GOLDSTEIN ENDNOTES

1. How do we determine whether a lawyer is tough and smart? Crowning oneself "The Texas Hammer" or "One of the best lawyers in Texas" is no better. We really should prohibit subjective and "trade mark" advertising. Recently the Bar has begun to enforce some of the prohibitions provided for in the DR's. See *TexDRPC*, DR 7.02(a)(4). While not gospel, Comment 5 states: "Sub-paragraph (a)(4) recognizes that comparisons of lawyers' services may also be misleading unless those comparisons "can be substantiated by reference to verifiable objective data." Similarly, an unsubstantiated comparison of a lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. Statements comparing a lawyer's services with those of another where the comparisons are not susceptible of precise measurement or verification, such as "we are the toughest lawyers in town", "we will get money for you when other lawyers can't", or "we are the best law firm in Texas if you want a large recovery" can deceive or mislead prospective clients. The "Texas Hammer" has now disappeared from lawyer advertising. But it has been replaced by "The Christian Law Firm." Reading *Zauderer* (*Zauderer v Office of Disciplinary Counsel*, 471 U.S. 626 (1985)) together with *Benton* (*Commission for Lawyer Disciple v Benton*, 980 S.W.2d 425 (Tex. 1998)) suggests that substantial restrictions can be placed on lawyer advertising without infringing on commercial, free speech.

2. On its face the *Dauber* concept is simply an expression of no confidence in the ability of a jury to decipher scientific truth from scientific fiction. More closely examined it is a demon conjured up by the pharmaceutical industry to insulate its products from civil liability. Indeed, requiring that a fact be proved with statistical certainty (95% probability for general causation with a risk ration of 2.0 or greater) sets science back to the middle-ages. Virtually all epidemiologists disavow such rigid application. Certainly, none require a C.I. (Confidence Interval) greater than 2 at the low end. Many of the studies relied on by the courts to show "no relationship" were two tailed and required a 97.5% probability to support one.

3. Perhaps worst of all is the selection process used to appoint judges to high office. The effort to determine in advance how a judge may decide a case surely erodes judicial independence.

4. For a historical review see Kalsih, HOW TO ENCOURAGE LAWYERS TO BE ETHICAL: DO NOT USE THE ETHICS CODES AS A BASIS FOR REGULAR LAW DECISIONS, 13 Geo. L. J. Legal Ethics 649 (2000).

5. See *Even Judges Don=t Know Everything: A Call For A Presumption Of Admissibility For Expert Testimony In Lawyer Disciplinary Proceedings*, 39 St. Mary's L. J. 825 (2005). Professor Chinaris seeks in this article to establish that expert testimony should be freely admitted in grievance cases. Frankly I get the impression that he actually believes and would like to say that the State Bar must submit expert testimony establishing the standard of care required when the reasonableness of the lawyer's conduct is at issue. He didn't; so I'll say it for him.

6. *Commission for Lawyer Discipline v Benton*, 980 S.W.2d 425, 438 (Tex. 1998). This statement reminds me of the young girl who was just a little bit pregnant. The Court provides no clue what that lesser standard might be. This may be a reference to the different due process standard applicable when constitutionally protected activity like free speech is at issue. In that circumstance a substantial

number of applications where the statute may be too vague is required to support a finding of facial unconstitutionality. See *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494-95 (1982). When protected activity is not involved the inquiry does not consider other circumstances where the law may be vague. *Id.* at 495 n. 7. Surely the Texas Court was not embracing the vague distinction suggested in *Winters v New York*, 333 U.S. 507, 515 (1948)(Aa standard of some sort was afforded@), that is no distinction at all.

7. It is not my purpose to explore the difference between substantive and procedural due process or the degree of vagueness necessary to invalidate a law that impacts constitutionally protected activity. In this article we can assume that the constitutional law question is simply whether the Rules are sufficiently clear in a specific fact situation.

8. Later state and federal cases have interpreted this requirement as a guarantee of only procedural due process. See e.g., *In re Triem*, 929 P.2d 634 (Alaska 1996).

9. Hopefully, punitive action cannot be based on the view of a single lawyer. The standard should be that no competent lawyer would find the fee reasonable.

10. See DR 1.04, Comment 7. The rub arises when later events alter the work to be performed or the anticipated monetary recovery. Because of an existing attorney-client relationship any modification of the fee falls under DR 1.08. For that reason, rather than attempting a re-negotiation of the agreement, the lawyer should simply submit the matter to a local fee review committee for resolution. In a fee dispute, DR 1.08 imposes a burden of proof on the lawyer. DR 1.04 does not. The client may not agree to the referral, but the lawyer has done all that can be expected.

