

A NEW STAR CHAMBER

I must be old fashioned. Indeed, because of the permissiveness of lawyer advertising¹, the hardball trial tactics permitted in our litigation system, and the evidentiary, gate-keeping function now exercised by the judiciary², I have become uneasy about our advocacy system of justice. Marginally more disquieting are the processes used by the State Bar to police the conduct of lawyers in Texas and the malfunction of those processes when the State Bar deals with specific instances of alleged misconduct. Worse are the actions of the State Bar and the courts in interpreting the law applicable to lawyers³. It would not be possible to discuss all of these shortcomings in a single article, so I have decided to devote my attention to the perversion of the grievance process and the failure of stare decisis in this great State.

As an initial matter it is worth observing that computers have done for lawyers what Viagra has done for sex offenders. Both represent a good idea gone bad by use. While a simple keyword search may turn up case citations where particular words or phrases are used, the computer will never know and, therefore, the lawyer or judge will never know, without more, the philosophical background and basis for the rule of law being investigated. This accounts for, in my opinion, the degradation of stare decisis rather than an escalation of its importance. The Law after all is more than a string of words sewn together. It is an amalgam of concepts that is intended to govern the affairs of people in their business and personal activities. Literally interpreted, “stare decisis” means “let the decision stand.” It is important, therefore, for the courts to get it right the first time and thereafter to adhere to the concepts that directed the initial decision. Implicit is the notion that the court must always be willing to re-examine a precedent that is being woodenly applied and the words being given more importance than the concepts that underlie them. Those concepts, however, must be sufficiently described and understood by those who apply them as well as those who are bound by them. Vague generalities are the stuff that the Star Chamber was made of.

Conduct applicable to lawyers? And how do these observations support my view that we have abandoned stare decisis, nurtured a fledgling Star Chamber to oversee lawyer conduct, and, in the process, created a standard of conduct for lawyers that exposes us to virtually unlimited, civil liability?

The DR’s: The current Rules are the third version of the substantive guidelines that govern a lawyer’s ethical conduct. First there were the Canons. Then the Code. In 1990 the Rules were adopted.⁴ To a large extent Texas has followed the ethical refinements suggested by the American

Bar Association. In one respect, however, Texas has rejected the ABA standards. The ABA proposed, and most states adopted, a prohibition of contingent fee agreements in matrimonial cases. Texas declined to adopt this prohibition in 1990. That issue will be discussed later in this article.

From a historical perspective it is noteworthy that the Canons were expressed in aspirational terms. The Code was more specific. The Rules, while not much different from the Code, have attained a higher standing. Texas courts view the DR's as if they were statutes to be interpreted by the courts based upon the words used, court rules, and the "lore of the profession." See *Commission for Lawyer Discipline v Benton*, 980 W.W.2d 425, 437 (Tex 1998). While Benton also mentions "case law," that is an unlikely source of enlightenment given the dearth of decisions that are actually interpretive in nature. Indeed, a sincere argument can be made that the courts tend to over-emphasize a lawyer's duty as an officer of the court rather than focusing on the reality of our advocacy system that a lawyer's primary duty is to the client tempered only by his obligations to the court and his own conscience. Examples of this imperial view are *In re Snyder*, 734 F.2d 334 (8th Cir. 1984), reversed 472 U.S. 634 (1985); and *Howell v State Bar of Texas*, 843 F.2d 205 (5th Cir. 1988). The Benton court omits any reference to scholarly works or expert opinions. At least one author has suggests that there is a quantifiable difference between those two sources. See Green, *Second Circuit Review*, 55 *Brooklyn L. Rev.* 485, 521 (1989). He also argues that it was actually improper for the court in *Doe v Federal Grievance Committee*, 847 F.2d 57 (2nd Cir. 1988), to rely on expert testimony in rendering an ethics decision. *Ibid.* Professor Green, however, fails to rationally justify his conclusion except by resorting to the "old saw" that interpretations of the law are questions solely for the court to decide. As will hopefully be demonstrated, it is my view that not only was the Doe court's reliance justified it was also required.

