

**“Greed , for lack of a better word ... is[n’t] Good.”**

By F. Daniel Knight<sup>1</sup>

Alexis de Tocqueville famously said of lawyers in his ovular work *Democracy in America* that he could not “believe a republic could exist if the influence of lawyers in public business did not increase in proportion to the power of the people.”<sup>2</sup> Many of the Founding Fathers of this country were lawyers, including four of the first six Presidents of the United States.<sup>3</sup> From the inception of this country, lawyers played a role in shaping our government, our laws, our culture, and our society.

What defines our profession today? Is it a pursuit of justice? Is it the concept of fairness? Is it equality under the law? The inscription over one of the entrances to The University of Texas School of Law (my alma mater) reads: “That they may truly and impartially administer justice.” There is an entire generation of lawyers who hold out Atticus Finch, the protagonist of Harper Lee’s *To Kill a Mockingbird*, as their legal hero because of his pursuit of justice.

Most non-lawyers could possibly say that one word defines our profession – Greed. They hear stories, some true, some false, about rampant lawsuits, runaway juries, law firms creating tax shelters for individuals and companies, both foreign and domestic, all for a dollar. Whether it is overall cynicism, a particular negative experience with the legal system, or simply watching too much television, the public has a negative impression of not only what we do, but who we are.

This is not a new phenomenon. In 1952, Albert P. Blaustein lamented the poor public perception of attorneys in The American Bar Association Journal.<sup>4</sup> Mr. Blaustein cited to several polls and studies wherein the public held a poor opinion of our profession, and that all things being equal, only around 8% of those polled would enter our profession if they could do anything for work.<sup>5</sup>

More recently, the Pew Research Center conducted a poll in both 2009 and 2013 of 4000 U.S. residents to gauge their perception of various professions in the United States, particularly as to their perceived “contribution to society.” Attorneys ranked at the

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<sup>2</sup> DETOCQUEVILLE, ALEXIS, DEMOCRACY IN AMERICA Vol. 1 Ch. 16 (1835).

<sup>3</sup> John Adams, Thomas Jefferson, James Monroe, and John Quincy Adams were all attorneys.

<sup>4</sup> Albert P. Blaustein, *What do Laymen Think of Lawyers? Polls show the need for better public relations*. 38 A.B.A. J. 1, 39-41 (January 1952).

<sup>5</sup> *Id.* at p. 39.

bottom of the 10 listed professions in both polls. In 2009, only 23% of respondents said attorneys contributed “a lot” to society. By 2013, that figure declined to 18%.<sup>6</sup>

This short paper provides no clear solution to this public perception problem. The focus herein, however, is not to lambast capitalism, earning money, or zealous advocacy for our clients. The author is a fan of all three concepts. Rather, the purpose of this paper and presentation is to demonstrate and discuss both how greed can cloud the judgment of an attorney, as well as what we can do to avoid falling under such a fog. Avoidance of these dilemmas could help, slowly but surely, to wipe cleaner the lens through which we are perceived by the public.

To evaluate this conundrum, the tension placed between financial gain on the one hand and truthful or ethical conduct on the other, we will discuss first the fiduciary and ethical responsibilities attorneys in Texas have to their clients. The paper will then turn to four case studies – three focused on greed, and one focused on a slightly different, but related tension: when an attorney’s obligation of zealous and loyal representation to their client conflicts with the requirement (both professional and moral) to tell the truth. The author is hopeful that these case studies will provide for discussion as well as individual reflection.

## FIDUCIARY & ETHICAL OBLIGATIONS OF ATTORNEYS

There are two main sources for the obligations an attorney owes to their client in the state of Texas – case law, and the Texas Disciplinary Rules of Professional Conduct (“TDRPC”). What follows is a bullet form list of those obligations from case law, and thereafter a summary of the high points of Section 1 of the TDRPC.

Attorneys are fiduciaries for their clients. We are also agents, counselors, and sometimes bill collectors, both for and from our clients. However, it is only the first role upon which we focus today. A fiduciary duty exists in Texas when a person or entity, through an obligation created by contract or law, has a responsibility to act on or give advice for the benefit of another person or entity in that relationship.<sup>7</sup> Under Texas law, attorneys owe a fiduciary duty to their client(s).<sup>8</sup> Associate attorneys at law firms owe a fiduciary duty not only to those they represent, but also to their law firm to not personally profit or otherwise obtain a financial gain from referring a matter to a lawyer or law firm other than their own.<sup>9</sup> Reported cases within Texas demonstrate that with respect to their clients, Texas attorneys have a duty to:

- preserve client confidences and confidential information;<sup>10</sup>
- represent the client with undivided loyalty;<sup>11</sup>

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<sup>6</sup> PEW RESEARCH CENTER, *Public Esteem for Military Still High* (June 11, 2013), as seen at <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/>

<sup>7</sup> *Stephanz v. Laird*, 846 S.W.2d 895 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1993, writ denied).

<sup>8</sup> See *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

<sup>9</sup> *Johnson v. Brewer & Prichard, P.C.*, 73 S.W.3d 193, 203 (Tex. 2002).

<sup>10</sup> *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2001, pet. Denied).

<sup>11</sup> *Burrow v. Arce*, 997 S.W.2d 229, 237-38 (Tex. 1999).

- act with absolute perfect candor, openness, and honesty and without any concealment or deception;<sup>12</sup>
- be honest with fees and refrain from self-dealing;<sup>13</sup>
- inform the client of matters material to the representation;<sup>14</sup>
- turn over funds belonging to the client;<sup>15</sup>
- timely inform the client of a conflict of interest;<sup>16</sup>
- follow the client's instructions;<sup>17</sup> and
- fully and fairly disclose the terms of a proposed settlement agreement.<sup>18</sup>

In addition to these obligations, Section 1 of the TDRPC contains numerous obligations and duties owed from a lawyer to their client. In the opinion of the author, the most important of these obligations are to zealously represent your client, to communicate with your client on the status of a legal matter, and to avoid conflicts of interest that could deter the required and aforementioned zealous representation.<sup>19</sup> Attorneys are also prohibited from

However, the Preamble to the TDRPC makes clear that the Rules are not designed to impose standards of civil liability against attorneys.<sup>20</sup>

15. These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Likewise, these rules are not designed to be standards for procedural decisions. Furthermore, the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

With these general guidelines in mind, it is now appropriate to turn to some examples of greed clouding the judgment of attorneys in Texas, or attorneys affiliated with Texas law firms.

<sup>12</sup> *Trousdale v. Henry*, 261 S.W.3d 221, 229 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2008, pet. denied).

<sup>13</sup> *Archer v. Griffith*, 390 S.W.2d 735, 739-40 (Tex. 1964)(setting aside an attorney's contingent fee because it was excessive).

<sup>14</sup> *Joe v. Two Thirty Nine Jt. V.*, 145 S.W.3d 150, 159-60 (Tex.2004).

<sup>15</sup> *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 399-400 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1988, writ denied).

<sup>16</sup> *Deutsch v. Hoover, Bax, & Slovacek, L.L.P.*, 97 S.W.3d 179, 190 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2002, no pet).

<sup>17</sup> *Rhodes v. Batilla*, 848 S.W.2d 833, 840-41 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1993, writ denied).

<sup>18</sup> *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex.. 1996).

<sup>19</sup> See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01, 1.03, and 1.06 (2018).

<sup>20</sup> TEX DISCIPLINARY R. PROF'L CONDUCT PREAMBLE §15.

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