**ETHICS, THE MEDIA, AND ENVIRONMENTAL LAW:**
**"Honestly"**

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The case of *Landry's Inc. and Houston Aquarium, Inc. v. Animal Legal Defense Fund* provides an example of the interaction of law and ethics of great import for practicing lawyers – particularly Texas lawyers. As the ultimate authority on the meaning of Texas common law and the governing authority of the legal profession in Texas, the Supreme Court of Texas clarified the application of defamation law in the context of media and press statements and extra-judicial disseminations of a statement regarding opponents. The court rejected an opportunity for extension of the judicial proceedings privilege to create lawyer immunity for defamation.

In addition to discussing the *Landry's* case, this presentation explores the interaction and interrelationship of the common Law, statutory law, principles of ethics norms and applicable Texas Disciplinary Rules of Professional Conduct.[1] In today's broad ranging and interstate practice, comparing the Texas Disciplinary Rules with the ABA Model Rules of Professional Conduct[2] allows lawyers to understand national norms and plan for state variations among the rules. Additionally, the importance of positive law can be charted by reference to the Restatement of the Law Governing Lawyers and The Restatement of Agency. Today all states have adopted the template of the Model Rules although some have amended parts of the rules, making both significant and insignificant changes. Texas is one of the states that has clarified the Model Rules and made some important changes. The law of agency applies to all lawyers as agents for their clients. While the Model Rules do not displace the applicable common law or statutory law relevant to lawyers, they provide useful guidance for lawyers and clients in recognizing agency law in the specific type of agency found in the lawyer-client relationship.

The touchstone principle of compliance with the law is the first principle of our democracy. It applies to all people, and, thus, to all lawyers. In fact, even without the codes of conduct now adopted by all states, the rule of compliance with the law would apply.[3] Compliance with law is a duty of each person, including lawyers. Likewise, legal persons such as corporations generally are subject to the same duties as natural persons.[4] The first section of the Restatement (Third) of the Law Governing Lawyers states the point in a direct manner: "Upon admission to the bar of any jurisdiction, a person becomes a lawyer and is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies,

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[1] https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271

[2] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

[3] *See* Restatement (Third) of the Law Governing Lawyers § 1 (2000) (noting that lawyer codes "particularize some general legal rules in the particular occupational situation of lawyers but are not exhaustive of those rules").

[4] Theory as well as laws indicate that corporations have a duty to obey the law. *See* Principles of Corporate Governance (ALI) sec. 2.01(b) (noting that the corporation "Is obliged, to the same extent as a natural person, to act within the boundaries set by law." *See also Martin Petrin, The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law, 59 Am. U. L. Rev. 1661 (2010)(noting potential tort liability of corporate constituents).*

and criminal sanctions."[5] The Restatement makes clear that lawyers do not have special dispensation to disregard the law except in cases in which the law provides for immunity or variance from the law.[6]

Restatement (Third) of the Law Governing Lawyers § 56 states: "Except as provided in § 57 and in addition to liability under §§ 48- 55, a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances."[7]

Restatement (Third) of the Law Governing Lawyers § 57 indicates the areas of immunity for lawyers. It states:

> (1) In addition to other absolute or conditional privileges, a lawyer is absolutely privileged to publish matter concerning a nonclient if:
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> > (a) the publication occurs in communications preliminary to a reasonably anticipated proceeding before a tribunal or in the institution or during the course and as a part of such a proceeding;
> > (b) the lawyer participates as counsel in that proceeding; and
> > (c) the matter is published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding.
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> (2) A lawyer representing a client in a civil proceeding or procuring the institution of criminal proceedings by a client is not liable to a nonclient for wrongful use of civil proceedings or for malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding.
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> (3) A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.[8]

Lawyers may sometimes forget the existence of their own accountability under the law. The lawyer who comes to regard herself as part of the machinery of legal representation runs the risk of ignoring the issue of their own liability. If a lawyer joins the client in defrauding a third party, both the client and the lawyer are subject to the common law of tort. Second, lawyers have a heightened duty to comply with and support the law because of their role in the legal system. For example, the Model Rules require a lawyer to "inform the appropriate professional authority" when he knows "that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[9] Likewise, the Model Rules identify

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[5] Restatement (Third) of the Law Governing Lawyers § 1 (2000).
[6] Restatement (Third) of the Law Governing Lawyers § 56 (2000).
[7] Restatement (Third) of the Law Governing Lawyers § 56 (2000).
[8] Restatement (Third) of the Law Governing Lawyers § 57 (2000).

[9] Model Rules of Prof'l Conduct R. 8.3 (AM. BAR ASS'N 2020).

instances of "professional misconduct" that involve dishonesty that may not meet the definition of fraud.[10]

Honesty is one of the touchstone principles of professional responsibility as well as an obligation of the common law. Counseling a client who has a pattern of violations or even one significant act that violates requirements of law carries the risk of liability for the lawyer. Dishonesty undercuts the foundations of the common good. Accordingly, a lawyer's dishonest statements are a violation of Model Rule 3.3, even if such statements advance a client's short-term interests.

Texas Disciplinary Rules of Professional Conduct Rule 4.01- Truthfulness in Statements to Others provides as follows:

> "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."

Likewise, the Texas Rule on candor to the court is clear cut.

> Rule 3.03. Candor Toward the Tribunal
> (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; (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision; (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (5) offer or use evidence that the lawyer knows to be false.
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> (b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
> (c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

While *Landry's* marked an important decision for the common law immunity and privilege rules that apply to attorney speech and conduct, it bears emphasis that attorneys were subject—and *remain* subject—to these ethical principles and rules of professional conduct. Thus, attorneys should consider not only the tort-liability implications of their speech, but also relevant ethical obligations.

[10] Id. R. 8.4. Model Rule 8.4 recognizes types of misconduct beyond violations of law and also makes clear that sanctions can apply for conduct by lawyers that is not involved in a representation of a client.