By and large, the Disciplinary Rules (DRs, herein), even though mandatory, are couched in generalities. They are replete with phrases like "reasonable" and "reasonably." One scholar counted 29 instances of this illusive standard found in the Disciplinary Rules.⁵ Take, for example, the requirements of DR 1.03: "The lawyer shall keep the client reasonably informed concerning the

matter being handled so that the client may make reasonable decisions concerning it.” Another example of this literary fog is the definition of an unconscionable legal fee contained in DR 1.04: A fee is unconscionable if “a competent lawyer could not form a reasonable brief that the fee is reasonable.” This vague language is sufficiently unclear that it might not withstand a facial due process challenge if the DRs were considered criminal sanctions. Our Texas courts have avoided this constitutional confrontation by declaring the DRs to only involve civil penalties, and, while due process is required, a less rigorous evaluation is appropriate. At least that’s what the Court stated in *Benton*.⁶ I won’t pretend to know what the Court was really talking about.⁷ However, Justice Douglas expressed a more realistic view in *In Re Ruffalo*, 390 U.S. 544 (1968). There the Court held that disciplinary cases prosecuted against lawyers where the lawyer was under threat of financial ruin were actually quasi-criminal in nature and that due process was necessary.⁸ Be that as it may, it is unlikely that at this late date our courts will reclassify a disciplinary proceeding as criminal. So, how do we interpret these “civil penalties,” and, to take a specific example, what type of expert testimony is necessary to establish an unconscionable fee in violation of DR 1.04? Clearly, testimony must be offered (1) to show that the testifying lawyer is competent; (2) to explain how and why the testifying lawyer came to a reasonable belief, and (3) to establish that a competent lawyer could not reasonably believe that the fee is reasonable. As to this last element, evidence that the testifying lawyer believes the fee unconscionable is insufficient, in my opinion, to satisfy the required proof.⁹ Frequently overlooked is the requirement that the reasonableness of the fee must be determined by the facts known at the time the fee agreement is made.¹⁰ And just as frequently some courts have mistakenly imposed on fee agreements the fairness concepts contained in DR 1.08.¹¹ Moreover, as incredible as it may seem, some courts have not required expert testimony to support a disciplinary decision adverse to the lawyer finding that the lawyer charged an unreasonable fee or violated a standard of similar ilk.¹² The rationale for this aberration is: “Who can better decide what is reasonable in a particular case than the judge?” Well, I say: “Horse manure.” And it is on this precise point that I have, with a shudder, decided that this is the same rationale that authorized the Star Chamber to imprison dissidents for an indeterminate term in the Tower, to brand and flog those whose conduct was considered disrespectful to the King, and to starve petit jurors until they reversed their decision in a common law case that the Chamber did not agree with.¹³ There were no clear rules of conduct enforced by the Star Chamber. It was explained that these devout and educated men

knew what was acceptable and what was not. What we have done in Texas is to place this same authority for the same reasons in the hands of the judiciary and by extension in the hands of the Commission for Lawyer Discipline. After all, what judge will argue with interpretations of the DR's advocated by the Bar? *Goldstein v Commission for Lawyer Discipline*, 109 S.W.3d 810 (Tex. App.-Dallas 2003, pet. denied) illustrates the point.

