

## ETHICS, THE MEDIA, AND ENVIRONMENTAL LAW

Ethical implications of Attorney Publicity and Common-Law  
Developments in the Wake of *Landry's, et al. v. Animal Legal  
Defense Fund, et al.* (Tex. May 21, 2021)

# Potential Sources of Law Governing Attorney Publicity

- ▶ *Statutory Law*
- ▶ *Ethics Rules/Norms*
- ▶ *Texas Disciplinary Rules of Professional Conduct*
- ▶ *Common Law Privileges & Liabilities*



# Background Ethical Principles: Communications with the Client

## ▶ Texas Rule 1.03

- ▶ (a) A lawyer shall keep a client **reasonably informed** about the status of a matter and promptly comply with reasonable **requests** for information.
- ▶ (b) A lawyer shall **explain** a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

## ▶ Model Rule 1.4

- ▶ (a) A lawyer shall:
  - ▶ (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  - ▶ (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - ▶ (3) keep the client reasonably informed about the status of the matter;
  - ▶ ...
- ▶ (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# Background Ethical Principles: Confidentiality (slide 1 of 2)

## ▶ Texas Rule 1.05

- ▶ (a) *"Confidential information" includes both "privileged information" and "unprivileged client information." . . .*
- ▶ (b) *Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:*
  - ▶ (1) **Reveal** confidential information of a client or a former client to: . . .
  - ▶ (2) **Use** confidential information of a client to the disadvantage of the client unless the client consents after consultation.
  - ▶ (3) Use confidential information of a **former client** to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
  - ▶ (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.
- ▶ (c) *A lawyer may reveal confidential information ... [in limited circumstance noted]*



# Background Ethical Principles: Confidentiality (Slide 2 of 2)

- ▶ Model Rule 1.6

- ▶ *(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).*
- ▶ *(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: [circumstances listed].*

# Background Ethical Principles: Truthfulness (to 3d party)

## Texas Rule 4.01

- *In the course of representing a client a lawyer shall not knowingly:*
  - (a) *make a false statement of material fact or law to a third person; or*
  - (b) *fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a **party to a criminal act** or **knowingly assisting** a fraudulent act perpetrated by a client.*

## Model Rule 4.1

- *In the course of representing a client a lawyer shall not knowingly:*
  - (a) *make a false statement of material fact or law to a third person; or*
  - (b) *fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*



# Background Ethical Principles: Candor to the Tribunal

## ▶ Texas Rule 3.03

### ▶ (a) A lawyer shall not knowingly:

- ▶ (1) make a false statement of material fact or law to a tribunal;
- ▶ (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; ... [continues]
- ▶ ...
- ▶ (5) offer or use evidence that the lawyer knows to be false.

## ▶ Model Rule 3.3

### ▶ (a) A lawyer shall not knowingly:

- ▶ (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- ▶ (3) offer evidence that the lawyer knows to be false.
- ▶ ...

# Background Ethical Principles: Trial Publicity

- ▶ Texas Rule 3.07

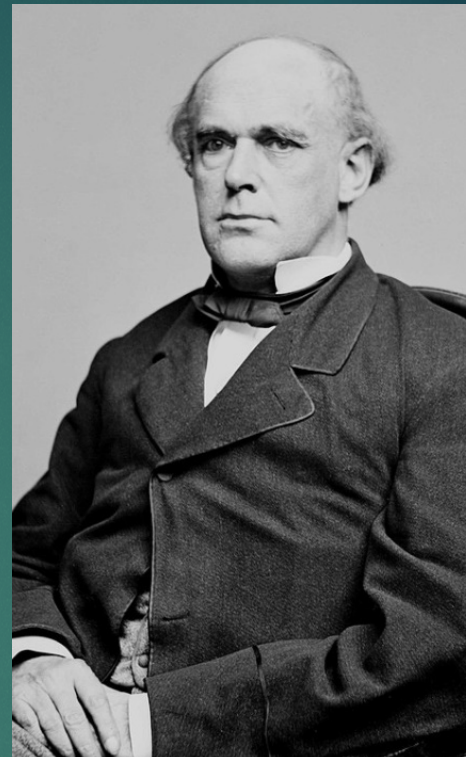
- ▶ (a) *In the course of representing a client, a lawyer shall not make an **extrajudicial statement** that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.*
  - ▶ *specific examples*