11. See *Goldstein v Commission for Lawyer Discipline*, 109 S.W. 3d 810 (Tex.App. -Dallas 2003, pet. den'd). In that case the trial court found that Goldstein had not carried his burden to justify the use of a contingent fee in a divorce case. But Goldstein had no such burden. See *TexRDP* ' 3.08. Indeed, Goldstein was not even charged with a violation of DR 1.08. In a disciplinary proceeding the Bar has the burden of proof on all issues, except those thought to be in the nature of "confession and avoidance." The strained distortion of this simple rule accomplished in *State Bar v Dolenz*, 3 S.W.3d 260 (Tex.App.CDallas 1999, pet. den'd) defies logic. Moreover, *The Restatement of Law, 3rd ed., Law Governing Lawyers* § 34, suggests strongly that DR 1.04 should not be a basis for disciplinary proceedings and should only be used to adjust fee disputes between the lawyer and the client: "It is therefore important to distinguish between applying this section in fee disputes and applying it in disciplinary proceedings."

12. *Goldstein v. Commission for Lawyer Discipline*, 109 S.W.3d 810,815 (Tex.App. - Dallas 2003, pet. den'd); *Hawkins v Commission for Lawyer Discipline*, 988 S.W.2d 927, 934 (Tex.App. - El Paso 1999, rev. den'd).

13. The misuse of power by the Star Chamber is not open to debate. Holdsworth wrote: "Thus we find it laid down in the Star Chamber that exorbitant offences are not subject to an ordinary course of law; and that in case of necessity no precedent is needed as, they can make an order according to the necessity and nature of the thing itself. **** It is equally clear that the powers thus assumed were gradually undermining the legal securities of the liberty of the subject. Those who were bold enough to complain

or criticize soon found themselves committed to prison for an indefinite period." *Holdsworth's History of English Law - Volume Four - The Common Law and Its Rivals*, p. 421 (1924)

14. See *Tex. Gov't Code* § 25.0592

15. Instructing a jury on such a presumption is plain error. See *Texas A & M University, et al v Chambers*, 31 S.W.3d 780, 783-785 (Tex.App.- Austin 2000, pet. den'd); *Sanders v Davila*, 593 S.W.2d 127, 130 (Tex.Civ.App.- Ama. 1979, writ ref'd, n.r.e.). The instruction was emphasized in spades in Question 9: "Ginsburg's consent does not preclude questions into the fairness of the entire transaction, and her conduct does not necessarily constitute her adoption or voluntary performance of contracts with Goldstein."

16. The Judgment recited: "[S]ubject to the finding of the jury that the property paid by Plaintiff **was not a gift or bonus** ***." (emphasis added)

17. See *Transportation Ins. Co. v Moriel*, 879 S.W.2d 10, 30 (Tex. 1994).

18. My purpose was to inform the Bar of the trial events and to determine whether a publication of those events might possibly be considered ethically improper. The Bar's response was an inquiry whether I wanted to submit the filing to the Texas Bar Journal for possible publication. It was not then in article form, and I did nothing further at that time.

19. This issue of a contingent fee in a matrimonial case best illustrates the influence the State Bar exercises with sitting judges. Contingent fees have never been illegal in Texas except in criminal cases. See DR 1.04(d) and (e). There are two reported ethics opinions. One by the State Bar and one by the Dallas Bar stating that such fees are in fact allowed. See *Texas Ethics Opinion 292* (1964) and *Dallas Bar Ethics Opinion 1983-02* (1983). Nevertheless, the Bar=s Motion for Partial Summary Judgment asserted: "27. The (malpractice) court in its final judgment found that "the payment to Goldstein was a contingent fee." **** Goldstein has violated *TDRPC*, Rule 1.04(d) which prohibits contingency fees in divorce matters."

20. Goldstein had several prior disciplinary rule violations as well as a prior felony conviction.

21. See *Even Judges, etc., supra*, 36 St Mary's L.J. at 840.

22. So far as can be determined, this phrase first appeared in the *Snyder* case. It was enclosed in quotation marks but no citation of the source was given. I believe the Court may have been referring to the guidance provided by the Comments accompanying the disciplinary rules. In Texas, however, the Comments do not provide a basis for disciplinary action. See *TexDRPC* Preamble Scope ' 10.

23. See *United States Civil Serv. Comm= n v National Ass=n of Letter Carriers*, 413 U.S. 548, 579 (1973).

24. See *TexDRPC* Preamble Scope ' 10.