The predicate acts that formed the basis of Goldstein's disbarment arose in a high profile divorce case. In January 1997, Lynne Ginsburg hired Robert Goldstein to represent her in what was, according to Ms. Ginsburg, an uncontested divorce from her husband Scott. A written, hourly fee contract was agreed to. During the first couple of months of Goldstein's representation Ms. Ginsburg undertook, on her own, discussions of an appropriate property settlement directly with her husband. She initially discussed a \$10,000,000 settlement, and in March 1997 she and Scott agreed to a \$20,000,000 property settlement. When Goldstein found out what she had done he told her that the amount was inadequate and that she needed to let him handle the negotiations. She agreed, and the proposed \$20,000,000 settlement was not consummated. Ms. Ginsburg did instruct Goldstein that he was to conduct no formal discovery, although she later denied giving any such directive. Goldstein independently and informally investigated Scott's considerable wealth. But he never submitted formal discovery requests or required Scott to file an inventory and appraisal of the marital assets, believing that Scott's holdings were a matter of public record contained in SEC filings and the like. In July 1997, Goldstein secured a \$50,000,000 settlement proposal that Ms. Ginsburg accepted. A hearing was had before the divorce court to finalize the property settlement, to establish Scott as the custodial parent, and to obtain the Judgment of Divorce. At the hearing, Ms. Ginsburg testified that she was satisfied with the agreements, and she explained that she did not want to put her two children through a bitter property dispute. The property settlement contained a statement that Ms. Ginsburg owed Goldstein \$300,000 as his attorney's fee and nothing else. Thirty days later, when the Decree became final, Ms. Ginsburg received free trading corporate stock with a market value of \$50,000,000. She promptly remitted to Goldstein \$5,000,000 of this stock as his fee. Goldstein logged the payment in as a \$300,000 fee and a \$4,700,000 gift. Five months later, Ms. Ginsburg filed suit against Goldstein in a Dallas county court alleging that her settlement was inadequate, that Goldstein had pressured her into agreement, and that he charged her an illegal contingent fee. She sought damages in excess of \$100,000,000. (Special legislation permitted county courts in Dallas to exercise jurisdiction in cases where the damages exceeded the normal county court maximum of \$100,000.¹⁴) The case was set for trial in early May over Goldstein's objection that such a trial setting did not permit him adequate time to prepare. The case went to trial in late May. The abundant trial errors were documented in papers filed with the State Bar shortly after the trial concluded. One of those errors was particularly shocking. The trial court instructed the jury: "There is a presumption of unfairness or invalidity which attaches to a transaction such as that alleged by Goldstein and the burden of showing its fairness and reasonableness is on the attorney."¹⁵ At all events, the jury found that Goldstein had misrepresented his competence, was negligent because of his failure to conduct

discovery and that the payment to him was not proven to be a fair gift or bonus. The jury also found that the payment was unconscionable, although that issue was not directed at the circumstances existing when the alleged agreement was made. The court in its Final Judgment recited that the fee was a prohibited contingent fee, apparently believing that the jury's finding that Goldstein had failed to prove that the payment to him was a fair gift or bonus amounted to a finding that the payment was not a gift or bonus, and, therefore, it must have been a contingent fee.¹⁶ The amount of damages awarded in the Judgment was \$110,000,000. Before that judgment became final the parties settled by a Rule 11 agreement dictated in open court. The amount of the settlement was approximately \$2,900,000. The judgment, however, was not reformed to reflect the settlement, nor was the case dismissed as moot when Goldstein made the required payment. Two recitals in the Judgment prepared by Ms. Ginsburg's attorneys and adopted by the trial court bear mention. The Judgment recites that the case was withdrawn from the jury and the court directed a verdict in plaintiff's favor finding that the payment was a contingent fee. That event never occurred. The judgment also states that the court bifurcated the case as required by Moriel¹⁷ before the jury was impaneled. Another fictitious event. The fact is that the court denied Goldstein's Motion to Bifurcate as not timely and ordered Goldstein to prepare a detailed financial statement which led to an interminable series of hearings concerning the adequacy of his prepared statements, all while Ms Ginsburg was putting on her case in chief. Only when Ms. Ginsburg was cross-examined about her own financial worth did the court order a bifurcation, and, thereafter, the court did prohibit such inquiries at the non-punitive stage of the trial. How do I know that those two recitations were incorrect? Hell, I was there. I was brought into the case about 30 days before the trial started, and I'm the trial counsel who filed the statement of trial errors with the State Bar.¹⁸ In addition, of course, neither the court's file nor the docket sheet reflected any of this activity. The latter misstatement in the judgment was a throw-away intended, perhaps, to mitigate the mishandling of the Moriel issue. The former misstatement about a directed verdict actually served no real purpose in the case, but it later served as the cornerstone of Goldstein's disbarment. Let's get this exactly straight. Goldstein was disbarred because the county court judge signed a judgment that misstated the actual events. Worse, the Bar had knowledge that the recital in the judgment was wrong, and, incredible as it may seem, the Bar knew that the testimony it planned to offer, and did in fact offer, against Goldstein in disbarment proceedings was tainted and probably perjurious. But let's move on.

