

# Ethics Game Show: What Would Phil Do?

PRESENTED BY HON. DARYL MOORE  
AND JANE WEBRE  
UT CLE CONFERENCE ON  
STATE AND FEDERAL APPEALS  
JUNE 4-5, 2020

SCOTT  
DOUGLASS  
McCONNICO

WWW.SCOTTDOUG.COM

1

## Question No. 1

You represent a client pursuant to a contingent fee agreement that provides for a fee of 35% of “any amount received”. You recover for the client a monetary judgment of \$50,000 plus the discharge of a \$250,000 mortgage on their home. Are you entitled to a contingent fee on the amount of the discharged mortgage?

**WWPD:** You won the benefit of a discharged mortgage for the client. Of course you get a fee on that amount!

**Answer:** You are limited to a contingent fee on the monetary portion of the judgment (\$50,000) because it is not clear that “any amount received” includes non-cash benefits like loan forgiveness. Because the lawyer is in a better position to describe the fee arrangement than the client, the burden is on the lawyer to include such matters clearly in the fee agreement.

**Source:** *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92 (Tex. 2001).

SCOTT  
DOUGLASS  
McCONNICO

2

## Question No. 2

Are omissions of material facts in appellate briefing a violation of Texas Disciplinary Rule of Professional Conduct 3.03's "duty of candor"?

**WWPD:** It's called "advocacy," dummy. Why would I EVER include material facts that hurt my client's case? That's called malpractice.

**Answer:** Yes. Appellate counsel has a duty to present "a fair portrayal of the facts appearing in the record." Fair portrayal includes disclosing all material facts appearing in the record essential to a proper determination of the issues on appeal.

**Source:** *Schlafly v. Schlafly*, 33 S.W.3d 863, 873 (Tex.App.—Houston [14th Dist.] 2000, pet. denied); *Dube v. Eagle Global Logistics*, 314 F.3d 193, 194-95 (5th Cir. 2002).

SCOTT  
DOUGLASS  
McCONNICO

3

## Question No. 3

If you are tried and convicted of a crime, can you sue your criminal defense lawyer for malpractice?

**WWPD:** Sure, why not? And you will have plenty of time in the prison library to do your research.

**Answer:** Yes, but only if you have been exonerated of the crime on appeal or in a post-conviction proceeding. If the conviction is vacated on grounds other than actual innocence, then you must prove your actual innocence of the crime as an element in the legal malpractice case.

**Source:** *Gray v. Skelton*, 595 S.W.3d 633 (Tex. 2020).

SCOTT  
DOUGLASS  
McCONNICO

4

## Question No. 4

Does an attorney owe a duty of confidentiality to a party with whom the attorney meets to discuss potential representation if the party ultimately hires another attorney?

**WWPD:** Of course, if it was really, really, confidential, and you didn't say at the beginning of the meeting, "if you don't hire me, there's no attorney/client relationship and I get to talk about what we talk about."

**Answer:** Yes, Phil would be right. If a party reveals confidential information, it must be kept confidential unless the party was advised prior to the meeting that nothing discussed would be held confidential unless the attorney was subsequently engaged.

Source: Comment 1 to Texas Disciplinary Rules of Professional Conduct 1.05; *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996).

SCOTT  
DOUGLASS  
McCONNICO

5

## Question No. 5

May a lawyer encourage current and former clients to post positive reviews and comments or favorable "star" ratings of the lawyer on social media platforms?

**WWPD:** Yes, but only if you get to write the lengthy and glowing reviews yourself.

**Answer:** Yes, so long as the lawyer does not encourage false or misleading reviews and takes reasonable steps to remove any reviews that are false or misleading.

**Source:** Tex. Ethics Op. 685 (2020).

SCOTT  
DOUGLASS  
McCONNICO

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Ethics Game Show: What Would Phil Do?

Also available as part of the eCourse

[eSupplement to the 2021 Robert O. Dawson Conference on Criminal Appeals](#)

First appeared as part of the conference materials for the  
30<sup>th</sup> Annual Conference on State and Federal Appeals session  
"Ethics Game Show"