at 617.

<sup>97</sup> *Id.* at 616 (quoting *In re Maloney*, 949 S.W.2d 385, 388 (Tex. App.—San Antonio 1997, orig. proceeding) (en banc) (per curiam)). In contrast to the Corpus Christi Court Of Appeals' approach in protecting its honor, the Texarkana Court of Appeals was more lax in letting appellate counsel slide with a warning for its briefing practices. See *Tex.-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 145-46 (Tex. App.—Texarkana 2000, no pet.). While not quibbling with the fact that errors took place, the court left unnecessary leeway for the possibility that the “errors were not made in bad faith.” *Id.* at 146.

<sup>98</sup> 2004 WL 1120005, at \*1-2.

<sup>99</sup> *Id.* at \*8.

<sup>100</sup> *Id.* at \*8.

Obeying the grownups also might have avoided some trouble in *Hill & Griffith Co. v. Bryant*.<sup>101</sup> The sanctions in *Hill* grew out of discovery disputes in a silica case. To support their “failure to warn” claims, the plaintiff had propounded an interrogatory asking for details about documents relating to the health hazards of silica and a production request for any internal memoranda relating to the marketing of silica-based products.<sup>102</sup> The defendant propounded its stock objection.<sup>103</sup> In response to a ruling on the plaintiff’s motion to compel, the defendant propounded amended answers and produced some documents, including three warning labels.<sup>104</sup> A week later, one of the defendant’s managers was deposed and intimated that there were other warning labels and documents that had not been produced.<sup>105</sup> The defendant’s counsel, however, contended that they had no other responsive documents.

The plaintiff moved for sanctions as pretrial began, and the defendant’s counsel came forward with a key document that had been held back: a “Labeling Memo” that chronicled the history of the defendant’s warning labels in response to federal regulations.<sup>106</sup> The production resulted in a delay of the trial and the retaking of depositions at the defendant’s expense.<sup>107</sup> It also resulted in sanctions.

The interesting sanction in this case was the 50 hours of community service affirmed by the appellate court. The court rejected the argument that the “Labeling Memo” was not responsive to the requests, and it relied upon an “obey the grownups” rationale:

Plaintiffs’ suit was prefaced on [the defendant’s] failure to warn consumers of the hazards of its products that contained silica. The trial court had been explicit at the . . . hearing on Plaintiffs’ motion to compel that all information and documentation relating to the potential health hazards of silica was to be turned over to Plaintiffs prior to the depositions of [the defendant’s] executives . . . . The trial judge also made it clear that he took an expansive and liberal view of Plaintiffs’ discovery requests.<sup>108</sup>

While community service is usually considered a severe sanction, the court found that it was warranted given the manner in which the trial court’s instructions had been violated. The attorney who produced the three warning labels *had detached* those labels from the very

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<sup>101</sup> 139 S.W.3d 688 (Tex. App.—Tyler 2004, pet. denied).

<sup>102</sup> *Id.* at 691.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 692.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 693-94.

<sup>108</sup> *Id.* at 694-95.

“Labeling Memo” that had been improperly withheld.<sup>109</sup> One final irony. The jury awarded no damages against that defendant, even with the disclosure of the “Labeling Memo.” How bad could it have been?

Advocates are not the only ones who transgress the limits of propriety. If judges are the grownups, then lawyers, clients and the system all suffer if the grownups are either abusive parents who demean those appearing before them or absent parents who listen to an expensive trial, hoping the jury sorts it out, rather than attend to their motion dockets.

The abusive parent is exemplified by *In re Greene*,<sup>110</sup> which the Fifth Circuit called “a classic case of a judge making a mountain out of a molehill.”<sup>111</sup> Mr. Greene, a federal public defender, had the misfortune of showing up ten minutes late for an arraignment docket before a federal district judge.<sup>112</sup> Rather than accept Mr. Greene’s apology or his proof that his secretary had mistakenly listed the arraignment as being before the magistrate at 9:30, the judge announced his intent to immediately try Greene for criminal contempt.<sup>113</sup> During the immediate trial, the judge came to the conclusion that Greene had misrepresented to the court the location of an inconsequential letter within the lawyer’s own file.<sup>114</sup> The judge found Greene guilty of two counts of contempt, one for being twelve minutes late and one for lying about the location of the letter.<sup>115</sup>

Thankfully, the Fifth Circuit did not let the matter drop. It held that when a lawyer has never before been late and offers a reasonable explanation, criminal contempt should not even be “on the judge’s radar screen” for such a “minor infraction.”<sup>116</sup> As for the letter, the record showed that Greene truly was uncertain about its location in the file and that he was “justifiably bewildered about [the judge’s] intense interest in such a peripheral point.”<sup>117</sup> We can all heed the message here. Participants on both sides of the bench should avoid “making a federal case” out of something when it is more appropriate to cut each other some slack.

### III. CONCLUSION

There are two types of lawyers who get their pictures on the front pages of the lay papers: famous lawyers and *infamous* lawyers. I have no deep, burning need to place myself in the first

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<sup>109</sup> *Id.* at 697.

<sup>110</sup> 213 F.3d 223 (5th Cir. 2000) (per curiam).

<sup>111</sup> *Id.* at 224.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 225.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

category. Even more, I have an *intense* desire to avoid the latter. Perhaps you share my view. If so, the extent to which we are able to accomplish our goal of avoiding the front page may well depend on going back to the basics. Show up every day, do the job, do it as well as you can do it, and do it in a manner that a five-year-old would recognize as fair. In that sense, the five-year-olds really do know all we need to know about ethics.