In January 2001 the Commission for Lawyer Discipline filed a disbarment lawsuit against Goldstein based upon his representation of Ms Ginsburg in 1997. The allegations in the Bar's petition were as follows:

1. "Respondent accepted the matter without possessing the competence or experience to handle such a complicated divorce."
2. "After accepting the representation, he failed to follow his client's directions or to protect the client's interests."

3. “Respondent failed to conduct any formal discovery into the size and assets of the community estates.”
4. “Even though Respondent knew Ginsburg has various learning disabilities, Respondent failed to clearly explain matters to Ginsburg in a manner that enabled her to make informed decision.”
5. “The agreement was made without sufficient discovery to ensure that Ginsburg was receiving an equitable portion of the community assets and debts.”
6. “Respondent pressured Ginsburg to change the fee agreement to a fee contingent upon the value of Ginsburg’s divorce settlement. The contingent fee agreement was never reduced to writing. **** Although Ginsburg paid Respondent the requested fee, Respondent failed to provide Ginsburg with a disbursement sheet at the termination of the representation.”
7. The other allegations were abandoned before trial.
8. “This conduct violates Rules 1.01(a), 1.01(b), 1.02(a), 1.03(b), 1.04(a)(d), 1.06(b), 1.14(a)(b)(c), 3.03(a)(1) and 8.04(a)(3).”

In a definitive step the Bar moved for summary judgment on the contingent fee issue based upon collateral estoppel. According to the Bar, the issue was foreclosed by the findings in the malpractice case. Further the Bar asserted that because contingent fees are prohibited in matrimonial cases, Goldstein had violated the DRs and should be disbarred. At this point it seems fair to say that the Bar took a legal position that might only be asserted by an aggressive advocate, ignoring its own published opinions.¹⁹ Notably, the Bar did not actually rely on the jury’s finding that the fee was unconscionable, probably because the issue did not focus on the relevant time frame. At all events, the disbarment court accepted the Bar’s argument and granted summary judgment on the Afee@ issue, relying on offensive collateral estoppel -- no pun intended. And at this point it seems fair to say that the court accepted the argument of an aggressive advocate, ignoring the Texas Supreme Court’s decision in *Archer v Griffith*, 390 S.W.2d 735 (Tex. 1964). Indeed in *Archer* the Court specifically pointed out that contingent fee agreements relating to property recovered in divorce cases were not prohibited and that, in fact, the minimum contingent fee for representation in the property aspect of divorce cases was set at 10% by the Bar in its Minimum Fee Schedule. *Id* at 742-743. See *White v Hunt*, 224 S.W.2d 511, 512 (Tex.Civ.App.—Dallas 1949, no writ). As far as “collateral estoppel” is concerned it was incongruous, to say the least, for the doctrine to be applied to a negative finding on an issue on which Goldstein had the burden of proof in the malpractice trial to foreclose further consideration of the same issue in a proceeding in which the Bar had the burden of proof. See *Wright, Miller, Cooper*, 18 Fed. Prac. & Proc.,Jurisdiction 2d § 4422. These legal conclusions could be reached only by ignoring existing law. No effort was made to justify the changes being advocated by the Bar and adopted by the trial court.

The case then went to trial on the other allegations. To bolster its case the Bar called Ms Ginsburg as a witness to provide the same testimony she provided in the malpractice case: How Goldstein failed to do any discovery; how her custody of the children was the most important objective he was to achieve; how he failed to explain to her the custody issues; how he failed to follow her directives concerning the custody issues; and how he pressured her to accept the settlement. One hour before Ms Ginsburg was to be cross-examined an affidavit given by Ms Ginsburg in another case was discovered. That affidavit directly contradicted the testimony given by