# Background Ethical Principles: Trial Publicity

## ► Model Rule 3.6

- *(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.*
- *(b) Notwithstanding paragraph (a), a lawyer may state:*
  - *(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;*
  - *(2) information contained in a public record;*
  - *(3) that an investigation of a matter is in progress;*
  - *(4) the scheduling or result of any step in litigation; [other circumstances noted]*
  - *...*

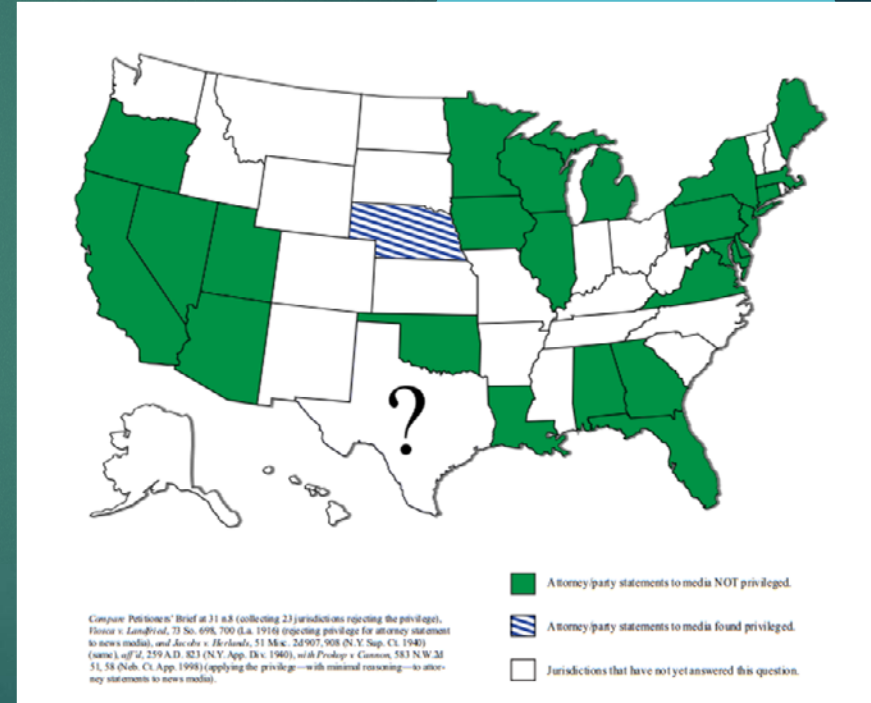


# Lawsuit Publicity - Historical Examples



# The Historical and Nationwide Common Law Rule – No Absolute Immunity for Press Statements

- ▶ *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)
  - ▶ Rejecting the notion “that in 1871 there existed a common-law immunity for a prosecutor’s, or attorney’s, out-of-court statement to the press.”
- ▶ Near Unanimity of States reject absolute privilege for media statements.



# Setting the Stage for *Landry's*: Texas's Dual Absolute Privileges

## The Judicial-Proceedings Privilege

- **What:** A defamation-specific absolute privilege for certain case-related speech
- **Who:** Parties, Witnesses, Attorneys
- **Context:** Litigation
- **Standard** (Restatement):
  - *An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has **some relation** to the proceeding.*

## The Attorney-Immunity Doctrine

- **What:** An absolute privilege for certain lawyer conduct—speech or otherwise
- **Who:** Attorneys Only
- **Context:** Litigation or non-litigation (*Haynes & Boone, LLP v. NFTD, LLC*)
- **Standard:**
  - Conduct that is (1) in the scope of the attorney's representation and (2) "not foreign to the duties of an attorney."