Ms Ginsburg on direct. In the affidavit Ms Ginsburg recited that the sole reason she did no discovery and accepted the \$50,000,000 property settlement was the possible criminal prosecution of her husband and father-in-law for perjury and obstruction if formal discovery was undertaken. She further recited in the affidavit that she gave Goldstein specific instructions to do no formal discovery. When confronted with the affidavit on cross-examination, Ms Ginsburg agreed that it correctly recited the true facts. During this stage in the trial, Goldstein further learned that the Bar had knowledge and possession of the sworn statement for at least four months prior to the trial and that it improperly failed to produce the statement in response to discovery requests. Goldstein immediately moved to strike her testimony given on direct. The trial court, however, determined that such a sanction was too severe and simply fined the Bar \$10,000. Goldstein then moved to dismiss the case against him as founded on perjury. He further moved to overturn the court's prior decision on collateral estoppel because the findings in question were based in part on Ms Ginsburg's testimony that she now admitted was false. The Bar's response in the main was an impassioned plea condemning Goldstein for all his past misdeeds which were thought considerable.²⁰ The disbarment court bought into that presentation and denied both Motions. The court then proceeded to disbar Goldstein, although Ms Ginsberg's allegations concerning her children and their importance to her were rejected. The disbarment court further found that Goldstein had no conflict in interest in his representation of her on a "contingent fee" basis. On appeal, the Fifth Court of Appeals affirmed. One judge dissented on the ground that collateral estoppel should never be applied in grievance cases and/or where the prior fact findings were based on perjured testimony. The Supreme Court declined to grant review, thus sealing Goldstein's fate.

This house of horrors was compounded by the trial court's findings that Goldstein had violated DRs 1.01, 1.02, 1.03 and 8.04, with no expert testimony to support them. The trial court's fact findings on these issues were that Goldstein had not followed his client's wishes to discover the marital assets and had not explained matters in sufficient detail for his client to understand the issues. On the "attorney's fee" issue, the court recited:

47. Ms. Ginsburg sued Respondent for his actions in the divorce in *Lynne Ryan Ginsburg v. Robert N. Goldstein, et al.*, No. CC-98-01019-b, County Court at Law No.2, Dallas County, Texas. Based on the jury's answers to the questions put to them, the trial court found Respondent had charged a contingent fee for his services. This court has granted collateral estoppel effect to this finding.

48. Respondent's use of an attorney-client fee agreement based upon a contingency of the property recovered was not justified.

49. The acts and/or omission on the part of Respondent as described in paragraphs 47 through 48. hereinabove. constitute conduct that violates Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct. Texas Disciplinary Rule of Professional Conduct 1.04(a) prohibits a lawyer from entering "into an arrangement for charge or collect an illegal fee or unconscionable fee." The use of a contingency fee in a divorce case involving child custody issues raises per se ethical concerns. Note (sic) 9 to Rule 1.04 states:

Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements are rarely justified.

The Respondent has failed to justify the use of a contingency contract in this domestic relations case.

54. The Court finds that the remaining proposed findings in the Commission for Lawyer Discipline's Proposed Findings of Fact and Conclusions of law are either unproven or acts which do not rise to the level to be violations of the Texas Disciplinary Rules of Professional Conduct. The Court specifically includes within this category the proposed findings regarding conflict of interest.

The recitations in 47 and 48, above, show beyond peradventure that the finding of a violation of DR 1.04 was predicated on the contingent nature of the fee. The Court of Appeals refused to recognize this obvious conclusion and stated that the contingent nature of the fee was just one of the reasons the trial court found the fee unconscionable. If that were true where do we find the other facts that support that observation? A better question is what facts were foreclosed by collateral estoppel that support that observation.

How the disbarment court, or any court for that matter, could conclude that expert testimony was unnecessary to support these findings is beyond my comprehension. Scholars have recognized the issue, but none has seemed concerned that a lawyer may be disbarred without the State Bar being required to prove its allegations. Indeed, the scholars have focused on whether a lawyer should be permitted to offer exculpatory evidence from an expert witness. At least one has been so bold as to suggest that expert testimony should be presumptively admissible in a grievance proceeding.²¹ Only Florida has required the bar association to toe the line in a grievance case. See *Florida Bar v Barley*, 831 So.2d 163, 169 (Fla. 2002). Interestingly enough, the Florida case involved an Unreasonable fee. In rejecting a finding of an Unreasonable fee the court stated:

“Under rule 4-1.5(b) there are numerous factors that can be considered in determining what constitutes a reasonable fee, including the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skills requisite to perform the legal services properly. See *Florida Bar v. Carlon*, 820 So. 2d 891 (Fla. 2002) (approving a referee's recommendation that Carlon charged a clearly excessive fee where the Bar presented expert testimony that Carlon's charging a client \$ 3,340.10 for extracting names from Martindale-Hubbell constituted sheer overreaching). In the instant case, the Bar presented no expert testimony or any evidence, other than Mr. Emo's testimony, challenging the legality or the reasonableness of the fees Barley charged. Moreover, the record shows that Barley consistently provided Mr. Emo with billing statements

which detailed the work Barley did and the hourly rate he was charging. As Barley argued, Mr. Emo consistently paid these statements without challenging the reasonableness of the fees. Although we find Mr. Emo's testimony reliable, in and of itself, his testimony does not constitute competent, substantial evidence that Barley's fees were clearly excessive. Thus, we reject the referee's recommendation that Barley be found guilty of violating rule 4-1.5(a).”

Id at 169. Obviously, if the issue were a question of law for the court to decide, no Atestimony@ would be required.

Our Dallas court stated the matter with some eloquence in *Sizemore v Texas State Bd of Dental Examiners*, 747 S.W.2d 389 (Tex.App.- Austin 1987), reversed, 759 S.W. 2d 114 (Tex. 1988). While the case involved the suspension of a dental license and while the Texas Supreme Court reversed the decision, there is a lesson in dignity and morality delivered by the court:

“[T]he practice of dentistry is a lawful profession. *** [T]he right or privileged to engage in it, once lawfully acquired, is a right or privilege protected by the due process clauses of the state and federal constitutions. *** The right to practice a profession has been called a property right, but it is more. There is moreover a prestige and good name and should be a pride attached to the practice of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and to leave him in most instances the equivalent of a bankrupt. But it does much more than this; it takes from him his professional standing and in a manner whatever good name he has, which leaves him poor indeed. **** Neither could the Board rely upon its own expertise. Although we are confident that certain members of the Board were persons highly qualified in the dental profession, their qualifications were not placed in evidence. Nor was appellant afforded an opportunity to cross-examine the Board as to any expert opinion they may have entertained. Nothing is more thoroughly established than the proposition that neither a judge nor a juror may act as a witness. For us to hold that the Board may do otherwise would amount to the deprivation of cross-examination and the condonation of secret evidence” Id at 392-397

It should be unnecessary to say more than this.

At present we seem in Texas to be content that the DRs can readily be understood by lawyers because of their training, court decisions, and the “lore of the profession.”²² But in *Benton*, supra, 980 S.W.2d at 440, the Court found a portion of the DR’s unconstitutionally vague. The term “embarrass” was found too vague to pass muster, and the term “harass” was given a narrowed construction. *Benton*’s conclusions in this regard might be sui generis in that the case focused on Free Speech issues B things *Benton* said not things that he did or failed to do. *Benton* relied on *Howell v State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) as authority to enforce vague standards against lawyers. There the court determined that “conduct that is prejudicial to the administration of justice” was not unconstitutionally vague. In *Howell*, the court relied on *In re Snyder*, 472 U.S. 504 (1985), as authority for its enforcement of that vague standard, but, although *In re Snyder* used those words (“lore of the profession”), the actual holding in the case was something quite different. *Snyder*’s conduct that was condemned by the Eighth Circuit was a rude letter written to the secretary of the Chief Judge of that circuit. When *Snyder* refused to apologize for his actions he was suspended from practice in federal court for six months. The Supreme Court decided that *Snyder*’s conduct was not “prejudicial to the administration of justice” and, thus, did not warrant disciplinary action. The Court did not undertake a valuation of the “vagueness claims.” But how could the phrase “prejudicial to the administration of justice” not be unconstitutionally vague? The Eighth Circuit judges found the conduct sanctionable and a unanimous Supreme Court did not. The real question is whether “an ordinary person exercising ordinary common sense can sufficiently understand the directive and conform his conduct accordingly without sacrifice to the public interest.”²³ Paraphrased for a lawyer, the question is whether a reasonable lawyer using his knowledge of the law can understand and comply with the directive without sacrifice to his duties to the court, his client, or his conscience. Why should we judicially enforce vague statutes or regulations just because in some situations a violation would be self-evident? That sounds like an affirmation that only the guilty are indicted. But the cure need not be more harmful than the disease.

It is time, I think, to take a close look at the DRs and provide better guidance to Texas lawyers for the conduct of their affairs. This is particularly true where the DRs have been afforded virtually statutory standing in malpractice cases. My suggestions are straight-forward and understandable.

The Preamble to the Disciplinary Rules states that the Rules do not constitute a standard of conduct that lawyers may incur civil liability by violating.²⁴ Nevertheless, expert testimony has been admitted in malpractice cases that is specifically founded on the Rules. It is one thing to permit an expert to testify that the lawyer was negligent because he failed to adequately inform the client of the risks of litigation. It is another to say that the lawyer had a fiduciary obligation to provide the client with sufficient information for the client to make an informed decision and that there is a disciplinary rule that says so. Any reference to the DRs should be prohibited unless raised in relevant cross examination. Second, a lawyer charged with unethical conduct by the Bar should be

permitted to introduce expert testimony on the issue. If he does so, the burden would then shift to the Bar to introduce expert testimony of a violation. This is particularly true where the standard is based upon the reasonableness of the involved conduct. This process would at least clarify the matter. This procedure should apply in any court proceeding as well as any administrative proceedings. Some courts have said that administrative proceedings like we have in Texas, as described in the Texas Rules of Disciplinary Procedure (TRDP), do not produce “final” decisions, and, therefore, procedural due process is not required. The premise, however, is not correct. Once charged, a lawyer must elect between an administrative or judicial proceedings. TRDP 1.15. In either event a trial occurs that could lead to prescribed penalties. TRDP 1.17. The decision that is not “final” is the one made by the local investigative committee whether or not charges should be brought at all.

Goldstein believes that the Dallas Bar pursued the grievance against him because of his devil may care attitude. He also suggests that anti-Semitism may be alive and well in Texas. My own view is that he was disbarred because the Bar assumed the role of an advocate bent on convicting him because of his past misdeeds. I think we would all agree that such conduct on the part of the Bar was improper. Another possibility that might account for the handling of the Ginsburg testimony and her sworn statement is the contingent nature of the attorney’s fee that may be earned by an independent lawyer who prosecutes the case for the Bar. If the Bar fails to win the case there will be no award of attorney’s fees. That sounds to me like a prohibited contingent fee. Whatever the motivation Goldstein was wrongly convicted, and I would hope that this miscarriage will prompt the Supreme Court to reconstruct the Disciplinary Rules.

We also need to assess the process used by the Bar in determining what sanction it will seek and the process used by the court in imposing a sanction. In the Goldstein case the conduct complained of, from the Bar’s perspective, was his charging a contingent fee in a divorce case and failing to conduct discovery of the community assets. It was also contended that he failed to follow the client’s wishes on the custody issues, misrepresented the facts regarding his fee to the divorce court, and failed to provide his client with an accounting when the case was concluded. As to these last three contentions, the disbarment court rejected them as unproved or not sufficiently serious to constitute a violation of the DRs. The question jumps from the paper: Why did the Bar seek disbarment and why did the court impose disbarment? No lawyer, so far as I can determine, has ever been disbarred for charging a contingent fee in a divorce case, and certainly no lawyer has ever been disbarred for failing to conduct discovery where no harm, serious or otherwise, to the client has been shown. In *McCleery v Comm. for Lawyer Discipline*, No. 01-04-0136-CV (Tex App Hou.[1st], 10/06/2006), a lawyer, on the eve a trial, had an elderly and infirm client sign a 40% contingent fee agreement in a case in which the lawyer had previously been obligated to represent the client pro bono. He then charged the client a fee on the recovery that included non-monetary benefits and then failed to remit the fee to the Houston Volunteer Lawyers Program in accordance with his agreement with that organization. The court found the lawyer guilty of charging the client an unconscionable fee and assessed his punishment as a public reprimand. Goldstein, of course, was disbarred for conduct not nearly as reprehensible. We should at least consider adopting standards similar to those utilized in North Dakota. See North Dakota Supreme Court Rules, N.D. Standards Imposing Lawyer Sanctions, Rules 3, 6-9.