## Pre-*Landry's*:

# Texas becomes the Wild West of Immunity

- ▶ In the 1990s, Texas intermediate courts began to immunize speech—under both doctrines—simply because it related to the **subject matter** of a pending or threatened lawsuit.
- ▶ Examples:
  - ▶ Attorney statement to reporter (Judicial Proceedings Privilege)
  - ▶ Attorney press release (Judicial Proceedings Privilege)
  - ▶ “Speaking about an opposing party in a negative light,” including to the Wall Street Journal (Attorney Immunity)

# The *Landry's* Case: The Background

- ▶ Parties publicized allegations that Landry's/Houston Aquarium's white tiger exhibit violated the Endangered Species Act, including in:
  - ▶ Notice Letter
  - ▶ Press Releases
  - ▶ Tweets/Facebook Posts
  - ▶ Statements to Media
- ▶ Landry's/Houston Aquarium sued for defamation, among other things
- ▶ Trial Court dismissed the case and Court of Appeals affirmed on privilege & immunity grounds



# The *Landry's* Case: The Holdings

1. The judicial proceedings privilege does not apply to attorney publicity statements

- Functional relation vs. subject-matter relation
- Republicizing waives the privilege

2. Attorney publicity is not the “type” of conduct to which immunity attaches

- Only those acts within “the office, professional training, skill, and authority of an attorney”

# Putting *Landry's* in Perspective: What it does not do

- ▶ Does not impose liability for attorney speech
- ▶ Does not withhold privilege/immunity from every out-of-court statement
  - ▶ *E.g.*, notice letter itself (not republicized)
  - ▶ *E.g.*, evidence-gathering communications
  - ▶ *E.g.*, class-action notice
  - ▶ *Maybe* press statements soliciting evidence or parties
- ▶ Does not alter existing restrictions
  - ▶ Ethical Rules
  - ▶ Sanctions for groundless, bad-faith, or harassing pleadings

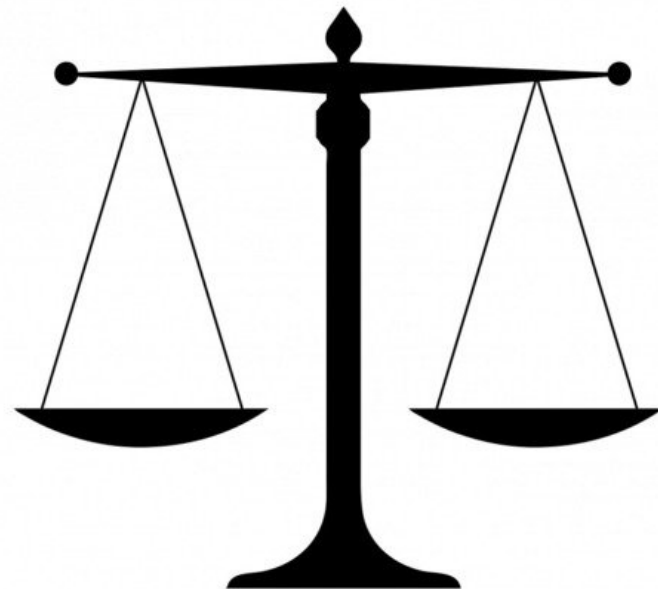


# Post-*Landry's*: Misconceptions Surrounding Republication

- ▶ Attorney sharing or “reporting” allegations does not qualify
- ▶ Fair Reporting Privilege is a different privilege
- ▶ Tex. Civ. Prac. & Rem. Code Section 73.002
  - ▶ (a) The publication by a **newspaper or other periodical** of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.
  - ▶ (b) This section applies to . . . a fair, true, and impartial account of:
    - ▶ (A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;
    - ▶ ...
  - ▶ (2) reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

# Putting Landry's in Perspective: How should attorneys move forward?

- ▶ *Least Risky:*
  - ▶ Nothing.
- ▶ *Less Risky:*
  - ▶ "My client plans to vigorously defend against/prosecute the claims, and I would direct you to the publicly available pleadings, which speak for themselves."
- ▶ *More Risky:*
  - ▶ "My client sued because opposing party did X, Y, and Z."





# Mitigating the Risks: Lessons from the trenches

- ▶ Prepared statements
- ▶ Steer the conversation
  - ▶ Review the statements if possible
  - ▶ Work with trusted reporters
  - ▶ Off the record

# Gauging the utility: Why speak at all?

- ▶ Shape Coverage
- ▶ Winning in the court of public opinion
- ▶ Client reputation
- ▶ Other strategic goals



Point-Counterpoint:  
Is *Landry's* good policy?

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# Question & Answer Session